SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: 62

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PATRICK NAUGHTON, JR., Index No.:

Plaintiff(s) 104026/2005

-against-

PETROCELLI CONSTRUCTION, INC.,

Defendant(s). ***Jury Trial***

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PETROCELLI CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

W&W GLASS SYSTEMS, INC, and METAL SALES,

Third-Party Defendants.

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80 Centre Street
New York, New York
March 11th, 2014,

B E F O R E:

HONORABLE FRANK NERVO,
Justice,

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

SACKS & SACKS, LLP
Attorney for Plaintiff
150 Broadway
New York, New York 10038
BY: *JAMES J. McCRORIE, ESQ.*

Appearances continued on next page.

APPEARANCES CONTINUED:

MALAPERO & PRISCO, LLP
Attorneys for Petrocelli Construction, Inc.
295 Madison Avenue
New York, New York 10017
BY: *FRANK J. LOMBARDO, ESQ.*

LEWIS BRISBOIS BISGAARD & SMITH, LLP
Attorneys for Metal Sales
77 Water Street, 21st Floor
New York, New York 10006
BY: ALAN KAMINSKY, ESQ.
SAMANTHA CANTERINO, ESQ.

LAW OFFICE OF JAMES J. TOOMEY
Attorneys for W&W Glass Systems, Inc.
485 Lexington Avenue
New York, New York 10017
BY: ERIC P. TOSCA, ESQ.

William D. Leone
Senior Court Reporter

Proceedings

COURT OFFICER: All rise. Juror entering.

THE COURT: Counsel, please be seated. For the record, this is the matter of Naughton against Petrocelli and others.

Counselor, I've discussed with you a note we received from a juror, Christy Canterbury, that's you ma'am.

JUROR: Yes.

THE COURT: And you asked to be excused for certain personal and business problems you are having.

I discussed the matter with counsel and we all consented to excuse you. Please, do not discuss this matter with anybody. The case is still ongoing. Don't discuss with the other jurors, don't discuss it with anybody makes life easier.

You are excused from further service in this matter.

JUROR: Thank you.

THE COURT: Are you ready for the jury?

MR. McCRORIE: Yes.

THE COURT: For the record, I received another note from the juror that she has a personal conflict. I'm aware of juror's concern of a conflict. We do not anticipate that there will be any conflict that will arise and leave it at that.

(Pause in proceedings.)

Proceedings

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Please be seated.

Good morning. My name is Frank Nervo. I'm the judge assigned to this case. This is the matter of Patrick Naughton Junior against Petrocelli Construction, Inc., as defendant and W&W Glass Systems, Inc., and Metal Sales, third party defendant,s under index number 104026 of 2005.

Mr. McCrorie, is plaintiff ready for trial?

MR. McCRORIE: Yes, your Honor.

THE COURT: On behalf of the defendant Petrocelli ready for trial?

MR. LOMBARDO: Yes.

THE COURT: On behalf of the W&W Glass, Mr. Tosca?

MR. TOSCA: Yes.

THE COURT: On behalf of Metal Sales, Mr. Kaminsky.

MR. KAMINSKY: Yes, your Honor.

THE COURT: Is the jury satisfactory?

MR. TOSCA: Yes.

MR. LOMBARDO: Yes.

MR. McCRORIE: Yes.

MR. KAMINSKY: Yes, your Honor.

THE COURT: Ladies and gentlemen of the jury, please, stand up to be sworn in by our clerk.

THE CLERK: Raise your right hands.

Proceedings

(Whereupon, the jury was sworn in.)

THE COURT: Again, good morning. Before I proceed to give you some general instructions about how a trial is conducted and how all the attorneys and you as jurors ought to conduct yourselves during this trial, I do want to make mention that I'm aware of one of the jurors who indicated a concern with a conflict.

We do not consider or think this case will conflict with your issues.

Members of the jury, we're about to start the trial of this case about which you have heard some details during the process of jury selection. Before the trial begins, however, there are certain instructions you should have in order to understand what you will hear and see and how you should conduct yourselves during the course of this trial.

A party who brings a lawsuit is called the plaintiff. In this action, the plaintiff is Patrick Naughton Junior. He sues to recover for damages that is money for personal injuries.

The party against whom this suit is brought or the parties in this case are called the defendants. In this action the defendants are Petrocelli Construction, Inc., W&W Glass Systems, Inc., and Metal Sales Co., Inc.

When I have completed these opening instructions to you, the attorneys will make opening statements to you in

which each will outline what he or she expects to prove. The purpose of such opening statement is to tell you about each parties' claims so that you will have a better understanding of the evidence as it is introduced.

What is said in such opening statements is not evidence. The evidence upon which you will base your decision will come from the testimony of witnesses here in court or as read from examinations before trial or in the form of photographs, documents or other exhibits introduced into evidence.

The plaintiff makes a opening statement first and is followed by the defendants.

After the opening statements the plaintiff will introduce evidence in support of his claim. Normally, a plaintiff must produce all of his witnesses and complete his entire case before any defendant introduces any evidence, although, exceptions are sometimes made to that rule in order to accommodate a witness.

After the plaintiff has completed the introduction of all of his evidence, the defendants may also produce witnesses and exhibits. If they do so, the plaintiff may offer additional evidence for the purposes of rebutting the defendants' evidence.

Each witness is first examined by the party who calls that party to testify and the opposing party is

permitted to question the witness.

At times during the trial an attorney may object to a question or introduction of an exhibit or make motions concerning legal questions that apply to the case. Arguments made in connection with such objections are sometimes made out of the presence of the jury. Any ruling upon such objections or motions will be based solely on the law and, therefore, you may not conclude from any such ruling or anything I say during the course of the trial that I favor any parties this to this lawsuit.

After such a ruling, you may hear one of the attorneys taking an exception to that ruling. Exceptions have nothing to do with your role in the case.

I mention the procedure to you so that you will not be confused or mystified if you hear that word during the course of the trial.

Sometimes you will hear the court say counsel you have an exception to my ruling. And the conversation is over.

Upon completion of the introduction of evidence the attorneys again speak to you in closing statements or what is also know as summations. In summing up the lawyers will point out what they believe the evidence has shown, what inferences or conclusions they believe you should draw from the evidence, and what conclusions they believe you should

reach as your verdict.

What is said by the attorneys in summations like what is said by them in their opening statements or in the making of objections or motions or anything else during the course of the trial is not evidence. Summations are intended to present the arguments from the parties based on the evidence.

Under our system, the defendants will sum up first followed by the plaintiff. After the summations I will instruct you on the rules of law that apply to the case and you will then retire for your deliberations.

Your function as jurors is to decide what or what has not been proved and apply the rules of law that I give to you to the facts as you find those facts to be. The decision you reach will be your verdict. Your decision will be based on the testimony that you hear and exhibits that will be received in evidence during the trial. You are the sole and exclusive judges of the facts. Nothing I say or do should be taken by you as any indication of what my opinion is as to the facts.

As to the facts, neither I or anyone else may invade your province. I will preside impartially and not express any opinion concerning the facts. Any opinions of mine on the facts would, in any event, be totally irrelevant because the facts, again, are for you and you alone to

decide.

On the other hand, and with equal emphasis, I instruct you that in accordance with the oath you just took as jurors, you are required to except the rules of law that I give to you, whether you agree with them or not. You are not to ask anyone else about the law, even if there was a lawyer or judge sitting as a member of this jury. You should not consider or accept any advice about the law but anyone else but me. If you do so you will be violating your oath as jurors.

As the sole judges of the facts, it is up to you to decide which of the witnesses you believe, what portion of their testimony you will accept and what weight you will give to that testimony.

At times during the trial I may sustain objections to questions and you may hear no answer or when an answer is given may be instructed that it will be stricken from the record and you are to disregard it from the your minds. You may not draw any inference or conclusion from an unanswered question. Nor, may you consider testimony which has been stricken or removed from the record in reaching your decision. I will remind you of that should that happen during the course of the trial.

The law requires that your decision be based solely on the evidence before you. Such items as I exclude from

your consideration will be excluded because I find them not to be legally admissible. The law does not, however, require you to accept all of the evidence I shall admit.

In deciding what evidence you accept, you must make your own evaluation of the testimony given by each of the witnesses and decide how much weight you choose to give to that testimony.

The testimony of a witness may not conform to the facts as they occur because he or she is intentionally lying; because the witness did not accurately see or hear what he or she is testifying about; because the witnesses recollection is faulty; or because the witness has not expressed himself or herself clearly in testifying.

There is no magical formula by which you evaluate testimony. You bring with you to this court room and we expect you to bring to this courtroom all of your experiences and background of your every day lives. In your everyday affairs you decide for yourselves the reliability or unreliability of things that people tell you. The same tests that you use in your every day dealings are the very same tests that you apply in your deliberation - the interest or lack of a interest of a witness in a outcome of this case; the bias or prejudice of a witness, if there be any; the appearance, manner in which the witness gives testimony on the stand; the opportunity that witness had to

observe the facts about which he or she is testifying; the probability or improbability of the witness's testimony when considered in light of all the other evidence in the case are all items to be considered by you in deciding how much weight, if any, you will give to that witness's testimony.

If it appears that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy can be reconciled by fitting the two stories together. If, however, that is not possible, you will then have to decide which of the conflicting stories you will accept.

The purpose of the rules I have outlined for you is to make sure that a just result is reached when you decide the case. For the same purposes, you should keep in mind several rules governing your own conduct during any recess.

Since this case involves something that happened at a particular location you may be tempted to visit the location yourself. Please, do not do so. The fact of the matter is, the location where the accident happened has undoubtedly changed significantly. The situation that was there at the time of the accident has has changed significantly. Location is actually across the street from this building. Obviously, you can't avoid it but it's still irrelevant. So don't do any investigation. I'll give you a little more instruction about that in a moment.

So, please, avoid going to the location or past it until the case is over. You might be inadvertently be influenced. Don't even look at the building.

In addition, please do not view the scene by using any computer program, such as Google Earth or whatever the contemporary programs are.

Viewing the scene in person would be unfair to the parties since the location at the time of the accident and the way looks now is undoubtedly very different. This case involves a location and a situation as it existed at the time of the accident and not as it exists today. Therefore, you should rely on the evidence that is presented here in court to determine the circumstances and the conditions under which the accident occurred.

Now, in this case our concern is not so much how the accident occurred, but the award of the compensation that you will be making for personal injuries allegedly sustained by the plaintiff if any on the accident on August 2nd, 2004.

Making any kind of a visit in a case without benefit of an explanation might lead to a mistaken impression on matters that aren't even properly before you leading to unfairness to the parties, who need you to decide the case based solely upon the evidence relevant to this matter and which you will hear within the four walls of this

courtroom. That is the agreement that all the parties have made with you and the Court, that your determination and my determination on the law will be based on what we hear in this courtroom.

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then after you have heard both sides fully you will reach your verdict only on the evidence that is presented to you here in this courtroom and only in this courtroom and then only after you have heard these summations on each of the attorneys and my instructions to you on the law.

You will then have ample opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Please, do not discuss this case either among yourselves or with anyone else during the course of the trial.

Do not do any independent research on any topic that you might hear about in the testimony or that you see in exhibits whether by consulting others, reading magazines or conducting an Internet search of any kind. All electronic devices, including any cellphones, Blackberries, I-phones, smart phones, laptops, Kindles, Nooks or any other personal electronic devices must be turned off while in the courtroom and while you are deliberating and after I've

given you the law.

It is important to remember that you may not use any Internet services -- this is third time I said this -- you may not use any Internet services such as Google, Facebook, Twitter, or any others to individually or collectively research topics concerning the trial which includes the law, information about any of the issue in contention, the parties, lawyers or even the Court.

After you have rendered your verdict and have been discharged you will be free to do any research you choose or to share your experiences directly or indirectly through your favorite electronic means for now.

Be careful to remember these rules when you are using the computer or any other personal electronic device during the time you are serving as a juror while you are not in the courtroom. While this instruction may seem unduly restrictive particularly in this day and age, it is vital that you carefully follow these instructions.

The reason is simple:

The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence that is considered in this courtroom. To do otherwise by allowing outside information to affect your

judgment, is unfair and prejudicial to the parties and can lead to the case having to be retried.

Accordingly, I expect and am fully confident that you will seriously and faithfully abide by these instructions.

Please, do not permit any person who is not a juror to discuss this case in your presence. If anyone does so despite your telling that person not to, report that to me as soon as you are able. You should not discuss with your fellow jurors that fact or any other fact that you feel necessary to bring to my attention.

It is normal tendency to talk to people with whom one comes in contact, please do not, during the time you serve on this jury talk, whether in or out of the courtroom, with any of the parties or any of the attorneys or any of the witnesses. By this, I mean, do not talk about the case, but do not talk to them at all, not even to pass the time of day. In no other way can all parties be sure of the absolute impartiality they are entitled to expect from you as jurors.

Under the law only six jurors will deliberate on this case when it is considered for consideration. We have selected additional jurors. Because a regular juror may be prevented from continuing to serve by emergency such as a very serious illness or death. Although this seldom happens

during at trial there are cases that we do call upon alternates. Alternate juror are required to pay the same careful attention to the trial as the regular jurors so that if needed they will be fully familiar with the case.

The fact that there are alternate jurors does not mean that any regular juror is free to excuse himself or herself from the case. As a duly chosen juror, it is your obligation to be available throughout the trial.

There is a possibility that you may hear testimony through an interpreter. An interpreter will provide a translation. Even if you happen to understand the language spoken by the witness, even if you disagreed with the interpreters translation you must rely on the official court interpreter's interpretation of the testimony. If you believe the interpreter is not correctly interpreting the testimony you must advise the Court immediately. Do not offer your own translation of any testimony to the other jurors at any point during the trial.

The description of trial procedure rules governing your conduct and legal principles I have discussed with you will, I believe, make it easier for you to understand the trial as it goes on and reach a just result at its conclusion.

That's the book version that the Court is required to give. Obviously, I modified it a little bit for this

case.

There are a few housekeeping things that I need to discuss with you.

You may read in newspapers or read online that some courts in some places in this country permit note taking. We do not in this court. It is more important that you concentrate on the evidence as it comes in. It is important that you evaluate the testimony, so we prefer that you do that. There's also the possibility that people make errors when they take notes and end up with a dispute of jurors. Opens whole can of worms.

We do not permit any questioning by jurors during the course of the trial. So there's no passing of notes or raising hands. We have very experienced counsel in this case. Any concern that you have will be addressed at some point during the testimony.

If there is any question with respect to the testimony or of the evidence during the course of the deliberation write us a note and we'll revisit that issue, reread the testimony if you need to or give you further instructions if we have to.

If you wish to bring beverage to the courtroom you are welcome to do so. No gum chewing or eating in the courtroom. If you wish to bring a beverage you can, just as long as there's a screw-on cap. If it spills, it's a major

production to get it cleaned up.

We anticipate taking breaks every hour and a half or appropriate time when the witness is testifying. If you have an emergency situation, get my attention or the court officer's, and we'll address that.

Probably comes as no surprise, this court must by direction of the chief administrative of the judge stop by 4:30. So we generally break at 4:20, 4:25.

Keep that in mind when you are estimating time for your witnesses to testify.

I have instructed the attorneys and the witnesses, as you probably surmised, this facility was not built as a courthouse. It's a modified office building. As such, we have issues that we have to deal with, such as conflicts in using the facilities, the bathrooms.

Ladies bathrooms, I understand, is locked and our officer will have to give the lady's access to that. I've instructed the attorneys and the witnesses that they are to use the bathrooms on the first and second floor. That the court and the jurors and court personnel will be using the bathrooms on this floor. Again, that's consistent with my instruction not to have any contact with any witnesses in the party so we can all remain impartial. Plus, we have experience of people saying things in the bathroom that should not be said.

With that, that concludes the Court's instructions.

Is the plaintiff ready to proceed.

MR. McCRORIE: Yes, your Honor. May it please the Court, counsel for the defendants, ladies and gentlemen of the jury, welcome back.

Because of the logistics, if you'll excuse me, I don't want to stand on top of you, I'll stand over here.

I want to start out, as we told you we would, thanking you on behalf of Mr. Naughton for taking the time out of your lives. Mr. Naughton, you'll hear from during the trial, is Patrick, he's in the blue shirt in the row behind us, and he truly does extend a thank you for listening and solving this dispute.

He's excited to get this chapter, this decade of his life behind him.

Although it was a decade, it's our position that the ten years of medical treatment, the ten years of where his injury has gone, will give you a fuller idea of where it's going in the future.

This case will be about a fight. We told you in jury selection the attorneys know each other, we've been against each other, we're colleagues, not so much a fight with the parties, although, we do expect differences of opinions, I submit it's a fight of a courageous fight of Patrick, trying to hang on to a career he loved, of Patrick

trying to hang on to his identity as a ironworker. And you're going to hear about that fight and what he's done over the years to try to stay in that job at all costs.

July 21st, 2004, just to give you a little background about how it occurred, very brief, because that will be for another part that we have nothing do with, the judge already told you and we've gone over ad nauseam, this case is about damages only. The defendants have been already found responsible and they're going to do another part of responsibility later.

Patrick was standing on top of a flatbed truck that was getting a delivery. He was, in fact, standing on top of the delivery 15 feet in the air. The crane was hoisting six 10,000 pound curtain wall boxes. The curtain walls are the shell of the building that were to be going up. And when it picked up the fifth out of the sixth, with Patrick standing on the sixth, it did something that it did before and that 10,000 pound box swung toward Patrick, hit him and knocked him off the truck. He fell 15 feet. He hurt on what was called a jersey barrier. He also hit his leg on the concrete floor below.

He had a hardhat on and he'll tell you he held on for dear life. But he held on. And his leg virtually -- The bones snapped in half. They broke in two. He had what's called a by malleolar fracture. He was taken to the

hospital and you'll hear about that.

His leg, currently, still has the eight pins and screws that they put into his ankle to hold it together.

So the case is going to be about those categories and we intend to prove to you the medical costs from the date of the accident until now. I believe they're going to be stipulated, but they've been paid under a work accident related system. Patrick owes the money back approximately $36,000.

The case will be about the medicals. It's our position, and you're going to hear from his doctor today, we talked about things coming in and out of order, you'll hear from the orthopedic doctor that's been seeing him since 2004 and been treating him consistently until today. You'll hear there have been breaks, some of them long, but each time he saw him he examined him and he'll give you those findings. So, Dr. Touliopoulos will be the first witness after all of the openings, as he has a medical conference to attend later in the week.

So it is our position that he'll need treatment in the future. He will need surgeries in the future. And that treatment will come out to somewhere in the area of $400,000 over the time. You'll hear from an economist who will put that into prospective. It will be your decision whether he needs the treatment or not, but it is our position that, and

I don't think there's a dispute, that the accident caused his ankle to break in half, and as to what it became over the years, and again, you'll hear from doctors on both sides.

The wages might be the biggest fight in the case.

Again, we submit that Patrick has been a courageous fighter throughout this. He is, in fact, losing wages. You are going to hear about his injury, with complications afterwards, which I will tell you about in a little bit, from the first surgery, with a PICC line in him for months because of an infection that developed.

After the surgery Patrick went back to work just 13 weeks later. He ran back to work to keep his job. And you'll hear, then, after working a number of years, how he had to take off and stop, and how even if they call it laying him off, he then continued again the next year. He tried again the next year, until his doctors told him you can't do this any more, until he knew he couldn't do it any longer.

So that will be one of the issues you'll have to deal with. Patrick is ready for anything the defendants have to dish out.

I just want to say personal injury trials sometimes become about things other than the trial. This case is about his ankle. And his ankle only. And his ankle is what

stopped him. We don't say Patrick is paralyzed, or he can't work, or he won't get another job again. We don't say he can't do the things that he used to like to do, like play cards, play chess, like walk. He can do all of those things. You will hear why he can't do his chosen career and why his identity has been stripped.

You're going to hear about a claim for wages and again into the future, into his work life. And we're going to suggest, I believe the parties, both experts, on both sides called vocational rehabilitation experts, who have seen Patrick and we agree he can make a range of money.

All he has to do is retrain, and he's got to get off his meds, and he's got do that, but he's going do it and even though he's not doing it now, we're going to tell you from now on take the money off. And that money will be the range that we agree. Somewhere between 35 and $44,000. And you have to takeoff for retraining and some other things. The economist will tell you how he calculated what he calculated.

So, you'll learn that every step Patrick takes, every step step he's taken since the accident, every step he will take for the rest of his life will be plagued with pain. Even after the surgeries. And they're serious surgeries that they're talking about.

I believe the evidence will show that Patrick

optimizes that expression, *When you get knocked off your horse you get back up again.* You'll hear he got back up again, several times, with regard to keeping that chosen career, and you will hear that he cannot do it any more with regard to that career.

It will be your decision. You'll listen to his efforts. You'll actually get to see his ankle. We've taken pictures of it a month ago. And the Court said you'll get to view it and see it and compare it when the doctor shows you what it looks like today even after sitting here for hours.

So, we're not just going to put Patrick on. You'll hear a little bit about him. He turned 49 last week. Patrick was born in Yorkville, in Manhattan. The son of an ironworker who's four uncles were ironworkers. His brother was an ironworker. His 15 cousins are in 580. But Patrick was what his mother calls *"the great hope."* He promised his mother he wouldn't go into ironwork.

So Patrick, after high school, went to Boston University for two years. Biomedical engineering. Did it for two years. Due to financial constraints he got out up in Boston, was waitering/bartending, figuring he can make the money, go back in one year. Unfortunately, it turned into two, three, four years and he didn't go back to school.

So he came back to New York, intending to break his

mother's heart and enter the Local 580.

Patrick waited for the test to come up. And while he did he entered another union, Local 32BJ. He became a doorman, with union benefits, and he worked as a doorman. You'll hear as while as an apprentice at 580 he still stayed at 32BJ and worked two jobs. You'll only hear that to assess his work ethic.

So, in around 1994 the tests came out. And you're going to learn Local 580 is the ironworkers union. Three unions within the ironworkers, structural ironworkers, the ones that do the structure, ornamental. What Patrick does is the stone and curtain walls around the outside of the building as new construction goes out. Then you have the metal layers and the ones that works with the rebar that hold the building together.

You'll learn it's strenuous work, but to Patrick it was part of a legacy. You'll hear now that it's killing him that he -- He stopped working in 2010, just when they started the rebuild of the World Trade Center. You'll hear that it's killing him that he can't be with the rest of his family there.

You'll hear how his father and four brothers have pictures of all four corners of the original Trade Center. You'll hear how Patrick loved from the time he became an ironworker that it was his life. It was who he was. And

you'll see his work record. And the incredible amounts of hours. He blows away the average every year. He even blew it away after this accident, what an average ironworker does. He had just gotten to the point in his career when you can, quote/unquote, *run a job*.

You'll hear different than other careers, as an ironworker, as a construction worker in any trade, you prove yourself by getting there early and doing the work and by doing what others won't do and by working consistently and you build a reputation so you don't have to quote/unquote *shape the hall, go down and beg for it at the union hall.* He's never been without work before this accident.

His family, his reputation that he lived up to, made it so that he was to the point where they would, even on the day of accident, he was what's known as a gang foreman. Not the foreman who's running the job. He was the foreman's assistant for a particular gang and he'd done that many times and he had run jobs before.

In fact, after this accident, so he wouldn't have to do such manual labor, Metal Sales, his very employer, took him back for years and let him run jobs rather than being the one doing all of the bold work. You will hear that even if you're running a job, you need to be able to lift, climb, and you'll hear that on every construction site there's uneven ground. You have to be in these buckets that

bounce up and down, the hoist, and it's incredibly strenuous on your legs and your ankle.

Going to the timeline of the case, it's ten years. You will see Patrick was staying in New York, downtown, taken by ambulance. His leg, he was told, don't look at it and because they need swelling to come down when such a severe brake happens you can actually see the x-rays and you're going to see the postsurgical x-rays, as well, but you'll see the original x-rays, the two bones separated. That's what's called a bimalleolar fracture, the fibula. The ankle where, actually, the two major bones and where the foot comes together for stability.

You'll see when you look at an x-ray you'll just see bones it's ensconced in nerves and ligaments and they needed to let the swelling down. So, for two full days they pumped him up with morphine. Every time it moved a little bit it was searing pain, and, eventually, in the hospital, they took six screws and put the bone together on his left.

They put the outside bone together with six screws and they took two long screws and put them up diagonally into the malleolar part that's hanging off. You'll see the foot really offline in the x-rays.

Patrick gets out after several days in the hospital and starts seeing an orthopedic doctor, Dr. Touliopoulos. You'll hear Dr. Dr. Touliopoulos has worked on, because he

works within the work accident related system, he sees a lot of construction workers. He sees a lot of 580 workers. He's seen a lot of our clients. You'll hear that our firm specializes in it just like their firm specializes in representing the construction companies.

So Dr. Touliopoulos starts seeing him on August third 2004. He takes the cast off, puts another cast on, a short cast, I'm sorry, takes the cast off and puts Patrick in what's called a cam walker, something when you have crutches or you should have the ability to try to get walking on the foot. Patrick had searing pain, such pain that it wasn't described to him, even though he's on the pain meds in the weeks following the accident, and because of the cam walker he wasn't used to it and his ankle was unstable he fell one week after the accident. You're going to hear that smells started coming up from the cast.

Patrick is divorced. He was divorced before the accident. At the time of the accident he intended to marry the woman he was living with. She had a child. There was another motivation for him to get right back. They were living together and to make the money for the marriage for the life they wanted to live.

You'll hear the one thing I skipped on Patrick, he was born on the upper eastside, but his family had moved him to Heldon, North Jersey, and that's where he goes back and

that's where he's living now, not Heldon, but he's been back there several time.

You'll hear throughout the course of the case, he sometimes had to rely on the charity of some friends, sleeping on the couch, but he went to high school in Heldon. His friends are in Heldon and that's where his family settled in.

So, now, Patrick goes back to Dr. Touliopoulos after the first visit, tells him about the fall, it's noted in his record, talks about it, and he'll tell you there was a smell coming from the cast. Dr. Touliopoulos said, We got to get you back in, and he admits him to St. Vincent's Hospital in August of 2004.

He opens up the staples and the wound and when he's in there he notices the original surgeon apparently made a mistake and he sutured Patrick's sural nerve. He sutured it. It was entrapped in a suture and that was the searing pain he was feeling. So he un-entrapped the nerve, thank goodness, and he cleared the infection that was starting.

That was the smell. That was the the additional pain he was having. And Patrick stayed in the hospital St. Vincent's for eight full days and had inserted a PICC line for intravenous antibiotics to clear the infection. And Patrick will tell you, even while in the hospital, every visit to Dr. Touliopoulos, When can I get back to work when?

Can I get back on the job? Metal Sales says they have stuff for me, I can run jobs. It went on for three months.

Patrick first needed a bone stimulater that he would wear to stimulate the bone growth where metal was holding him together. And he was told you need it to follow-up with your infectious disease specialist.

Even from the beginning, there was talk of things don't always work out. Hardware can come out it can get loose. It can irritate. It can do a lot of things.

On October 19, 2004, just three months after the accident, Dr. Touliopoulos will tell you it's pretty unusual to do it that early. Gives him clearance. You want to go back to work, you're not going to be jumping up and down and in October he returns to work in October 2004.

From that point on he sees the doctor, it starts to get less and less. He comes back in February 2005, but he has complaints of stiffness. He's got complaints of numbness. And he sees him again in May of 2005, and the doctor notes on that time, permanently, he's lost 45 percent of the scheduled use of his ankle. That's what it's going to be. It's not going to get better. In fact, it will probably get worse. That's what it is. You'll live with it. It's PRC. He'll tell you what that means.

He notes, even back then on x-ray he can see what's called loosening of the hardware. Something just as of last

week after you were selected we received a report from a defendants' doctor. He says to this day there's no loosening in the hardware. With your very eyes today, from across the room, you will see the screws, two of them distinctly popping out, not tight like the others. Hardware has become looser and looser and it's irritating the inside of Patrick's leg.

Patrick understandably has been sinking his head in the sand like an ostrich, not wanting to go through another surgery. Surgeries they tell him he needs. And pretty serious surgeries.

Patrick is told 100 percent when you have an infection the first time that you are much more likely to get infected the second time. When you see the pictures of the second surgery they want to do, cutting his bones and realigning it, again, you're going to consider why Patrick hasn't gotten the surgeries that have been approved to this date and we'll tell you when they were approved and what Patrick's plan is. It's all for you to determine. But I don't think there's even a dispute that he needs them from this accident.

So, Patrick doesn't come back to the doctor for two full years, all right? He says come back PRN, as needed, and he doesn't come back. When he comes back two years later he had been working full work for two years, not

missing a day, incredible hours logged in. Even as someone running the job Patrick will tell you he's required on the hoist, on the plywood boards. He's required to be on his feet all day.

Patrick did not accept the early narcotic medication because it would affect his ability. He took it very early on, but it would affect his ability to concentrate. Made him feel, he calls it muddy. He didn't like it and he just doesn't want to do that. He wants to just -- In a certain part of these ironworkers, Patrick in particular, will climb out of edges of building. He said he could take the pain back then.

What he wasn't ready for was over the course of the years, loosening, not just of the hardware, of the ligaments and a rolling that -- It's been occurring and occurring -- a rolling of his ankle. So you're going to see and Dr. Touliopoulos will tell you originally he wanted to remove the hardware back in 2007 and debride, clean it up again.

It eventually became after the rolling consistently and persistently and Patrick actually falling sometimes from the ligament it became and what was approved after Patrick had to see doctors on behalf of the employer Metal Sales under this system, they fully approved, as related to this accident, a reconstruction of his ligaments and a removal of that hardware.

So, you'll see he comes back two years later. He's got increasing pain, swelling, it's noted. The doctor tells him all about the surgery that's needed. Says come back in a few weeks. Patrick comes back in a year. There's nothing that can be done. He's left with what he tells you a catch-22. Damned if he does, damned if he doesn't. But if he does he's got to stop work. End of story. You're not doing ironwork.

So he goes and comes back in April of 2008. You'll see and hear from the doctor that now he's got posttraumatic contractures of the ankle. The doctor will tell you what that means. They put him back on Vicodin for the first time again in years. He's got swelling that's increasing. It's incredibly big when he's working all day. It's big when he's doing nothing. You'll see. And he's got what's called atrophy and it's increasing.

Atrophy is a wasting away of the muscle on the leg because he's not stepping down on it. The doctor will tell you the level of atrophy. He's got what's called an antalgic gait. He limps. He's not putting the weight there and the muscles have developed differently.

Patrick did the physical therapy he was supposed to do in the beginning and he's consistently done the home physical therapy. He's still, to this day, he ices it, he takes what he chooses to do is over the counter medication.

He will tell you about his own weening off of the pain medication that he's done.

He stops work due to pain and limitation. He says his favors ran out in October of 2008, four months after seeing Dr. Touliopoulos. Again, one job ends a new job starts and he's not asked to run it. And he's going to use the time to chill out, let the leg heal and, in fact, he tries to go back to work again in 2009, but before he goes, he goes back to the doctor now in February of 2009. Tells him that he stopped work. Doctor sees the swelling and now they're talking about injections. They want to do injections into his ankle and they have to put in for authorization because everything requires authorization.

So he sees the doctor in February. He sees the doctor's partner. It's a team. In June of 2009. And they put him into a program of pain management for the first time where he's going to get every six weeks or so Lidocaine injections into his ankle to take the pain and to take the swelling down.

You'll hear that he still gets those injections into the ankle and that it's only in an effort to keep the swelling down and to give him more function of the ankle. And you'll see the other notes. It flips around and he has to start seeing the doctor more and more, but he sees Dr. Touliopoulos in September and that's the first time Dr.

Touliopoulos says that it's over. There is no more ironwork. Permanently disabled from that. Not from that anything else.

He'll tell you he can answer phones. Patrick has a plan. He'll tell you. But he cannot do ironwork. Not even as a supervisor. In fact, he saw the experts on both sides and even their vocational counsel says not even as a supervisor can you be on your feet all day, can you be on those construction sites. It is over.

So Patrick doesn't want to believe that. He still tries to go to work after that. In September of 2009, after getting the first round of injections he runs right back to work and he works a full job until October. Gets another job in November. They lay him off after that. Despite his name, despite what he can do. He even tries to go back to work again in 2010. And in 2010 early on, records are here, either February or April, it's done not in his mind but it's done where it is. And he's in pain management.

You may even hear on cross that one of the life care planners says he should get some psychological counseling. Patrick will tell you that's not for me. He'll call it a funk. They tell him he should be in counseling at that time. He's on medication. He wants to be off. He wants to be back at work.

We're going to ask you to consider that, in

addition to the pain and suffering, you assess the loss of enjoyment of life. We're going to present evidence on what he wanted to do and why he wanted to do it and what that made him feel and why he loved that job.

So, Patrick will tell you that he started the pain management as they told him to and he's seeing a doctor. He goes to this doctor for pain management and he gets the injections into the ankle. And he sees the vocational counselor on both sides and hears about his efforts and hear about his function. This is where Patrick is out.

In 2009, at the end of 2009, December, the surgeries were approved. Come on in and get your ligaments reconstructed and get the hardware taken out, the hardware that's loosening, that's stretching your ligaments, and you'll see actual pictures of when Patrick's foot rolls how big it gets. It actually looks a little disgusting. When it rolls causes him to fall downstairs. You'll see the rolling throughout the records. Noticed the fall several times.

One of the doctors uses the electronic record. It says he fell last week and you'll see that's a rolling record. He's fallen a bunch of times and his ankle is 100 percent unstable and getting more unstable.

So he doesn't get the surgery and he will get the surgery. Patrick will tell you why he's afraid to get the

surgery and that he's resigned to get the surgery. And the surgeries are this. Dr. Touliopoulos will tell you.

He first needs now and he needed it then four years ago, plus he needs to have his ankle opened up and all of the ligaments tightened and reconstructed. He needs the hardware out because despite what their experts says and, by the way, they hired a hand expert for this foot/ankle case, but the board certified hand surgeon says there is no loosening of the hardware. You'll see it with your eyes.

Dr. Touliopoulos will tell you it's causing him pain and irritation. We can go straight to the other one but he's too young. The other one is called a total ankle fusion where they put the bones open and they stop all movement of your ankle. Maybe it will take the swelling away. Certainly cause a different way he has to walk and it will cause the knee in the future approximately gives a number of years when it will cause the need for further physical therapy and we're only asking for systematic physical therapy, a portion of it. And it will cause the need for more pain management and it will cause him the need for him to see a orthopedic two or three times a year. Get x-rays once a year and he gets to see an orthopedic every four months to see what's going on with this accident, because you're going to hear about squaring of the joints, about arthritic conditions that are starting to occur.

Again the ten years. What's occurred now, what did the doctors think will occur in the future.

Just before I sit down so you're going to hear we may just have a agreement on the vocational counselors because we both agreed, I believe they both agreed, that he can't work even as a supervisor in ironwork and that he can do something else.

You're going to hear from an economist on our side. They've hired an economist, too, and they can choose to call their economist if they want. You'll hear a economist who will help you, aid you, not telling you to award, giving you numbers. All the economist will do is present if this happens these are the numbers.

You're going to hear that as we've told you our firm special -- don't want to say specializes -- we represent a lot of construction workers and we hired an economist from Kentucky. He comes in on every case because you'll hear his specialty. He doesn't just have a degree in economics. His Ph.D. is in labor economics, breaking down the union contract that you're going to have, breaking down the union benefits, the annuity and the pension plan. And this is where Patrick's loss comes in.

If he becomes a real estate agent, if he becomes something else, he will not duplicate a pension, an annuity, a vacation fund. These incredible collective bargaining

agreements that Ron Missun will tell you all about and explain to you union records and what they mean.

So I believe we're not going to be calling a union representative. We may not be calling all physicians on both side. They streamline it for you. And it's our position Patrick is in a classic catch-22, using his words, and that at the end of this case we'll come before you and ask you to decide, because this is a civil dispute and it's been going on for ten years, we'll ask you to award Patrick whatever you feel is fair and reasonable based on the evidence.

Under those theories of jury selection it is what it is and what's fair and is fair. What are his losses for his wages for the future. That's the biggest fight. What amount of pain and suffering. We can't give you that aid. We'll see what you see. You'll see his condition now and you'll hear from both doctors and what amount of medical costs because there are three separate categories.

I thank you once again for your patience today. It was a ten year wait to get here. I just wanted to be thorough. I look forward to working before you on behalf of the Patrick Naughton and seeing you at the end of the case.

THE COURT: Mr. Lombardo.

MR. LOMBARDO: We're going to switch. Mr. Kaminsky will go first.

Openings - Defendant (Mr. Kaminsky)

MR. KAMINSKY: Good morning, everyone. It's good to see you after a week and, yes, the first thing I want to clear up is, yes, I did get a haircut. So we'll put that to rest right off front.

Just to go over again quickly who's who and what this is about. I represent company called Metal Sales. At the time of this accident ten years ago Mr. Naughton was working for Metal Sales. We were his employer. The plaintiff, Mr. Naughton, has already won his case. He's won his case against Petrocelli. Petrocelli was the general contractor and over the course of the last ten years the courts have made different decisions and one of those decisions is, Mr. Naughton, you have sued Petrocelli and you win. So the plaintiff has already one his case.

As we know a second part of this trial where Petrocelli has said, Hold on a second, not so fast. Yes, Mr. Naughton, you are entitled to recover damages against me, but Petrocelli is going to try and recover those damages against W&W Glass and my client.

So, even though Petrocelli is suing me, I am going to stand up here and help Petrocelli during the trial in the dispute of damages against Mr. Naughton and I hope all that makes sense.

Now, this is a very unusual case. And why is this case so unusual?

It's unusual because it has taken ten years to come to trial. Think about that? Ten years. I don't even remember 2004. I think I still have the same Blackberry I was using, but other than that some of you were teenagers in 2004. This case has taken ten years to come to trial. And the reason that's unusual is because it's very helpful. What do I mean by that?

Usually when a case takes a year or two years to come to trial the doctors and the experts have to get on the witness stand and they have to guess -- not guess, but they have to use their best judgment as to what the future is going to hold and they have to make all these projections as to what the next ten years are going to be like or what the next 20 years are going to be like and they have to make all these assumptions and use their best knowledge to say what the future holds for Mr. Naughton.

Here, again, very unusual, but we have the benefit of ten years of hindsight. We don't have to guess what's going to happen from 2004 to 2014 because we know. We know. We have the facts. We have the records. We have the doctor's reports. We have depositions. We have expert disclosures. We have what's called ten years worth of discovery. We know everything that happened over the last ten years.

No dispute. Mr. Naughton suffered a bimalleolar

fracture of his ankle that required what's called open reduction and internal fixation. It's a relatively serious fracture to his ankle. It's not uncommon. It happens but it's the type of fracture that required pins and screws to be inserted. Sometimes people fracture a part of their body and they don't need that. They can just put a cast on and the injury heals.

In this particular instance Mr. Naughton did require open reduction and internal fixation. No dispute about that.

He had hardware, which was placed in his ankle and is still in his ankle. We know that. So we know that he is entitled for pain and suffering as a result of this accident. That's the first category. First category that we spoke about is fair and reasonable award for pain and suffering. And he's entitled to a fair and reasonable award for the pain and suffering he's had from the day of the accident up until today and then from today for the rest of his life.

Pain and suffering. And I don't think that's the biggest dispute in this case.

The bigger dispute in this case is what he's entitled to for his medical expenses. Okay?

Now, we know because the plaintiff has told us through discovery, through reports of his experts that he is

claiming that from the day of your verdict into the future he is going to need approximately $400,000 to compensate him for his future medical expenses.

Now let me put that into perspective.

Over the course of the last ten years, his ankle surgery, the infection, the rehospitalization, the stay in the hospital, the x-rays and anesthesiologist, physical therapy, all the counseling, all the visits to the doctor doctors, everything added up over the last ten years comes to $34,000, and yet, for the rest of his life somehow he's going to need $400,000.

That's why we have this big dispute. Because we obviously disagree that he needs $400,000 to cover his medical expenses. And this is how they get to that.

Dr. Touliopoulos, who is going to come to court today, may be waiting out in the hall to testify after opening statements, he's going to say this is what the plaintiff needs in the future. He's going to need surgery to his ankle. He's going to need hospitalization. He's going to need an anesthesiologist. And he's going to need follow-up visits for the rest of his life and that costs X number of dollars. He's going to need medications. There's a number of kinds of pills a day for the rest of his life. This is how much that costs.

Then the plaintiff's are going to call this fellow

Ronald Missun. An economist. Gentleman from Kentucky. And he's going to take those numbers and he will project them into the future. He will turn them into future value. And that's how they come up with this number of $400,000.

Even with the possibility of future surgery and the costs associated with that, that still doesn't get you to $400,000. So, plaintiff's had to get a little creative.

You're going to hear that one of their experts, who I don't think they're going to be calling to testify, but you'll hear about it and see his report to help build up, if you will, those future costs. They put in things like psychotherapy every week for the rest of his life at a cost of $7,000 a year.

Now you take that for the rest of his life and you put that out into future value, that helps you get to $400,000 dollars. That helps you to get to more than $400,000, but you'll have to decide if that's fair and reasonable considering he's never had one visit to a psychotherapist for the last ten years.

So you'll have to see the components of what is called a life care plan, future medical expenses, interchangeable, future medical expenses. You're going to have to determine the components of that plan are fair and reasonable. You may say that some are, you may that some aren't.

Now, one other point I'll make about Ronald Missun. I have had the pleasure of cross-examining him probably 15 to 20 times. I think I've cross-examined him twice already this year. I cross-examined him last month. This will be the second or third time in the last two or three months. All he does is come to court and testify and make these projections.

I can tell you now during the course of his career, because I asked him this during the last trial, he has earned over $1 million just from working with Mr. McCrorie's law firm.

MR. McCRORIE: Objection.

THE COURT: Overruled.

MR. KAMINSKY: I'll ask him again and you'll have to judge his credibility. You'll have to judge his projections. But, you see, the $400,000, even that's not the real big money that the plaintiff's are going to be asking you to award in this case.

They're going to ask you to make an award for future loss of earnings. It's why they've spent so much time talking about, he can't do this, he can't do this, he won't get his vacation benefits, he won't get his pension plan, he won't get his raises as a union worker.

Now, let's go back to Ronald Missun.

What does he project his loss of earnings to be in

the future? If I can call on you, ask you to raise your hands, I would, but I can't so I'll just tell you.

Well, it depends which version of his report you'll read because he's submitted several different versions over the last several years. And the reports range anywhere from two million to five million. That's where the dispute is in this. That's fight. That's what he's claiming. That's where the big money is. And that's what this fight is going to be about. Because we agree on his injury.

There's going to be a difference of opinion as to his recovery, because I can tell you that during the course of this case we did have the opportunity to have him examined by an orthopedic surgeon, and that doctor says he has made a good recovery and other doctors who have treated the plaintiff, who the plaintiff's attorney will not be calling to this case, you will see their reports and you'll see their findings as to his recovery as well.

So there's going to be disputes on the pain and suffering and the nature of his recovery. But that's not the big dispute. The bigger dispute is on the future medical expenses. There's no dispute on the past because we have the benefit -- all we have to do is add up the bills and it comes to $36,000.

The dispute is going to be what is fair and reasonable for the future, but the real dispute is going to

be the claim for loss of earnings.

Let me tell you a little bit about that claim.

Again, we have the benefit of having records. After this accident happened to his credit, you know, there's some people, I'm never going back to work, I'm staying home. Mr. Naughton went back to work and this is after he got out of the hospital obviously. He went back to work and he worked for a period of years.

Now let me tell you when I say Mr. Naughton, and at the time of the occurrence, was working for my client let me tell you what that means.

When there's a construction job going on, if it's a union job as opposed to a nonunion job, the general contractor has to hire union workers. So we've all heard the term union halls. Union workers literally report to a union hall to be assigned to a job. And it just so happened that Mr. Naughton -- Now, there's a subcontractor sitting quietly back there as he promised he would in jury selection.

The subcontractor hired my company to be the sub subcontractor, putting up these glass pains, okay? That's what we do. We install glass on the outside of the buildings. Every union you have electricians, carpenters, you have plumbers. We do the glass work.

So we went to the union hall and we said we need X

number of workers. And Mr. Naughton was assigned to the crew. So that's how he worked for us. That's what I mean he worked for us. He worked for us at this job site.

And what happens in the union is when a job gets completed, you go back union hall and you wait assignment for another job.

Over the course of time, Mr. Naughton worked for other companies at other job sites, other glass companies, I guess you would say our competitors or whatever you want to call them. He would be assigned to work as a union worker. So for those jobs he would be considered an employee of that company. For several years he went back to work. And then something happened.

On March 10th of 2010, I believe it was, Mr. Naughton said through his attorneys, That's it.

MR. McCRORIE: Objection.

THE COURT: Overruled.

MR. KAMINSKY: I can no longer work as a union worker. I'm sorry. I can no longer work as a laborer doing this type of work. That's the date. And allegedly it's because of the condition of his ankle. That's what we heard so far. And that he will never return to that work in that capacity. As much as he loves it, his family lineage, his legacy. But we subpoenaed the records the company that he was working for at that time.

Let me see if I can find the name of that company. I think it was Custom Precision Glass or something like that.

In response to subpoena they sent a letter saying, yes --

MR. McCRORIE: Objection to subpoena and letter. If they're not coming in --

MR. KAMINSKY: Subject to introduction of evidence.

THE COURT: Sustained, so far as the subpoena is concerned.

MR. KAMINSKY: Okay. I will show you during trial the reason that Mr. Naughton stopped working that day wasn't because of a disability. It's because there was no more work available.

Now, even though you are all young, you remember five years ago what happened to the economy. It tanked. There was no work available. And I will show you that the reason his employment, and don't hold me to the name of Custom Precision Glass but something like that, the reason his employment with that company terminated was because there was no work available.

So what does Mr. Naughton do?

Well, jump ahead now four years. Plaintiff's attorney just acknowledged to you that he's willing to be retrained and find some other type of work. Yet, for the

last four years he didn't do anything to be retrained. Yet, they want us to pay him for loss of earnings despite the fact that he didn't get retrained for some other job that they admit he can do and offset whatever loss of earnings he has? And they want us to compensate him despite the fact that the reason he stopped working wasn't because of his accident? It was because there was no work available.

So if he didn't get retrained and he didn't go back to work and if there was no work available what did he do during that time?

Well, through social media, and through other discovery, we were able to find out that Mr. Naughton entered some high stakes poker tournaments.

MR. McCRORIE: Objection.

THE COURT: Overruled.

MR. KAMINSKY: At the Borgata Hotel. Why is that important? It's important for several reasons.

Number one, he actually made a lot of plan.

MR. McCRORIE: Objection. $6,000 is --

THE COURT: Overruled.

MR. KAMINSKY: That's not the real important issue. We'll discuss what happened at those tournaments, but the reason it's important is because one of the reasons the plaintiff's experts say he cannot return to work is because he has an inability to concentrate.

MR. McCRORIE: Objection.

THE COURT: Overruled.

MR. KAMINSKY: Yet, we will show you that he absolutely has an ability to concentrate as evidenced by these poker tournaments with high buy-ins that he plays in.

MR. McCRORIE: Objection.

THE COURT: Overruled.

MR. McCRORIE: High buy-ins.

THE COURT: We'll see what the evidence shows.

MR. McCRORIE: It's irrelevant to his injury, your Honor.

THE COURT: Argument in summation.

MR. KAMINSKY: We will also show you during this time he could have, instead of waiting until today to say, I'm willing to be retrained, he could have been retrained years ago.

So what's this case all about about? A fractured ankle that required surgery to repair difference of opinion as to whether or not the pins are in alignment and whether or not he needs revision surgery. Some doctors say yes, some doctors say no. If he needs the revision surgery, it would help his condition. It would alleviate some of his pain if he goes through with it. If he doesn't go through with it, arguably, it's because he doesn't need it.

So you'll hear the different medical testimony,

difference of opinions. That's not the dispute.

Again, the dispute is over the $400,000 claim for loss of earnings and the big dispute is over the claim of several million -- I'm sorry. $400,000 for medical expenses. The big dispute is over the claim for several million dollars in loss of earnings. That's what this is about.

Thank you all very much. And I'll speak to you again during my closing arguments.

THE COURT: Mr. Lombardo.

MR. LOMBARDO: Yes, thank you, your Honor.

May it please the Court. Ladies and gentlemen of the jury, Mr. McCrorie, Mr. Kaminsky, Mr. Tosca.

How many of you are wondering first on behalf of the Petrocelli, I'd like to thank you for coming and sitting in this case.

As Mr. Kaminsky said, courts have already found that Petrocelli is was responsible for the happening of the accident. It's also true that Petrocelli is only saying, hey, we're not the only ones. Metal Glass is at fault here too.

You're going to hear testimony on July 21st, 2004, Mr. Naughton was in the employ of Metal Glass. He was an employee. He was a foreman. And while standing on top of this truck and on top of these window panels he was

directing other --

MR. McCRORIE: Objection. That's liability part.

THE COURT: Yes.

MR. LOMBARDO: It was opened by Mr. Kaminsky.

THE COURT: Let's not compound the error than.

MR. LOMBARDO: One sentence, Judge.

What you're going to find out is that this operation was under direction and control of Metal Sales. And Petrocelli is here to.

MR. McCRORIE: Objection.

MR. KAMINSKY: I'll object as well.

THE COURT: Sustained.

MR. LOMBARDO: Petrocelli is here to fight this. We're here because --

THE COURT: You're hear to fight the value of the injuries.

MR. LOMBARDO: That's my next sentence.

At this time we're here to fight damages. As Mr. Kaminsky said during selection, we're here, we teamed up because we believe what's going on in this case isn't what you heard from Mr. McCrorie in the beginning.

Now, if you all believe that what Mr. McCrorie said during his opening statement, you have to wonder why we're even here.

As you heard from Mr. Kaminsky, you're getting an

idea now of why we're here. You're going to find out that after the accident Mr. Naughton went to New York Downtown Hospital. He had the plates and screws put in. He developed an infection. And he came under the treatment of Dr. Touliopoulos from University of Orthopedics.

The evidence is going to show you that over the last, approximately, ten years Mr. Naughton has only seen Dr. Touliopoulos or at least that's what Dr. Touliopoulos showed us, approximately 20 times. Most of it in the first year. And there's gaps of treatment of a year, eight months, nine months with no treatment.

You're going to find out that in May of 2005 the hardware is still not out, but Dr. Touliopoulos is recommending that that hardware comes out. We're nine years later and that hardware still isn't out, because Mr. Naughton doesn't want to undergo this procedure. He's having discomfort.

All through Dr. Touliopoulos's records he's complaining of discomfort. Not pain. Discomfort. He's not being provided pain medications. He's taking over the counter Aleve for discomfort. Not for pain.

You're going to find out that he's in such extreme pain that he can't work, but there are these big gaps of treatment. And if he's in that much pain why isn't he seeing his doctors?

Ask yourself when you hear this testimony, you're going to hear that when he goes to the treatment Dr. Touliopoulos says years ago that it's possible he's going to need ligament surgery. Not that he definitely needs the ligament reconstruction. That's in Dr. Touliopoulos's record. It's possible. Yet, they want to provide you with the cost for that. They're going to ask you for the cost of future medical treatment and surgeries that Mr. Naughton already told his doctors he's not going to have. He doesn't feel comfortable with having those surgeries. They're not going to help his condition, but they want you to pay him for it.

You're going to hear from plaintiff's economic expert Dr. Missun. He's going to tell you that millions of dollars in future lost earnings.

The plaintiff himself has a duty. He's got duties to mitigate his damages. And this case is not only on top of what Mr. Kaminsky said, it's about Mr. Naughton's failure to mitigate his damages and he fails in two respects.

One, he doesn't have the medical treatment his doctors are recommending for five years, six years, seven years, to have the surgery. He's not following their instructions.

And the second thing is he didn't mitigate his economic loss, his economic damages. He's got a degree in

biomechanical engineering from Boston. Not a degree. I'm sorry. He had two years of college under his belt. In ten years why hasn't he gone back? Why hasn't he gone back to other schools, to another school, local school and learn another profession?

Okay, you're going to hear that he may not have been making what he was making as an ironworker to start but eventually he may. Depending on what vocation he decides to take up.

Also, here in the state of New Jersey there's a program of, free program by the state of New Jersey, as well asa one is in New York, to retrain him as to another vocation. He doesn't even make that effort. Even after he's told in 2010 by the defendants' vocational rehab, there's programs available for you. So four and a half years go by and he still hasn't called a New Jersey vocational rehabilitation center to ask about, how do I get into the program.

He's failed to mitigate his economic loss.

Yet, he wants us to forget it and give him damages for the future.

Ladies and gentlemen, you've heard a lot about what's happened here. I will not take up too much of your time. I just want to thank you again for sitting. And I want you to wait to hear all of the evidence before Judge

ProNervo reads you the law on the case and allows you to deliberate.

Thank you.

THE COURT: Mr. Tosca

MR. TOSCA: Yes, your Honor, on behalf W&W we reserve the right of conducting, to open after the close of plaintiff's case.

THE COURT: You make your opening now or you waive it.

MR. TOSCA: I'll waive it.

THE COURT: We'll take a little recess. Ten minute recess before we hear our first witness.

Please, don't discuss the case among yourself.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)

MR. TOSCA: If I may, your Honor, procedurally, I believe we have the right to open at the end of the plaintiff's case.

THE COURT: And before the defendants' case on the issue of damages.

MR. TOSCA: Yes.

MR. McCRORIE: I thought you meant on damages.

MR. TOSCA: I meant on damages.

THE COURT: What's your position with respect to that, Mr. McCrorie?

Proceedings

MR. McCRORIE: You know, I didn't know that. You mean after we're all done with our case?

MR. TOSCA: After your done with your case.

THE COURT: After you put your case on, Mr. Tosca is asking for an opportunity to make his opening at that time.

MR. McCRORIE: I'd say that I'd object to that.

THE COURT: The Court finds it appropriate under the circumstances.

MR. TOSCA: I believe --

MR. KAMINSKY: I support counsel's objection. I believe he does have the right to open at the close of the plaintiff's case.

MR. TOSCA: Yes.

THE COURT: All right. Fine. You have an exception.

(Whereupon, a short recess was held.)

(Whereupon, plaintiff's exhibits one through eight were marked and received in evidence.)

(Also received and marked was 3A through 3F in evidence.)

COURT OFFICER: All rise. Jurors entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Welcome back please be seated. Sorry for the slight delay in getting started. We used the time

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to mark some exhibits and documents.

So, at this time, we're ready to hear from the first witness.

Mr. McCrorie.

MR. McCRORIE: Yes, your Honor.

The plaintiff calls Dr. Steven Touliopoulos.

THE COURT: Doctor, come on up.

THE CLERK: Doctor, raise your right hand.

S T E V E N T O U L I O P O U L O S,

called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Please state your name and your address for the record.

THE WITNESS: My name is Steven Touliopoulos.

My address is 23-18, 31st Street, Astoria, New York 11105. T-O-U-L-I-O-P-O-U-L-O-S.

MR. McCRORIE: May I proceed?

THE COURT: By all means.

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Good afternoon, Dr. Touliopoulos.

A Good afternoon.

Q You might hear I'm speaking loudly. There's some noise back here through an air conditioner. Jurors all the way back

here need to hear you. If you could speak louder than you think we need to hear that will be helpful. Even louder than that if you don't mind?

A Sure.

Q Dr. Touliopoulos, are you a medical doctor licensed by the State of New York?

A Yes, I am.

Q When did you become so licensed?

A In 1993.

Q And to the extent you can break it down concisely but, please, don't leave anything out, directing all your responses to the jury, can you tell the jury a little bit about your background, including college, medical school, internship, residency, fellowship, defining any words that might mean something somewhere else like fellowship.

A Sure. I went to college here in New York City at Columbia University.

Q Even a little louder, sorry.

A At Columbia University. I majored in chemical engineering. I got a bachelor's degree in chemical engineering. I stayed on at Columbia to received my masters in bioengineering before entering medical school at Downstate in Brooklyn.

I did my medical school at Downstate, I graduated and then I went to do my residency also at Downstate, Brooklyn.

After completing my orthopedic residency I did an extra

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year of training called a fellowship in orthopedics sports medicine and that was done at Lenox Hill Hospital here at Manhattan.

Q And can you describe your current practice?

A Yes. I entered practice in 1997 after graduating my fellowship. I have a general practice with an office in the city, as well as one in Queens. I treat mostly injuries of the extremities, including fractures and joint injuries. And I'm in a group of other physicians called University Orthopedics.

Q Is one of the other doctors, we just may see the name in the record, Charles DeMarco one of the other orthopedics?

A Yes.

Q Are you board certified?

A Yes.

Q Can you tell the jury in what area you're board certified and the significance of board certification? What it entails?

A Yes. To become board certified in a specialty you have to complete an accredited residency program here in the United States. And then take a two part exam. The first part is a written exam based on your knowledge. And the second part is an oral examination based on your surgeries that you performed over a two year period.

I'm also, just to add to that, I'm board certified not only in orthopedic surgery but also orthopedic sports medicine.

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Q Can you just tell the jury a little bit more about sports medicine.

You told us your practice treats extremities. What does sports medicine and a little bit more in-depth about the types of injuries and patients you have in your practice.

A Sure.

Well sports medicine, just by the name of it, it's a specialty subspecialty of orthopedics that tends to specialize in injuries sustained in sports accidents, such as an ankle sprain or knee or shoulder injury. But these injuries can also be sustained in other accidents, whether it's a slip and fall or a car accident. So it's not limited to just sports related injuries.

My practice is predominantly treating patients with injuries to their extremities. These include injuries such as fractures, as well as soft tissue injuries which may be ligaments or tendons.

Q Does your practice accept work related accidents and all of the rules and procedures that come along with that?

A That is correct, yes.

Q Is the rule in fact if you accept one you have to accept all; correct?

A That is correct.

Q Do you perform surgery?

A Yes, I do.

Q Can you tell the jury approximately how many surgeries you perform each year?

A At the present time I believe I'm performing over 600 surgeries a year.

Q Do you perform surgeries to the ankle out of those 600 surgeries to the year?

A Yes.

Q On average, approximately, how many surgeries to the ankle are you doing each year?

A I would say approximately between ten and 15 percent, which would be, I guess, 60 to 90.

Q And the other areas of surgery, you do shoulders, knees, you said the extremities?

A Yes. Hips, wrists, elbows.

Q Finishing up on your background, do you have any academic positions that you hold?

A Yes. I'm presently Associate Professor of Orthopedic Surgery at Cornell Medical School.

Q And in fact, where were you this morning before testifying?

A I was at New York Presbyterian Downtown Hospital.

Q And in fact, are you going on a conference, orthopedic conference at the end of the week or tomorrow afternoon?

A Yes.

Q Where are you going?

A To New Orleans for the Annual Orthopedic Academy Meeting.

Q Okay. Have you testified in court ever before?

A Yes, I have.

Q Have you in fact testified for workers that were injured in accidents?

A Yes, I have.

Q And have you in fact testified for other clients of ours, the firm Sacks and Sacks, construction workers that were injured?

A Yes, I have.

Q As well as other firms?

A That is correct.

Q You and I, meaning myself as a member over there, have you and I ever met prior to two weeks ago in connection with preparing for this case with Mr. Naughton?

A No, we have not.

Q Or Mr. Naughton's case. We didn't prepare with him.

Are you being paid for your time away from practice?

A Yes, I am.

Q And did you in fact cancel all of the surgical patients and anyone else you had to see, follow-ups from all the surgeries you do?

A Yes, I have.

Q What is the rate that you are being paid to be away

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from your practice? Looks like it's going to be this morning and into the afternoon, the whole day.

A To clarify I have not been paid yet. It's an arrangement made between my office manager and the law firm, depending on how long I am away from my practice and what was canceled, but usually it ranges between 6 and $10,000.

Q Okay. And did you and I meet in connection with preparing to testify, preparing your testimony in terms of selecting certain views of the x-rays to speak to the jury about?

A Yes.

Q Did we go over medical illustrations that would aid you in discussing the injuries that Mr. Naughton sustained?

A Yes.

Q Did we also speak last night on the phone?

A Yes. Very late last night.

Q So other than the meeting two weeks ago and phone last night, that was it?

A Correct.

Q All right. Your file is now in evidence so you can refer to it if you need to.

We've also entered into evidence over here New York Downtown records and St. Vincent's, but Plaintiff's No. 3 is your file.

When did Patrick Naughton become a patient of yours for

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the first time?

A That was on August 3rd, 2004.

MR. McCRORIE: If I could ask the Court's permission to approach.

THE COURT: Sure.

Q Just going to place Plaintiff's 1 downtown, Plaintiff's 2, for your reference. Can you tell the jury what a history means?

You're the first doctor testifying.

When we say, Did you take a history, what does that mean in terms of medical records?

A Well, in examination with the patient usually entails a history and a physical.

A history is when you question patients to find out what happened, what hurts, how bad it hurts, did he ever hurt before, and that's what we did when I saw him for the first time.

Q Okay. And is it fair to say that despite any gaps in treatment you've been seeing Mr. Naughton for a ten year's period a decade?

A Yes.

Q Little shy of it if you saw him August of 2004.

What was the history you took? We're not going to go through every note. We may go through portions of them because it's ten years, but what is the history you took?

A Well, at that time he was 39 years of age. He was an ironworker. He was involved in an accident on July 21st, 2004? He stated that he fell off a pile of panels that were on a flatbed truck. He fell approximately 15 feet. And he injured his left ankle and left foot. He was taken to a New York University Hospital where he required ankle surgery for his fracture. Open reduction and internal fixation.

What that basically means is opening up the skin, going down to the fracture and fixing it with plates and screws to put it back into place and to hold them in place.

Q If you don't mind again, if I have trouble hearing you the jurors over here might so just a little louder. Louder than you think.

Continue with the history so we can find out what you knew and get to your examination when you're comfortable with it.

A Sure. When I saw him he was in a cast. He had complaints of ankle and foot pain and swelling. He had numbness to his toes. He denied any prior history of trauma to his ankle or foot prior to this accident, so is this first time he ever hurt his ankle and foot. When I saw him he was on crutches, in addition to his cast.

Q Just in terms of your notes, when you get to the portion of your note that says physical examination, that's what you actually in each of your notes did and observed to the

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patient?

A Yes.

Q So on the physical examination what did you do? What did you observe on that first visit?

A Well, we took the cast off to look at the wounds, the incisions on the ankle, and I saw that there were staples on the outside ankle and on the inside he had sutures. He had multiple fracture, blisters which is a significant finding.

A blister happens after a bad fracture and that signifies a breakdown in the circulation to the leg. Because of the slow down of the circulation the skin blisters up. This makes the patient more prone for problems later, such as infection as well as chronic swelling which a patient has. There was some sluffing of the skin.

Q On what portion of the body?

A That was on the inside of his ankle. So basically he broke both sides of his ankle and on the inside incision the skin was kind of falling off. Again, it's a problem with the circulation to the skin which causes the blisters and causes the skin not to heal. So, again, this is something seen in advanced injuries.

Q Continue with anything else that would be relevant in the examination.

A Although the skin had broken down, he was making granulation tissue which is healing tissue to cover the ankle,

which was a good sign.

He had decreased motion to his toes. So when I asked him to move his toes it was very limited. And he had decreased sensation about his ankle and his foot.

Those were basically the pertinent findings.

Q Can you tell the jury as first medical witness what the terms diagnosis and prognosis mean.

A The working diagnosis is basically what you think is wrong with a patient. So the diagnosis in this case would be ankle fracture. And prognosis is basically how you think things will turn out to the patient in the long run.

Q In your notes is the diagnosis synonymous with impression, the word impression in each of your notes, that section?

A Yes.

Q Can you just tell the jury a little bit about medically what's subjective and objective mean?

A Yes.

Subjective is what the patient tells you is going on or what's wrong with him, which is found in the history.

Objective is what the doctor finds wrong during the examination.

Q So not as simple as a broken bone but let's take swelling. Is that subjective or objective?

A It could be both. The patient can tell you that he

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feels his ankle is swollen and that's something that can also be objective finding because the doctor can see that on examination.

Q And can you tell the jury what your plan was and then you can define cam walker?

A Well, the plan was to continue mobilization of the ankle. We want the ankle to remain still while the soft tissues heal and bone. Soft tissue being the skin and muscles and structures around the ankle. And best way that I was to mobilize him was to put him in a CAM boot and not a cast. A CAM boot looks like a cast but it's a boot with buckle straps that's removable. I thought it was a good idea to not cast him since he had an open wound that we needed to follow closely and look at. So we placed a devisable CAM walker brace boot, which is basically a removable boot for the ankle.

He was instructed to be non-weight bearing meaning not to put any weight down on his left foot. And he also was instructed to take care of how to take care of his open wound he had on his ankle. And he was advised to follow-up in one week's time.

We gave him Vicodin, which is a narcotic medication for pain, and Vioxx, which is antibiotics inflammatory medication for inflammation.

Q It's so old that Vioxx is off the market.

A Yes, for almost nine years now.

Q And just because of your words that you used in your report to evidence these he's presently totally disabled from all employment.

A That's correct.

Q If you could just go to the next note. Again, we'll speed it up and I'll just have you step down, talk about the anatomy with the Court's permission of course.

You next saw him on August 17th; correct?

A Yes.

Q Will you tell the jury if something changed with the history, it's in evidence, so they say there's history of a fall. Tell them what you noted and what happened in that one-week time period.

A Since I saw him the week before he did tell me that he fell between the two visits and he also reported that he had some lateral sided ankle pain and swelling and that he started to drain from his ankle. He was still taking Vicodin for pain and the Vioxx as a antiinflammatory medication.

Q Did he report a fever?

A He had a rare intermittent episodes of fever.

Q Okay. And at that point you had x-rays that you reviewed?

A Yes.

Q Did there come a time shortly after that before you saw him next that you admitted Mr. Naughton to St. Vincent's

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Hospital?

A Yes.

MR. McCRORIE: Your Honor, with the Court's permission, I was going to ask permission of Dr. Touliopoulos to please come down and do some anatomy with the illustration and some of the x-rays.

I'm going to put up Plaintiff's 4 in evidence.

Q Use Plaintiff's 4 if you can to describe the anatomy to the jury in terms of the ankle, in terms of everything that's there, and if there's things that aren't there like nerves please let us know that.

A Sure.

The ankle is made up of three bones. We call it the mortise, the tibia and the talus. And the ankle is held in place by the bones and ligaments that hold the bones together. The ligaments are structures that holds the bone to a bone.

You can see there are multiple ligaments in the ankle that hold the ankle down in the socket. And this is the outside of the ankle. Outside use of fibula, which is the small bone on the side and this is the inside of the ankle. This structure here is the medial malleolus and the lateral malleolus is the lower part of the fibula bone.

This patient broke both sides of his ankle, meaning the medial malleolus, and, frequently, when there are fractures of the bones the ligaments that are closer to the bones will also

get injured, strain or torn. This is especially true when the ankle is dislocated.

So what this patient had was not only a bimalleolar fracture, the fracture of both sides of his ankle, but a dislocation of the ankle where the socket actually comes out of the joint.

With this dislocation there's tremendous damage to the ligaments around the ankle and there can also be damage to the cartilage inside the ankle.

Q Can you also tell the jury even though what's depicted what a sural nerve is and where the sural would be and what function it serves in the body?

A The sural nerve comes down on the outside part of the leg.

Q Where does it start from?

A It starts in the hip area, comes down the tibial nerve and the branch of that is the sural nerve and that comes down the outside of the leg close to the fracture and incision and then it provides sensation to the outside of the foot as well as the outside of the toes.

This is a nerve that's a sensory nerve. So it is not a nerve that's moves. It's just a nerve that's involved in feeling of the foot.

Q I just want to put up Plaintiff's 1A now, some of the x-rays from New York Downtown Hospital.

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If you could explain to the jury what it is they're seeing and what is not right, if anything on the picture?

A Yes. This x-ray --

Q I'm going to give you red pen if you want to mark. If you do, please tell the court reporter what you're marking.

A Sure. I believe this is one of the initial x-rays in the emergency room.

Q New York Downtown and it got the date of 7/21/04.

A Yes. Patient Naughton.

You can see that the tibia is dislocated from the talus. So this bone here I'm marking the tibia belongs over here. You can see one of the fractures here. The fibula fracture and you can't see the medial malleolus fracture because of the angle of the picture. So basically all the ligaments that held the ankle together, most of them are torn. Not all but a lot of them are torn.

The syndesmotic ligament here that holds the fibula -- The tibia is just torn because the bone is separated. So it's obvious from the records that there's significant ligament damage to the sample.

Q Show them the altered anatomy.

A Sure. This is another view you can see clearly now I'm circling malleolus fracture. This is the break of the inside of the ankle. And lateral malleolus fracture, which is the break here, these black lines are fractures. You can still see that

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the ankle is not in the socket.

MR. McCRORIE: Just to publish that portion over here to the far end.

Q Continue, Doctor.

A So again, the talus, which I'm outlining here, belongs over here. So the ankle is not in the socket.

Q If we can use Plaintiff's 7, it's a medical illustration, little clearer but it shows the same anatomy and same altered anatomy as the x-rays.

Can you show the jury, talking about the anatomy how it's supposed to look and how it resulted?

A Sure.

This is a normal left ankle and this is the medial malleolus bone and this is the lateral malleolus bone. And these are the fractures of the medial malleolus depicted here, as well as the lateral malleolus, which is over here, so getting both sides of the ankle.

Q Just going to put up Plaintiff's 6.

If you can take the jury through the surgery that was done for Mr. Naughton in New York Downtown two days after the accident.

If you can do this first:

Why would an orthopedic surgeon wait two days to do such a surgery?

A Well, it's not usual to wait. Sometimes it can be done

right away, but sometimes you have to wait even a couple of weeks. It all depends on how much swelling there is. Sometimes you don't want to perform surgery on a very swollen ankle because you may have trouble closing the skin after the surgery. So sometimes you have to wait up to three weeks to fix an ankle fracture.

Sometimes you can catch it early enough and within a couple of days you can fix it earlier. Sometimes the swelling gets worse, not so much on the first two days, but maybe a week later.

So they waited a couple of days, I'm assuming, to work-up the patient, awaiting for the swelling to go down. They fixed the fracture by making two incisions - one on the inside of the ankle and the other on the outside of the ankle. You can't reach both sides through one incision so he made two incisions.

The inside is fixed by his clamping the fracture together, the bone fragment or fracture together, and putting screws through the piece. We call this latch screw you see that thread through the screw only become it's a partially threaded screw. This part of the screw is not threaded. This allows for this fracture to compress when you tie a screw.

On the outside of the ankle it was fixed with a plate and several screws and, again, fractures put back in place with a clamp and then it's plated with a stainless steel plate and

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screws to hold the fracture in place.

Q Just the ORIF stands for Open Reduction and Internal Fixation?

A Correct.

Q See how the plates and the screws here, if you can just -- Looking at it -- I guess we'll go real time. Just picking along in 2013 does this depict the metal that is still in -- when I say "this" we're putting up Plaintiff's 3. Does that depict the metal and hardware that is still in Mr. Naughton's ankle?

A Yes, it does.

Q Are those your x-rays?

A Yes, they are.

Q We'll interpret those a little later.

Can you tell the jury first, this may seem very obvious, but for the record is this type of injury consistent with the mechanism of falling 15 feet and either striking the side of leg on a jersey barrier or landing on it after striking something else?

A It's consistent with a significant injury and it can be from a fall and/or twist to the ankle joint.

Q And in a case like this, it might be ridiculous, but for the record do you have an opinion within a reasonable degree of medical certainty as to the cause of the fracture and need for the surgery?

A Yes. It's absolutely from that fall.

Q When you admitted Mr. Naughton to St. Vincent's, can you please tell the jury any procedures you did and why you did them?

A Sure. He had drainage that developed on the outside of his ankle and that's usually a sign of infection.

Some infections can be treated with antibiotics, but if there is puss inside the best way to treat that is to drain it and sometimes that can be done in the office. But because of nature of this injury, I thought it was best performed in the operating room.

So we took him to the operating room to reopen the ankle, the incision on the outside, not the inside. And we did a cleaning. We washed it out and we took cultures to see what kind of bacteria was growing so we can set him on the appropriate antibiotics.

When we performed the surgery I didn't know the sural nerve was caught up in a stitch. So we freed up the nerve from the stitch and some scar tissue, hoping that would improve the numbness that he had in his foot.

Q Just for this next portion, I'm going to take you back to your notes.

Just to make it go a little quicker, was a PICC line inserted into Mr. Naughton's body while he was St. Vincent's Hospital?

A Yes.

Q What is that and why did he have a PICC line in there?

A Yeah. The infection this patient had, and usually a deep infection involves swelling, it requires a intravenous antibiotics. A normal IV that you see people have in the hospital, a intravenous line, usually lasts two or three days.

So in order for this patient to go home and to get home antibiotics, which is sometime, he will need it for up to six weeks, a PICC line was inserted.

So what a PICC line is it's a long-term intravenous access because you put it up in the shoulder/neck area where it lasts a full four to six weeks for this antibiotics and this would allow the patient to go home.

Q Doctor, just so it's clear on the original surgery, that was done under full anesthesia?

A Yes.

Q How about your procedures that you did?

A I just want to double-check. Also general anesthesia.

Q So I'll skip the next note.

Did you continue to see him through the month of September several times Mr. Naughton?

A Yes.

Q What is a bone stimulater and why is that given to someone with a fracture like Mr. Naughton?

A Well, a bone stimulater is a device that sends

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electromagnetic pulses to the bone. It's battery operated. It could be strapped to the leg or arm, and we don't fully understand how it works, but many years ago they found out that by doing this it can help bone heal. And we don't ordinarily give all patients with fractures a bone stimulater, but I decided to give this patient one because in September I was concerned that I could still see a fracture line on the x-ray.

Q Fracture line?

A Fracture line, yeah. Whereas most of these types of fractures heal within six weeks, this had some delayed healing. I thought a bone stimulater would help heal it faster.

Q Just so it's clear, it says, "I'm requesting authorization."

Under this system of the work accident you need to request permission for anything you do; correct?

A Anything over a certain price.

Q And at least even as far back as September 2004, September 7th, you were talking to Mr. Naughton about the potential possibility of further intervention; is that right?

A Yes.

Q And that's typical with such a fracture as he sustained.

A Yes.

Q I said it, but is it typical?

A It is typical, yes.

Q Did you start Mr. Naughton on physical therapy in September of 2004?

A Yes.

Q And did he attend the physical therapy as far as you know?

A Yes.

Q Now in October 2004, October 19th, can you tell the jury -- You've known Mr. Naughton ten years now, correct?

A Yes.

Q Was Mr. Naughton requesting to go back to work early on in your treatment of him?

A Yes. He always had a strong desire to go back to work. This is a injury that from my experience takes six months to a year before we can even talk about work, but at this point he had a strong desire to return to work and I did see some callus formation on the x-ray, meaning that there was enough healing on the x-ray where I thought he could put some weight down on his foot.

MR. McCRORIE: This is a good time to break for lunch, your Honor.

THE COURT: All right. We'll take lunch recess now. Please come back at 2:15.

Please don't discuss the case among yourself or anybody else. You haven't heard all the evidence.

See you 2:15.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)

THE COURT: All right. Have a good lunch.

(Whereupon, lunch recess was held.)

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Please be seated.

Doctor, you are reminded you are still under oath.

THE WITNESS: Yes, your Honor.

THE COURT: Mr. McCrorie.

DIRECT EXAMINATION CONTINUED

BY MR. McCRORIE:

Q Doctor, we left off at October 2004. I'll speed it up.

In your notes you indicate that Mr. Naughton could return to work that Friday.

A That is correct.

Q So you knew he was going back to work?

A Correct.

Q And the next note we have is February 2005.

A Yes.

Q Okay. Just in the note, just to speed it up, it is in evidence, you do note that, I'll point it out later, stiffness and discomfort in the times he's been working. Is that correct?

A That is correct.

Q And you also note that the mortice is in alignment and

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it's excellent fracture alignment.

A That is correct.

Q Going to May of 2005. When you took radiographs you started noticing something called loosening.

Can you tell the jury what loosening of the hardware is?

A Well basically having a loose screw. So it's not unusual that over a period of time that one or more of the screws --

Q If you can speak up please.

A That one or more screws can loosen and back out and if not enough, obviously, since there's not much over the plate other than skin, the screw can be very symptomatic and rub the patient the wrong way, especially wearing shoes.

Q And just again, noting that he was at work but having difficulties with activities, negotiating steps, walking at fast pace, things like that?

A Yes.

Q When you say someone can return to the office P.R.N., can you tell the jury what that means medically?

A That's as necessary.

Q And the sentence before there, that he can continue with his present employment, the very sentence before that, that he has a 45 percent loss of use of his foot or his ankle. It says foot, but when you talk about 45 percentage loss of the use

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of his left foot tell the jury what that means and how you determine that.

A Yeah. We use guidelines, workers guidelines, based on the injuries and sequela injuries to determine what percentage loss he has of the ankle and foot.

Q Is 45 percent medically significant?

A Yes, it is.

Q At that time, in 2005, was that a determination of yours that that would be a permanent condition?

A Yeah. It was my determination that the patient would not improve from this condition. Although, it was understood that he could worsen over a period of time.

Q The next time Mr. Naughton came to your office was April 2007.

A Correct.

Q You noted that he was now limping due to his symptoms; is that correct?

A Yes.

Q And he was working as an ironworker and you noted whatever difficulties he was having.

On your physical examination, what does mild effusion of the ankle mean?

A Effusion means fluid in the joint. So basically this would be fluid, more than likely water type fluid, that he had in his ankle joint.

Q And just because your words are there and the jurors may see the notes later, what does maintaining a slight antalgic gate mean in April 2007?

A That he had a slight limp when he walked.

Q And as treatment you offered him, due to ongoing symptoms, arthroscopic debridement and hardware removal.

What does those two -- We know what hardware removal means. What does arthroscopic debridement mean?

A The arthroscopic surgery is a surgery that's performed with little holes made around the joint, whether it's shoulder or your ankle, and a camera is inserted into the ankle joint through one hole to another one hole. It's instruments such as a shaver to perform a cleaning.

Q Because you prescribed the drug what is Ultracet prescribed for?

A Pain.

Q And at the end it says you instructed him on appropriate activity restriction and modification prognosis. Discussed with the patient. That means the future?

A Yes.

Q And you told him to come back in eight weeks time?

A Correct.

Q He came back a year later.

A Yes.

Q In April of 2008 you note for the first time he has

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symptomatic posttraumatic contractures of the left ankle. What does that mean?

A Posttraumatic contractures means basic stiffness that develops after a trauma, after an accident. When you fracture a joint such as an ankle, again, there's injury to the bone which is fixed, but also injury to soft tissue around the bone, including the capsule, ligaments, tendons in the skin. And during the healing process with inflammation it can contract demeaning his motion.

Q Just to make it go quicker, on the complaints that he made to you, they're in there, but difficulty negotiating ladders, steps and walking on uneven surfaces.

Did he tell you those words if they're in there?

A Yes.

Q He told you over the counter medications he was taking?

A Yes.

Q When you say he has symptomatic hardware and you do comma, what does rule out posttraumatic degenerative joint disease mean?

A That the rule out is that something that was suspected, may be one of the causes of his symptoms of that, over a period, especially over a period of years. After significant ankle fracture there is a high likelihood of developing arthritis which we call degenerative joint disease.

Q In the end of that note, April 2008, you were aware he

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was still working pretty much since he went back to work in 2004; correct?

A Correct.

Q You issued him Vicodin extra strength at that point; correct?

A That is correct.

Q And at the end of the notes when you say that you were going to, that further treatment options were going to be discussed, meaning, I guess, in the following visits after you looked at the radiographs studies, and those further treatments were hardware removal and arthroscopic debridement; correct?

A Yes.

Q You discussed those with the patient?

A Correct.

Q Did you tell Mr. Naughton whether or not he'll be able to continue to work as a ironworker if he had at that time the hardware removal and arthroscopic debridement?

A Well, he would be out of work for a period of time from surgery. Obviously, he would have an open wound and he would need a period of time to recover from the surgery.

Q You told him to come back in three to four weeks; correct?

A Yes.

Q Now the next time Mr. Naughton came back to you in February of 2009, he had informed you he had stopped working in

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October 2008, for a little bit.

A Correct.

Q In your notes the reason you stated was what in the third sentence?

A He had progressive left ankle symptoms of pains stiffness and swelling.

Q That's right in the sentence where he stopped working as a ironworker three or four months ago due to that.

A Right. And his level of pain, it was eight out of ten.

Q When you say it was increased with orthostatic activity can you just tell the jury what that means?

A Ortho means scanning, so any activity where you stand, whether standing or walking, going up and down steps, those would all be difficult for the patient.

Q Now when you state for the first time that his ankle is buckling, occasionally buckling in 2009, what does it mean when ankle buckles?

A The number one cause of ankle buckling in my experience is loose ligaments. Again as I said, ligaments hold bones together. If they're injured the ankle can be loose and what the patient tells you is that usually the ankle rolls on them usually without warning.

Q And on the physical examination did you note swelling objectively that you saw and felt with your eyes and hands?

A Yes.

Q Did you note that on every occasion or has he had consistent or persistent swelling from the time of his accident until today?

A I believe so, yes.

Q And when you state in February 2009 in the physical examination that there is atrophy of the left calf compared to the right calf, what does that mean, those words?

A Atrophy of the muscle means the muscle is getting smaller than the other side. And in this particular case, that's because of disuse. In other words, since he wasn't using his ankle normally and he was relying more on the other side to walk his calf was getting smaller than the other side.

Q Your plan for the first time included a request for something called left ankle Euflexxa injections.

What are those and what did you hope if you got authorizations to achieve with administering those?

A This is a type of hyaluronic acid injections. Basically it's not Cortizone. It's lubrication that replaces the normal lubrication of the joint that you lose when you have arthritis.

Q June 18, 2009, it's noted Mr. Naughton still out of work. This is where he sees a Charles DeMarco. That's on your letterhead. It's in your office. Is that your partner?

A Yes. One of the colleagues in the office.

Q In June 2009 Dr. DeMarco was still requesting Euflexxa

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injections and, in fact, requested that he be able to put Mr. Naughton into pain management; correct?

A Correct.

Q And did you become aware that in August of 2009 Mr. Naughton entered pain management through the referral from your office with a Dr. Perper?

A Yes.

Q Did you become aware that he's been given injections into his ankle, I think it's every six weeks or so to his left ankle?

A Yes.

Q In addition to whatever else medication or whatever else Pain Management does.

So, in fact, on August 25, 2009, you note in your follow-up visit that he actually received the first ankle injection by Dr. Perper a couple of weeks ago and has given him partial improvement of the symptoms; is that correct?

A Yes.

Q Dr. Perper says also prescribed Lidoderm patches for the first time.

Can you tell the jury what Lidoderm patches are and what, as a doctor, would that do for someone with Mr. Naughton's symptoms?

A These patches contain lidocaine, which a numbing medicine, and if any of you had a cavity that is usually

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injected into your gums to make you numb.

The patch is applied topically and it helps to numb the area and help the pain.

Q And using the words now for first time before, buckling, in August of 2009 it states he has episodes of rolling and buckling; is that correct?

A Correct.

Q And for the first time you are now requesting at the end, in addition to hardware removal, lateral ligament reconstruction surgery; correct?

A That is correct.

Q For the record, under this system you were seeing him under, when you request medical treatment such as a ligament reconstruction surgery and a hardware removal, Mr. Naughton is then evaluated by other independent doctors who say whether he needs it or not.

A Correct. We need to get permission and part of the process is for him to usually to see another physician that's dependent to get the permission.

Q Just did you receive written confirmation that you had authorization to do a left lateral ligament reconstruction and hardware removal based on the accident work accident that Mr. Naughton had sustained and injury he sustained five years before the authorization?

A Yes, I did.

Q Did you know the date of that? I can show you something to refresh your recollection?

A Sure. I don't remember the exact date.

MR. McCRORIE: Well, with the Court's permission if I can just.

THE COURT: Yes.

(Approaching the witness.)

A The decision notice was October 13th, 2009.

Q Okay. And tell the jury if Mr. Naughton had that surgery yet?

A He has not.

Q Does he still need the surgery?

A In my opinion he does.

Q And the opinion of other physicians that has seen him he does need the surgery.

A Correct.

MR. TOSCA: Objection.

THE COURT: What is this again?

MR. McCRORIE: Hardware removal and ligament reconstruction.

Q Did Mr. Naughton continue to see you through that year of 2009?

A Yes.

Q And your notes state what they state because, and at least until the end of 2009 you now had authorization to do the

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surgery.

A That is correct.

Q Did Mr. Naughton want the surgery to reconstruct his ankle and take the hardware out? Did you have discussions with him whether or not he wanted to do it?

A Yes. We had discussions on several occasions to perform the surgery. And he has expressed interest in doing it.

Q I mean back then. Did he come in and do the surgery?

A Has he done the surgery? No.

Q Did he express -- Withdrawn.

Did you tell Mr. Naughton the risks associated with the surgeries you were going to do and did you also tell him the risks of injection in light of the fact that he had already had an infection during the first surgery?

A Yes, I did.

Q Tell the jury what you told him the risks were and the discussions you had with him about having the surgery once you got authorization at the end of 2009?

A Sure.

The risks of the surgery -- Basically one of the problems with the surgery is that it's a very long recovery. Could be six months to nine months to a year that he would have difficulty walking, because not only are we scoping the ankle but we're also doing a ligament reconstruction. And any sort of --

Q Just a little louder.

A And any sort of ligament reconstructions require very long recovery period.

With surgery there's always risk for infection and in light of the patient's history his chance of infection would be higher than the average person who never had this problem. He had an infection that was hard to get rid of and that was a very big concern of his when we were discussing the operation.

Q Can postoperative operation be fatal?

MR. KAMINSKY: Objection.

THE COURT: Overruled.

Q Did you tell him all of the risk?

A Death is always a risk with any type of surgery.

MR. KAMINSKY: Objection, move to strike.

THE COURT: Overruled.

Q Did you relay to him all of the risks that you're telling the jury?

A Yes.

Q Continue with those.

A If there is an infection that's hard to control and that one that can be cured, especially if it's osteomyelitis, which is infection of the bone, that sometimes can result in amputation.

Other risk factors include blood clot. Something called RSD, which is Reflex Sympathetic Dystrophy, which is

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hypersensitivity of nerves. Stiffness. Pulmonary embolism. As well as death, such as other anesthesia complications.

Q After November of 2009 when you saw him the next time, he saw you, was September of 2010; correct?

A That is correct.

Q On your plan for the first time you used these words - he is permanently disabled from his employment as an ironworker. Different than calling things partially, permanently.

Did you in fact relay to Mr. Naughton that that's it, there is no more ironwork to any degree?

A Yes, I did.

Q Why would someone with Mr. Naughton's injury as it existed in 2010 and today not be able to physically do the work of an ironworker that required walking on the uneven surfaces, ladders, construction sites? Why wouldn't he be able to do that?

A This is a job that is very demanding on an ankle. This is a ankle that has arthritis and loose ligaments that can roll, cause him to fall, which can cause further injury to himself and to others. This is a patient that had received almost everything short of an operation, including injections, medications, physical therapy, and still had progressive pain dysfunction of his ankle. And it progressed to the point where not only did he have trouble working, but he also had trouble with simplest activities of daily living, like walking. So it

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was my opinion he could no longer work as an ironworker.

Q Again in November 2010, although he didn't have the surgery, he's now having frequent rolling episodes.

A Yes.

Q And each time you noted whatever you found, whether it was atrophy or swelling, all those are in your notes; correct?

A Yes.

Q In March of 2012 you saw Mr. Naughton again; correct?

A Yes.

Q And when you saw him in 2012 -- By the way, has all of your treatment to date been authorized and paid for under the system for the last ten years, the system that he's seeing you under?

A As far as I know, yes.

Q Did you ever put in March of 2012 notes that Mr. Naughton was now using an air cast, I guess, at home or other areas.

Why would he use an air cast if the leg wasn't broken? Why would you suggest that?

A It's called a air cast but it's not really a cast. It's a brace that has air that's pumped into it that you can wrap around your ankle on either side to give you vertical support and that could fit inside a shoe. So it's something that's not visible and can afford him some stability to help minimize his ankle rolling on him when he walks.

Q I got to ask you a silly question.

Does Mr. Naughton's injury prevent him from sitting at a table and playing cards?

A No.

Q Do they prevent him from sitting at a table and playing chess?

A No.

Q Does it prevent him from doing another job that doesn't involve being on a construction site and being on your feet all day?

A No, it does not. My opinion was that he was disabled from his work as an ironworker but not from all work. Obviously there could be sedentary work where he can do as long as he can, sit down and not be required to do a lot of standing and walking and steps, although he can do some.

Q I'd like you to assume that he will testify, and I don't think anyone will come in and say differently, that a supervisor on a high-rise construction site doesn't sit down. They're working and they're moving up and down the site. They're walking on the uneven surfaces. They're required to go to the edge of the building and up and down ladders.

MR. LOMBARDO: Objection.

THE COURT: Sustained.

Q So long as the job involves standing and climbing he can't do it.

A That is correct.

Q Has Mr. Naughton ever expressed a desire to not be on the pain medication?

A Yes, he has.

Q In fact, if you look back over the last ten years Mr. Naughton sparingly expected and utilized the narcotic pain medication; correct?

A I would say yes.

Q Okay. I'm just going to skip a couple of notes in 2012.

In 2013, May and July, do you note that he's still under the care of Dr. Perper getting all the treatments he was getting?

A Yes.

Q With the Court's permission I'm going to have you just come down one more time, maybe just bring the red pen.

I just want to, subject to connection, just want to show you photographs of Mr. Naughton's ankle.

If you could comment if there's any difference in malleolus, any difference of what should be there, and if you can just point an arrow to it.

A Yes, there's some swelling noted. Obviously this is a back view. That's the right ankle. Left ankle.

MR. McCRORIE: Using Plaintiff's 5.

Q Plaintiff's 5 is before you.

A And there is swelling noted in this area which is lateral malleolus, as well as in this area which is the back of the medial, inside of the ankle.

Q When you say "this," the record doesn't know, but is that hump compared to no hump on the other side?

A Yeah. There's swelling and loss of definition of the Achilles tendon in this view. There's loss of definition of the bone structure medial malleolus. See how there's swelling here and here it's more curved. And again you see the same thing in this view. This is the healed scar here but there is more swelling in this ankle than other ankle, again on the medial side.

Q Is that swelling persistently and consistently there?

A It's been persistently there since I've been treating him. At times it's worse than other times.

MR. McCRORIE: Your Honor, with the course permission can I have Mr. Naughton come up.

THE COURT: To demonstrate what it looks like today?

Q You know what, is this what it looks like today?

A Yes.

Q Did I have you again look at it at lunch?

A Yes.

Q So swelling would be on the interior aspect. That swelling there is that permanent?

A Swelling is permanent.

Q And the deformity and swelling that you see right here, is that permanent?

A It is permanent. And obviously, the more he stands he has a long day on his feet the more it's going to swell. If he has an episode of the ankle rolling, it will swell more. Every time he rolls his ankle he sprains it. With additional surgery he can even get additional swelling in the ankle.

Q Did you take x-rays over the years of Mr. Naughton's legs?

A Yes, I have.

Q I'll just go to one in 2012. If you could just show the jury what they're seeing here. Tell the jury what they're seeing here on Plaintiff's 3C.

A Yes. This is a side view of the ankle.

Q And the date, if you don't mind.

A I think it's October 2012. And it's a side view of the ankle. And these are the screws in the malleolus. This is the fibula plate. You could see where the fracture was. He has all this buckled bone. We call that callus, which means new bone.

So the fracture, although it had problems initially healing, it did eventually heal, but there are signs of arthritis on this x-ray. There is some narrowing of a space, this space here versus space there. So it's based on the posterior aspect of the ankle versus the space of the anterior

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aspect of the ankle, because there's some beginning of narrowing of the joint which is arthritis.

Q And that's 2012.

If you could just compare it to February 2014 and just tell the jury again. Maybe if you want to take your red pen to note where the arthritis is.

Now you're marking a different exhibit from February 2014, 3F.

A You can get -- Again, this distance here is different from that distance and the bone, so that's a sign of arthritis.

Another sign of arthritis is sclerosis, meaning hardening of the bone. And you can see this area of the talus is very white, meaning that there's increased calcium formation here. Again bone is hardening, getting hard in reaction to arthritis.

Also, signs are in the back of the ankle, the front of the ankle, is developing what we call squaring. Instead of being rounded, he's getting more of a kind of a square. So these are basic bone spurs. Again, another sign of arthritis is developing in the ankle.

Q If you could just circle the squaring of the ankle.

A (Indicating.)

Q Now from a side view like that can you appreciate hardware loosening or is it better seen on a different view?

A It's better seen on a different view. This is -- It's

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called on phosphu where you're looking at the screw on end. AP view would show you that better.

Q I'll put up AP view, 3D. Please show the jury which if any of the screws are loose.

A I think it's obvious this screw is loose.

Q At the bottom line circling in red.

A Bottom screw in the fibula plate.

Q By loose do you mean appears to be sticking out of the hole where the top one, one underneath that are tied into the hole and into the bone?

A That is correct. This screw, the head of the screw is flat with a plate. You don't see a space between the screw head and the plate.

As you come down you actually see progressive loosening. So bottom screw is the loosest, but there's also some loosening here and, to a lesser degree, even this screw has backed out.

Again, these are screws that are right here and they can obviously rub you the wrong way, especially when you're wearing certain types of shoes.

Q Just going to ask you to look at an x-ray from February 14th, same view, 3E. If you could hold it up to the jury as you speak.

If you can circle the loose screws on the February 14th one and --

A Sure. Again, this screw has backed out. This head here belongs down here, so it's backed out, I would say, a few millimeters. This is a magnified picture, but I would say the distance backed out is a few millimeters, enough to irritate the patient. Again, there was a space here and space over here too. So, as you come down the plate the screws get progressively looser.

Q Would you disagree with any board certified doctor that none of these screws are loose at all?

A I would strongly disagree with that statement.

Q Did you ever speak about another type of surgery with Mr. Naughton that he will be facing in the future?

A Yes.

Q Can you tell the jury what was the type of surgery?

A Ankle fusion.

Q Let me ask you this:

Doctor, regardless of whether or not Mr. Naughton gets the loosened hardware out and regardless of whether or not he fixes the ligament, the loose ligaments, will he still need the ankle fusion?

A Yes.

Q Is that your opinion within a reasonable degree of medical certainty?

A Yes, it is.

Q And can you please tell the jury the basis of your

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opinion with a reasonable degree of medical certainty as to why Mr. Naughton would need the ankle fusion regardless of whether or not he gets the other surgery first to take out the hardware that's loose and to fix his ligaments?

A Sure.

Q And one last thing.

Have you told Mr. Naughton that regardless of whether he gets the first surgery he's going to need this?

A Yes.

Q Is that in your notes?

A Yes.

Q Okay. Please tell the jury why he needs an ankle fusion and what it entails?

A Again, he's developing progressive arthritis after a bad fracture dislocation of the ankle, which is not unusual. Frequently in this type of fracture, this dislocation.

When the ankle dislocates it can injure the cartilage surface of the bone, which predisposes him to any arthritis.

Now, he has, I believe, three active problems.

One is his hardware is loose and that can be solved with simple removal of the plate and screws.

The other is his ligament is loose. And there's a 90 percent chance that the surgery can make that better, although not perfect. There's a 10 percent chance that surgery for the ligament may fail. So for every problem there's a different

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surgery.

So, the third problem is the arthritis. And other two surgeries are hardware removal and the ligament is not going to address the arthritis problem.

He's young. And since he's young we do recommend he maintain his natural ankle as long as possible, but as years go by the arthritis will get worse to the point where he will no longer be able to be treated conservatively and will need a fusion. Although some people perform ankle replacements it's an operation that has very high failure rate, unlike the hip and the knee. So ankle replacement is not a good option for a young patient with bad ankle arthritis.

The best option would be a fusion, which means you make the ankle one bone. So you remove the cartilage surfaces of bone and you remove the cartilage and then you put screws in it. Actually treat it like a fracture. You want it to bend together and not move anymore.

The upside of a fusion is that usually does help with arthritic pain. The downside is that he can no longer move his ankle. It will be fused in a position where it will no longer move.

Q Assuming he didn't get the hardware removal now, and we'll talk to the jury about when you're recommending these, but would the hardware that was in place that was in now come out at the time of the fusion if he didn't get it removed before then?

A More than likely, since he would get anesthesia we would remove it at that time.

Q It's not going to tighten up?

A It's not. We're hoping it doesn't get looser, but there's a good chance it will probably loosen a little bit more as time goes by.

Q Could you please take the seat.

We'll just go to your last note. February 12th, 2014.

You still note left ankle rolling; is that right?

A Yes.

Q And despite the fact that he may be able to accept prescription for them you note that he's only on Aleve; is that right?

A That is correct.

Q He's still limping; is that right?

A That is correct.

Q Tell the jury the pain levels he's feeling then or reports to you.

A The pain can go from six out of ten intensity or as high as eight or nine out of ten with activity. So if he's active and walking it will go as high as nine out of ten.

Q You note the injections that are he's receiving he just received from Dr. Perper?

A Yes.

Q Tell the jury what crepitus with ankle motion means on

left compared to the right.

A Crepitus is the medical term for crackling. So the patient has crackling of his ankle and that is usually -- The damaged cartilage, it can make noises as it moves. Also scar tissue inside of the ankle joint.

Q Atrophy 1.5 centimeters. That will be left calf compared to the right. Is that medically significant?

A Yes.

Q What is positive side to side deficit mean and what does anterior draw test grossly and positive mean?

A Anterior draw test is a test that we perform to check the stability of the ankle. So what we do is we pull the ankle forward and we kind of feel how much it moves. And that's really the best test to make the diagnosis of a loose ankle. MRI can somehow be helpful. MRI scan would be very limited because of the metal artifact you would get from an MRI scan.

Q You note once again that he's deferring the surgical intervention at present; correct?

A That is correct.

Q And you've told him, it says here, about the posttraumatic degenerative joint disease and you used the words "eventual effusion" as you've used in the past.

A Yes, I have.

Q Doctor, I'd like all of your opinions to be stated from this point forward to be within a reasonable degree of medical

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certainty. If you can't state that under that level let us know.

A Okay.

Q I may say the words anyway but within a reasonable degree of medical certainty do you have an opinion as to the cause for the need of the two surgeries you just told the jury about?

A Yes, I do have an opinion.

Q What is the opinion?

A My opinion is from the cause of his work accident that occurred in July 2004 that resulted in a fracture.

Q And the symptoms that you've told the jury about and the objective findings of swelling, crepitus, everything you've noted over the ten years, do you have an opinion as only to the left ankle as to the cause of the symptoms?

A Yes.

Q And what is that?

A That it's from that same accident.

Q Okay. When you say it's from the same accident tell the jury what sequela means? You have the initial accident and then you have what happens after. What does sequela mean?

A Sequela are consequences or side affects of an injury. So if you have a fracture that can result in sequelae, such as swelling, stiffness, arthritis and loose ligaments, those are all the result of the same accident.

Q You used the words that the degenerative nature in your notes is progressive.

What does that mean in relation to an accident when you say within ten years the degenerative nature is progressive?

A Arthritis is not reversible. It can only get worse over time. You can never reverse it. So as he gets older the arthritis will get vastly worse.

Q Do you have a reasonable degree of medical certainty as to whether or not in the future, after the date of this verdict, Mr. Naughton will continue to have pain in his left ankle?

A Yes.

Q And for what time period?

A Well, remember, the surgery, the hardware removal and the ligament surgery in the arthroscopy will address the hardware pain and hopefully the loose ankle, but he will still have arthritis.

So the first operation will not serve all of his problems and he will still have pain from his arthritis in his ankle joint.

Q For what period of time into the future? We just need it for the record, the words.

A Obviously he's going to have pain from arthritis until he has a fusion, which is the operation that we recommend for arthritis and that should be -- I think the far end would be 10 to 12 years, maybe sooner then that.

Q After someone has a fusion of their ankle and motion is totally gone, are they able to walk and go heel to toe? Are they able to walk normally?

A No, they'll have an abnormal way of walking.

Q Will that then cause more problems or more issues with atrophy and the same thing you've been telling me about this jury?

A Yeah. He will actually have more atrophy of his leg and calf after the fusion because right now he actually has some motion in his ankle. So he's able to move his calf muscle somewhat, but not normally because they're skinnier. But if there's a fusion he won't be able to use them at all and there will be more significant atrophy.

Q Were you asked to do an orthopedic life care plan by our office knowing that the trial was coming up? Were you asked to do a orthopedic life care plan?

A Yes.

Q Is that part of your chart? Do you have that with you?

A Yes, I do.

Q Since it's part of your chart just take it out.

Are the opinions within that chart made with a reasonable degree of medical certainty?

A Yes, they were.

Q And can you tell the jury without me asking the question each time, tell the jury within a reasonable degree of

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medical certainty what future care Mr. Naughton will require? And if I need the time period for qualification I'll ask you, but if you can please go through that and we'll be almost through.

A Sure.

As I said earlier at the present time I do recommend to remove the hardware from his ankle, to perform a arthroscopy and ligament restructure. That's something I recommend at the present time.

In the future he will require fusion of his ankle to make the ankle one bone to decrease his ankle pain.

Q You have the costs there.

First do the surgical costs and then the cost of what would be the anesthesia and facility fee. If you can just tell them what you're doing.

A Sure. For the ankle arthroscopy and lateral ligament the fusion fee will be $8,500. And hospital and anesthesia fees will be $11,000.

Q And these are surgeries you do and you're familiar with the costs in the metropolitan area?

A Yes.

Q You're not going to New Jersey where he lives?

A That is correct.

Q Continue with the ankle fusion fee, current cost.

A Surgical fee for the fusion will be $10,000 and for the

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facility and anesthesia $12,500.

Q You've already told the jury but it's in your note in evidence, you recommend that 10 to 12 years when he's approximately 60 years old.

A That is correct.

Q Okay. Will physical therapy be required to Mr. Naughton when any or either of these surgeries are done?

A Yes.

Q Can you tell the jury first what the purpose of physical therapy is with regard to both of the surgeries and with restoring his ankle?

A Well, the purpose of the therapy would be to help regain his strength and his ability to walk. He has to be retrained to walk. For the first surgery it will hopefully help gain his motion. Obviously, following a fusion that will be something that he would require. But basically it is to improve the musculature and motion, not only of the joint that had surgery but of the other joints that helped him ambulate.

Q If you could just go over any postoperative therapeutic intervention that you recommend.

A Yes. Following the operations there will be a period of time that he would require a fairly intensive therapy. I have few three times per week for 24 weeks. After which I have a course of supportive therapy.

Q Just for the record, it's in your notes, but you state

it's at $120 per session.

As a board certified orthopedic surgeon who refers people to physical therapy, I would anticipate often you're familiar with the costs of physical therapy.

A Yes, I am.

Q What is it per session?

A We have $120 a session.

Q So the annual cost for those one time each for each of the years that he gets the surgeries would be what?

A $8,640.

Q Continue on with the maintenance physical therapy.

A Again that would be two to three times a month. That would be $4,320 a year.

Q So 25 times a year, roughly, to 30 times a year; is that correct?

A Yeah. Two, three times per month, so basically almost every week or every other week.

Q In addition to that do you recommend that Mr. Naughton do something called home therapy?

A Yes.

Q And do you note that throughout the ten years that he's doing home therapy?

A Yes.

Q The $120 a session, just so we can move it along, for the two to three times a month?

A Yes, for the support of therapy, yes.

Q Do you recommend within a reasonable degree of medical certainty that he continue to see an orthopedic surgeon for any period of time?

A Yes, I do.

Q Because I'm trying to rush and jumping, maintenance physical therapy as opposed to the one year after surgery, how long would the maintenance of physical therapy, given ten years later symptoms and given the need for these surgeries and this persistent swelling and loosening, do you have an opinion as to how long into the future he should go to the therapy on that left ankle formal physical therapy with someone watching him two to three times a month?

A I think supportive therapy will be helpful for at least up to the fusion and thereafter. Either continue therapy because of the abnormal way he's walking and the stresses that are applied to other joints in the body, supportive therapy, even after a fusion, is bit ideal.

Q From what period of time?

A I think that would be forever.

Q So with a reasonable degree of medical certainty should he continue to see a orthopedic physician such as yourself, it doesn't have to be you but another board certified orthopedic physician, to monitor what's going on his ankle?

A Absolutely.

Q Let's just go over that first.

Any opinions you have with regard to seeing an orthopedic in the future on page one?

A Yes. Obviously, following an operation we have to see him more often, so it will be twice a month for the first month and then after the first month it would be once a month up to a year.

Q After each surgery?

A After each surgery.

Q At what current cost for an orthopedic doctor, assuming it's outside the system of work accident treatment?

A $120.

Q So $120 each orthopedic session for that time period you just said.

What about any monitoring for just general monitoring when the surgeries either not done or when it's done after that year?

A I recommended every four months so basically three times a year that he sees orthopedic surgeon.

Q For what period of time would you recommend Mr. Naughton at the age of 49 continue in the future to see an orthopedic three times a year?

A That would be until he passes away.

Q Whether he gets the fusion or not, you still would need to do that?

A That is correct.

Q Is that the same current $120?

A Yes.

Q And would you as an orthopedic doctor recommend that he take diagnostic testing, just simple x-rays at any time during the visits?

A Yes.

Q How many times per year?

A It would be once a year.

Q And what would be the current cost for an x-ray once a year to the left ankle?

A $250.

Q Covering all those views; correct?

A Yes.

Q Do you recommend that he continue with pain management?

A Yes.

Q With what degree and what time period and the costs, Doctor?

A Well, I did recommend injections to his ankle up until he has a fusion. Once he has the fusion you are no longer able to inject into the ankle joint because there's no longer a joint. So I did recommend one injection a year until the fusion.

Q Just so we're clear, he's been getting injections every six weeks. Different than Lidocaine. What is the type of

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injection that you would recommend he get into his ankle once a year that's different than the numbing Lidocaine?

A It would be the lubrication type injection I mentioned earlier.

Q Euflexxa?

A Yes.

Q What's the cost of that? What's the once a year cost?

A We have $200.

Q Finally, Doctor, last question for the pain management, time period, frequency and purpose of it and the cost.

A Yes. Every six weeks and at the cost of $120 a visit.

Q To continue basically what he's doing now?

A Correct.

Q It says here also to monitor medication.

Assume he's been taking less and less assume, he gets off all medication, just doesn't want to do it, would he still need to see, in your opinion with a reasonable degree of medical certainty, pain management doctor if he's not taking the pain medication?

A I think one of the reasons he's able to decrease his medications is because he's been receiving medications by a pain doctor, so I think that he needs to visit the pain doctor whether it's for injections and/or medications.

It's my opinion, as the arthritis gets worse, as years go by, injections will likely work less and he will likely need

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more medications.

Q And your report is in evidence, Doctor, but is that for life as well, the pain management visits?

A Yes.

MR. McCRORIE: No further questions.

THE COURT: Jurors, would you like a break now or we're okay?

JURORS: Now.

THE COURT: Okay, let's take a short break.

COURT OFFICER: All rise jury exiting.

(Whereupon, the jury exited courtroom.)

THE COURT: Take ten minutes.

(Whereupon, a short recess was held.)

COURT OFFICER: All rise, jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Please be seated.

You are reminded you are still under oath.

CROSS-EXAMINATION

BY MR. KAMINSKY:

Q I don't know if you recall, if don't know if you recognize me with my new haircut, but we've met before today; correct?

A Yes.

Q Could you tell us, this is what's called a bimalleolar fracture?

A Yes.

Q Meaning, there were two bones were broken; correct?

A Correct.

Q Now there is such a thing a trimalleolar fracture.

A Correct.

Q That would mean what?

A There's a third fracture and that's usually in the back of the tibia.

Q Obviously this is a significant injury but it's not uncommon; correct? If you can answer that yes or no.

A I can't answer that yes or no.

Q That's fine.

All things being equal, I would imagine just from the name of it a, trimalleolar fracture would be more significant than a bimalleolar? Just yes or no.

A Can't answer that yes or no because of --

Q That's fine.

Have you performed surgery on both bimalleolar and trimalleolar patients?

A Yes.

Q Many, correct?

A Yes.

Q Counsel was asking you about the risks associated with performing surgery and I think you told us you have performed 600 surgeries a year.

A Currently it's over 600 a year, yes.

Q Maybe 10,000 in your career?

A That's hard to stay. It's in the thousands.

Q Have you ever lost a patient during surgery?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q As a practical matter -- well, obviously, there are risks inherent with every surgery. You disclose those risks to every patient; correct?

A That is correct.

Q The risk of a fatal surgery to treat bimalleolar ankle fracture is relatively insignificant, if not nonexistent, true? Just yes or no?

A I would say it's small.

Q So let's compare the risks associated with the rewards.

You've been recommending that Mr. Naughton have this surgery for how many years?

A For a few years now.

Q And obviously you can't control what a patient does. You can only make recommendations, correct?

A Correct.

Q But to get the best recovery would you agree with me that it's incumbent upon your patient to follow his doctor's advice? If you can answer that yes or no.

A The physician's job is to give patient options and it's

up to the patient to decide.

Q Agreed the patient has the final call, but you have opinions as to wanting to provide the best result and best recovery for all thousands of your patients; correct?

A I do have a opinion, yes.

Q And your opinion in this case is that Mr. Naughton should have the surgery; correct? Yes or no.

A It would help him and it was a good option for him.

Q And the reason that you say it would help him because it would alleviate some of his complaints of pain; correct?

A It would hopefully help the pain from the ligament problem and hardware problem, but not from the arthritis problem.

Q We'll get to the arthritis. That's separate. But this initial surgery that you've been recommending for five years that he hasn't had, the reason you're recommending that is because it would improve his condition.

A I believe it would.

Q And by improving his condition, talking about alleviating some of the discomfort that he's talking about.

A Some of the pain, yes.

Q And we're talking about having a greater ability to do things; correct?

A If the surgery is successful, and usually it is, the pain is better and the stability of the ankle is better.

Q And I think, if I heard you correctly, you said the success rate of this surgery is 90 percent.

A Correct.

Q So we're comparing a 90 percent success rate with very small risks, correct, just all things being equal? You follow my question? If you can answer it. I know it's not the clearest question. If you can't answer it, I'll withdraw it.

A I can't answer yes or no.

Q Fair enough. It was a little confusing. I didn't understand the question myself.

Now you say that you would disagree with any doctor who said that the screws were not loose; correct?

A That is correct.

Q And by any doctor would that also include your partner Dr. DeMarco? Yes or no?

A If he had said that yes.

Q Have you reviewed any of Dr. DeMarco's record of what he says about the status of that hardware?

A I have his records with me.

Q Have you reviewed them?

A I did not look at them recently.

Q As recently as a few months ago Dr. Charles DeMarco, board certified in supports medicine, same as you, correct?

A Yes.

Q If he said the hardware was intact and in place would

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you agree or disagree?

A Well, again, what's the definition of intact and in place.

Q I'm asking if you would agree or disagree with that statement?

A Well, again, you would have to ask him intact means is it not broken.

Q Let's ask you, is it your opinion that that hardware is intact and in place? Yes or no.

A Intact. If he means it's not broken, I agree with that statement. In place, the screws are in the screw holes. It's my opinion that they're loose.

Q If he makes no reference to the screws being loose and, when we say somebody has loose screws this isn't what we're talking about.

A No.

Q If he makes no reference to the screws being loose and he says the hardware is in place with healed fractures you would disagree with him?

A Well, again, I don't know what he means by intact and in place. He doesn't say that they're not loose, so he's not saying they're not loose. Again, my opinion is that it's obvious on the x-rays the screws are backed out.

Q Regardless, it's your opinion that having the surgery would provide relief to Mr. Naughton?

A I think there's a very good chance it would be, yes. Some relief.

Q His work history, do you know off the top of your head from the day of the accident up until today the days he's worked as a ironworker and the days he has not? Generally, or we can do it by year.

A I don't know day to day. I have a ballpark idea of when he worked and didn't work.

Q What's your understanding of the years following the accident that he did work?

A I have to review my records.

Q I asked you off the top of your head.

What's your understanding of the years that he worked and the years he did not work?

A I believe he worked fairly regularly until 2007/2008, but I would have to review my records to know for sure.

Q Do you know if he's ever gone back to work after 2007/2008 in the capacity of an ironworker?

A I believe he's always expressed interest in trying to go back to work and I believe he has tried.

Q And prior to testifying today did you receive certain documentation from Mr. Naughton's attorney to review?

A Such as?

Q Well, I'm asking you, did you receive anything or is it just your file?

A I just reviewed my file.

Q So you didn't review any depositions or anything like that?

A No, I have not.

Q Did you review any records from any -- By the way, when we're talking about ironworkers, you testified numerous times in a courtroom on behalf of ironworkers; correct?

A I've testified on behalf of ironworkers in the past.

Q Dozens of times?

A I don't know if it would be dozens, but it's been more than a few.

Q Fair to me to say you've testified in court well over 50, 60, 70 times?

A I believe that number is high. I think the average amount of testimony in a certain year it averages to be out about three or four and I've been in practice maybe 15, 16 years, so it can add up over a period of time.

Q Well, there is such a thing as a jury verdict report. You're aware of that; correct?

A Yes.

Q And if we tally up a number of cases that is testified that were reported to the jury, if they were in excess of 70 would that surprise you?

MR. McCRORIE: Objection, Judge.

THE COURT: Overruled.

MR. McCRORIE: Doesn't just do testimony. It's a report that any time he's been on the case, whether it goes to trial or not.

MR. KAMINSKY: Not necessarily.

Q Regardless, let's talk about the number of times you've testified on behalf of plaintiffs for the law firm of Sachs and Sachs. Do you know how many times that has been?

A I don't know. I don't know the total number of times, but I don't believe I have in the past year.

Q Do you know if in your career it's more than a dozen?

A It would be hard for me to say for sure.

Q Have you discussed with Mr. Naughton the reasons why he has or has not returned to work since 2010; yes or no?

A Yes.

Q Have you received or reviewed any -- Okay, this is what I was getting at. I apologize.

You are familiar with the ironworker industry I'll call it the way unions work; correct?

A Well, I'm familiar with a job of an ironworker. I'm not familiar, per se, how a union works.

Q But the specifics of the inner workings of the union, you're aware that certain jobs are union jobs; correct?

A Correct.

Q And you are aware that if a contractor, general contractor or subcontractor needs more employees they would ask

the union hall to send over whatever number of employees in that field that they need; correct?

A If you say so. I'm not familiar but it sounds right.

Q Have you seen any records from any of the employers of Mr. Naughton since the day of his accident?

A From his employers?

Q Employers.

A I don't have any in front of me and I don't have any recollection. I may have. I just don't remember.

Q Do you recall seeing any documents from any of his employers saying that he became unemployed due to a lack of work?

MR. McCRORIE: I object to that. Your Honor, he said in opening that he subpoenaed it. It's not in the subpoenaed records that document.

THE COURT: Overruled.

Did you see anything in the employer record that indicates that Mr. Naughton wasn't hired because there was no work?

THE WITNESS: No. I usually don't get employees' records sent to me.

Q Do you know in the ironworker field if there are times when there is work for ironworkers and there's times during the economy or whatever when work is not available for ironworkers?

A I would assume that with any construction job there may

be a project going on, there may not be a project going on.

Q I don't want you to assume, so I'll ask that that be stricken.

Do you know if that's the case?

A I don't know the workings of the ironworker union.

Q Do you know or do you not know if there were times when Mr. Naughton did not work because of there not being work available as opposed to his injuries; yes or no?

A I'm not aware of my records.

Q All right. So the only records you have that are your records are from University Orthopedics of New York?

A Yes, correct.

Q You have a copy in front of you. I'm going to ask you to take those out.

Let's start with the surgery that you performed, okay?

A Yes.

Q I'm not going to go over everything that's involved, but there's a long narrative of how a surgical procedure is done.

Is it fair of me to say that the operative report that you have in front of you, the conclusion is the surgery was a success?

A I would say, yes, we set out to do what we wanted to do.

Q Now, when you do a bimalleolar ankle fracture do you

keep track or of studies of how many patients of yours return to work as opposed to how many don't?

A I don't have a personal record of how many patients go back to work. Although, I am doing a study of the patients I've treated that have fractures and ligament deficiency.

Q Now after the surgery over the course the next ten years do you know how many times you saw Mr. Naughton?

A I could count them up if you want me to.

Q You know what, just give me your best estimate if you can.

A Following my surgery?

Q Yes. Up until today?

A Ten to 15 times.

Q Okay. So you've seen him on average a little bit more than once a year, true?

A On average, yes. There were times I saw him more often and there were times a didn't see him as often.

Q In the beginning, fair to say, maybe you'll see him two or three times a year and then there will be gaps whether you didn't even see him for two to three years?

A Yes.

Q And you are his primary treating doctor.

A Primary orthopedic doctor for his ankle.

Q Yes, I don't mean his general family physician.

As far as this accident is concerned you are the

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primary treating doctor.

A That is correct.

Q As the primary treating doctor over the course of ten years you've seeing him approximately once a year?

A I believe so, yes.

Q How long is each visit that you spend with him?

A It can vary. There were times when I debrided his ankle wound early on that may have taken 45 minutes and there were times when it may have taken 20 minutes. So it would vary, depending on what the problem was and what needed to be done.

Q So in the beginning when you were taking care of the issues you spoke about, fine.

Subsequent to that there may have been a year where you spent over 20 minutes in his presence.

A Yes.

Q There may have been two or three years that you didn't spend one minute in your presence?

A Obviously if I didn't see him.

Q Let's, if you would, flip to September 10th of 2004. This is after the surgery.

By the way, all of your office notes follow a format, do they not?

A There is a rough format.

Q That format would be you take a summary of what happened and then you have a heading called Physical

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Examination. Then you have a heading called Plan; correct?

A Correct.

Q For the first part summary of what happened you basically just cut and paste that to each one of your reports. It's the same English?

A I should cut and paste but I actually dictate them individually.

Q So, for instance, on 9/7/04, when you say the hardware is in place, the mortice is well align, those are favorable findings; correct?

A That is correct. Yes.

Q If we go to 9/21/04, middle of the first paragraph, since his last visit he reports significant improvement in ankle pain as well as functioning with respect to strengthening motion. That's also positive finding; correct?

A Yes, it is.

Q And review of the radiologic films hardware is in place with no sign of loosening. That's also positive finding; correct?

A That is correct.

Q So over the course of the first couple of months since the accident not only was the surgery that you performed a success, his recovery is going along nicely.

A Yeah. He was improving at this point.

Q Okay. Now, let's go to the next visit, October 19th,

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still in 2004, patient is alert and oriented times three with stable vital signs. He ambulates without a cane and without a brace. He has a near normal gate. Again positive, correct?

A Yes.

Q This is where you wrote in the plan, he may return to work this Friday.

A Yes.

Q So you cleared him back to work relatively early.

A Yes, I did.

Q Next time you saw him was February 15th of '05, middle of the first paragraph, able to return to work as ironworker full-time, full duty. In his physical examination -- By the way how long does that physical examination take two like two minutes?

A Well, my examination is limited to the ankle. We watch him ambulate. We need to examine his ankle. It's not a long examination.

Q This is routine.

A It's a focused exam on his ankle.

Q Okay. And so your physical exam found that he was alert and things like that, and the film study showed there was excellent fracture alignment in mortice's alignment, medial and lateral fractures appear healed, and bridge and callus although a fracture line was still noted along the medial malleolus.

That's your review of the film studies at that time?

A That is correct.

Q And you had mentioned the healing was taking a little longer but coming along fine; correct?

A Well, it was delayed so it eventually did heal.

Q Next time you saw him was May 5, 2005. Patient able to return to work. He's employed as a ironworker. He is able to carry out his work duties. Again, so far so good, correct?

A Yes. He had complaints like stiffness and discomfort, but he was able to work at this point.

Q He also made a note under Plan that he's reached maximum medical benefit with respect to his left foot and ankle. 40 percent loss of use of left foot. Patient may continue with his present employment. Correct?

A Correct.

Q Then you saw him on April 17th, 2007. So now the visits start to become much less frequent. We go from '05 and you see him two years later roughly April of 2007.

A Yes. That's because when I do the schedule loss of use that basically means that for that period of time he's maxed out and he has to come back as necessary from that point onward.

Q So he doesn't come back for two years.

A That is correct.

Q Next time he comes back -- And you always tell the patient come back as needed; correct?

A I don't always say that.

Q Okay. I stand corrected.

A But I sometimes keep a time frame, but obviously if there's a problem, obviously, you can come back sooner or he may come back later, depending on the appointment issues.

Q So if you say to him, for instance, hypothetically, everything looks good, I'll see you in a year just for follow-up visit; correct?

A Yes.

Q And that's generally the pattern we're in at this point; correct?

A Well, there were two years between the '05 and 2007 visit. I did not give him -- In '05 I did not give him a follow-up visit. And on April of 2007 I did say follow-up in eight weeks.

Q But he didn't. He didn't come back for a year; is that correct?

A That is correct, yeah.

Q Arguably, he didn't feel the need to come back or didn't come back.

A He didn't come back.

Q Next time in April 2007, again, routine, April of 2008, next time you saw him.

A Yes.

Q Patient is alert and oriented times three. That's just a very brief neurological analysis just to make sure he knows

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who he is, where he is and what time it is, stuff like that.

A Correct.

Q Next time you see him is February of 2009. So we're still on the basically the once a year pattern; correct?

A About ten months but about a year.

Q And on this follow-up visit you wrote that he's not receiving physical therapy. It states that his ankle occasionally buckles. Vital signs are stable. He's alert. Ambulates with an antalgic gate. Walking without a cane. No signs of -- That would be one of those 20 minute approximately 20 minute visits you told us about.

A This goes into more detail, maybe a little longer.

Q Let's go to the next visit, which is June of 2009. Vital signs are stable. Patient alert. Patient is presently walking without a cane and without a brace. He's ambulating. Examination of the left ankle reveals and surgical incisions.

Those are good findings; correct?

A Yes. I just have to state that this report is from Dr. DeMarco, but I'm happy to comment on it if you would like me to.

Q You're right on next page it's signed by Dr. DeMarco.

Here Dr. DeMarco assessment and plan he writes fixation is good anatomic alignment.

A Yeah. Status post open reduction and internal fixation and good anatomical -- I believe he's referring to the bone. Not the fixation.

Q The next visit was you saw him. And again, patient was alert. Ambulates with antalgic gate. Without examination without brace. Examination of left ankle -- You note there is a degree of soft tissue swelling; correct?

A Yes.

Q Now we go to September of 2009 and, again, physical examination you say he's here for follow-up orthopedic valuation. Go into the history like you do on all of them. And you say that he ambulates with an antalgic gate, without a cane, without a brace. Examination of left ankle again reveals healed surgical incisions. No signs of infection.

So it's kind of consistent at this point over the last several visits during this time period; correct?

A Yeah. You're reading the first couple of lines of the exam and, yes, that has been fairly consistent.

Q If we go to November of 2009 -- By the way, Doctor, do you know if this case was scheduled to proceed to trial at any time before today?

MR. McCRORIE: Objection.

THE COURT: What's the relevance to that?

Q Well, do you know --

THE COURT: You're rephrasing the question, is that it?

MR. KAMINSKY: I'll rephrase it.

Q Do you know if sometimes trials get adjourned?

A Yes.

THE COURT: Common knowledge, of course.

Q So if something is scheduled for trial arguably in 2009 or something like that, that doesn't mean it's going to start trial but it could start trial then?

THE COURT: The Court concedes that.

Q Do you know if the increase in visits by Mr. Naughton was in any way related to potential trial scheduling; yes or no?

MR. McCRORIE: Objection.

A I don't know.

Q Let's go --

THE COURT: Overruled.

Q Let's go to the next visit, year later, and we're back on one year track, September 28 of 2010, and, again, physical examination shows -- I apologize. There was a visit on September 22nd, 2009, next visit was November 5th, 2009. Thank you, counsel. And your physical examination shows patient is alert, he ambulates with antalgic gate, without cane, without brace. Examination of left ankle, again, reveals healed surgical incisions. So it's kind of still kind of in that same pattern; correct?

A Again, you're reading just first the part of the exam, but you are correct that has not changed.

Q Then you write no signs of fracture, no signs of DVT and no signs of RSD. Would you explain that to us?

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A Yes. DVT is stands for deep venous thrombosis. Meaning, a blood clot which can happen after a fracture or after surgery. And there were no clinical signs of that during his visit which is a good sign.

RSD, I referred to earlier, that's reflex synthetic dystrophy. That is when the nerves, synthetic nerves get overly excited and cause significant pain, hypersensitivity redness and swelling of the ankle. That can also happen after trauma or surgery.

Q And we are five years after the trauma and there are no signs of either of those things; correct?

A That is correct.

Q And again, those would be positive findings; correct?

A With respect to those findings, those are favorable, yes.

Q Okay. After November 5th, 2009, you see him on November 28th, 2010.

Again, you give the history and he's here for follow-up orthopedic evaluation. He's alert. Vital signs stable. Ambulates with moderate antalgic gate. Examination of left ankle, again, reveals healed surgical incisions with some residual soft tissue swelling, but no signs of cellulitis and no signs of infection.

So, again, this is actually looking at his ankle; correct?

A That is correct.

Q Touching it, moving it, checking it?

A That is correct.

Q That's your physical examination?

A Yes.

Q You dictate the results and somebody types them up and you get this report.

A That is correct.

Q And in September 28th, 2010, you start discussing with Mr. Naughton different treatment options. You discuss with him conservative treatment versus operative intervention.

Now conservative treatment would be things like those patches you told us about.

A Could be patches or medication support, braces, injections.

Q Everything from heat pads ice pads to the patches.

A Anything short of an operation basically.

Q And it's Mr. Naughton's desire to remain with conservative treatment; correct?

A Yes.

Q Next time you see him, September 28th, 2010, the next time you see him November 30th, 2010, and again he's hear for follow-up evaluation of his injury. He's alert. Vital signs are stable. Ambulates with moderate antalgic gate. Examination of left ankle reveals healed surgical incisions with degree of

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soft tissue swelling. Moderate restriction of ankle inversion and eversion. Inversion and eversion is this and this?

A Eversion is doing this and inversion is doing this with the ankle.

Q So six years down the road he has moderate restriction with his ability to do that; correct?

A That is correct.

Q Also measure dorsiflexion and plantar flexion. That's up and down.

A That's what you referred to earlier. Dorsiflexion is bringing the ankle up and dorsi is bringing the ankle down.

Q There are no valgus or posterior instability.

A Yes.

Q What does that mean?

A There was testing of the ligaments and back of the ankle and on the inside of the ankle, which were stable. Injury to ligaments to this patient were in the front on the outside of the ankle are the ones that require the surgery.

Q So the fact that there's no instability is a good one.

A Yeah. That's positive, meaning, those ligaments were functional.

Q So let me jump now from November 30th, 2010, next time you see him is March 26th, 2012. Roughly almost a year and a half later; correct?

A Yes.

Q During that month and a half, since we're getting close to the present time, do you know what he was doing on a day to day basis?

A I don't have in my notes what he was doing on a day to day basis.

Q I guess by that, what I mean by that is do you know if he's able to drive?

A It's his left ankle so as long as there's not a clutch I don't see a problem.

Q Do you know if he's able to take public transportation?

A Again, I believe that it's probably something within his ability to do.

Q Is he able to dress himself?

A Yes.

Q Is he able to groom himself?

A Yes.

Q Feed himself?

A Yes.

Q Take care of himself?

A Yes.

Q Do all his routine daily living activities; correct?

A Well, again, his problem is prolonged walking and standing. So as long as it doesn't entail that he will be able to do things.

Q In fact, you make notes to that effect throughout your

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notes; correct?

A Yes.

Q Next time is October 17th, 2012, and we jump to March 6th of 2013. Again, you discuss with him different treatment options and you make a note that he understands the thought process and continues to be symptomatic, could be conservative measures. So at this point you're still treating him conservatively.

A Correct.

Q And you told him to use antiinflammatory; correct?

A That is correct.

Q Again, you recommended to him left surgical intervention in the form of a left arthroscopic surgery.

Now we've all heard the term arthroscopic surgery.

Arthroscopy is -- Well instead of my trying to explain it why don't you tell us what arthroscopy is?

A Sure. It's performed by making small incisions around a joint, such as the ankle or in your shoulder, and inserting a camera into the joint and you can actually watch what, you see on the screen, and through the other portals there's holes that were inserting instruments and tools that were used to make repairs.

Q And arthroscopic surgery, in and of itself, is an outpatient procedure; correct?

A Yes.

Q Takes about 20 minutes.

A If it performed solely an a ankle, it could be 25 minutes up to an hour, depends on what's found and what's done.

Q But in the schemes of surgery, talking about risk inherent in surgery, on a scale of one to ten arthroscopic surgery is probably a lot closer to a one; correct? If you can you can, you can't.

A I won't know the scale.

Q I accept that. But arthroscopic surgery is a 20, 30 minute outpatient procedure that people have all the time; correct?

A 20 to 30 minutes, might be longer, and it's not a open procedure which carries higher. Risks.

Q You continue to recommend the hardware removal.

A Correct.

Q May 1st, 2013. Findings are virtually the same. Correct me if I'm wrong. Discuss the different treatment options and you again recommend antiinflammatories. You continue to recommend ankle arthroscopic surgery.

A The arthroscopy and open surgery, which is the hardware removal and the ligament structure, have to be performed as regular incision.

Q Let's go to July 17, 2013. We're almost done.

Again, physical examination impressions are all pretty much the same and, again, you discuss with him that you're

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recommending that he have that arthroscopic surgery; correct?

A Correct.

Q September 24, 2013, again same thing, right?

A Right.

Q And that's the last record I have. I believe you did see him within the last month or so.

(Pause in proceedings.)

A There's a note dated February 12th, 2014, that was dictated by Dr. DeMarco. First sentence says I was there, that the patient was seen and examined by myself.

Q I'm sorry, let's go to December 24th, 2013. Is that the one you're looking at?

A Yes.

Q Okay, this is not Dr. DeMarco, this is you. Correct?

A December 24th is me, yes.

Q And it says no sign of infection. Discussed that his left ankle gave out when he was on steps. And again you discuss with him ankle arthroscopic and ligament reconstruction and continue to tell him to take antiinflammatories; correct?

A Correct.

Q And doctor, I apologize, is there a visit subsequent to that?

A There is a visit February 12th, 2014. On that particular date I have, both myself and Dr. DeMarco were in the office, and I did see the patient with Dr. DeMarco. But Dr.

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DeMarco actually dictated the report.

Q Okay. And I don't have it in front of me, but let me guess it says you're recommending the surgical procedure, should take antiinflammatories; correct?

A Recommends surgery and that he can weight bear is tolerated, meaning, he could put pressure on the foot and to continue with Dr. Perper and continue taking antiinflammatory medication.

Q And you note that he is deferring any surgical intervention at the present.

A That's right.

Q All right. Over the last ten years, and we didn't go into detail on everything, but is that a quick, may not be quick to the jury, but is that a quick summary of ten years of visits to your place?

A Well, it's -- You were going over normal exam findings, but not the abnormal findings.

Q That's because his attorney did that.

A I understand that. But I wouldn't call it a complete summary. But we didn't touch upon a lot of the dates that he came into see me.

Q All together you told us he came in approximately 20 times.

A I believe I said ten to 15.

Q I think I touched on them all. If I missed one or two

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I apologize, but is that a quick partial summary of everything that transpired over the last ten years?

A That I agree on.

Q Your life care plan that you prepared, are you aware that the plaintiffs had life care plans prepared by other life care planners aside from yourself?

A I believe there were others. There may have been. I'm not sure I reviewed them, but this is the most recent one that I have prepared.

Q This is the one that you are most comfortable with?

A Yes.

Q This covers what you believe he realistically would need in the future; is that correct?

A Correct.

Q You didn't put things in here just for the sake of putting him in here and driving up the --

A I would never do that.

Q -- driving up the cost.

A I would ever do that.

Q If somebody else put in that he needs another expert retained by the plaintiff put in that he needs $7,500 a year worth of psychotherapy --

MR. McCRORIE: Never been psyche claimed in the case, your Honor, in the BP or anywhere.

THE COURT: You're not going to go into this?

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MR. McCRORIE: No.

THE COURT: Sustained.

Q Did you ever review the life care plan of Joseph Carfi?

A I don't believe I have Carfi.

MR. KAMINSKY: May I approach, your Honor?

THE COURT: Sure.

Q Just going to ask you to take a look at this just going to --

MR. KAMINSKY: May I point something out?

THE COURT: Sure.

MR. McCRORIE: Just for the record.

MR. KAMINSKY: I'm sorry.

MR. McCRORIE: Is that the rehabilitation one or --

Q Having showed you what I showed you would you agree with someone who says he needs $7,540 worth of psychotherapy annually for the rest of his life?

MR. McCRORIE: Objection.

THE COURT: You have no opinion with respect to that, Doctor?

THE WITNESS: I do not have an opinion.

Q Doctor --

THE COURT: -- life care plan from orthopedic perspective?

THE WITNESS: Correct.

THE COURT: Period, end of story.

Q In your life care plan you put down the cost of the ankle surgery that you're recommending; correct?

A That's correct.

Q And you told us the cost of that surgery is how much?

A The arthroscopy or fusion?

Q Arthroscopy.

A The arthroscopy was $8,500, surgical fee and hospital and anesthesia $11,000.

Q So little bit more than $20,000.

A That's correct.

Q Now if he doesn't choose to have that surgery we can obviously take that cost off the life care plan.

A I would say if he never decided to have the surgery, that is correct.

Q As a companion to that surgery, if he has it, you told us that he would need postoperative therapy; correct?

A That is correct.

Q And you gave us a cost of $120 a session, three times a week for 24 weeks, annual cost of $8,640.

A That's correct.

Q If he doesn't have that surgery, just like we can take out the cost of the surgery, we can take out the cost of the postoperative treatment.

A That is correct.

Q And you gave the same cost for physical therapy;

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correct?

A Any therapy associated with postoperative recovery would not be necessary if he doesn't have the surgery.

Q So if he doesn't have the surgery the largest components of your life care plan we can take out; correct?

A If he does not have -- Obviously, if he doesn't have surgery then he doesn't need that in his life care.

Q Again, we found something we can agree on.

Conversely, if he does have the surgery it's your opinion that for the cost of $20,000 for the surgery and approximately $13,000 for attending follow-up care, for $33,000 for the cost of that surgery, should he choose to have it, he will experience a significant improvement in his physical condition with a 90 percent success rate; correct?

A It's 90 percent success rate in a good result that is better than before. Use the word significantly improved. I don't know about that. Could.

Q Take out the word significant.

A But some improvement, whether small or moderate or a lot, there's a 90 percent chance that he will get some improvement.

Q And that 90 percent improvement includes a reduction in discomfort and pain; correct?

A Yeah, the pain associated with metal plate screws.

Q So the answer is yes.

A Yes.

Q Can we also expect that in affect of having this surgery, the affect of having this surgery would be having the ability to walk longer distances?

A Yes. If successful than he should be able to walk father distances. If his primary pain is not arthritis which we don't know at this point in time.

Q If it's successful answer to that my question would be, yes, assuming it's not arthritis?

A If it's successful and arthritis is not the factor, he should be able to walk father.

Q And similarly, he should be able to climb stairs easier.

A Given that it doesn't give out, yes.

Q And the experience about the ankle rolling that one time on the steps, the likelihood of that happening again, I would imagine, would similarly be reduced, correct, if he were to have a successful surgery?

A Yeah, it would be reduced. I tell my patients that the rolling usually gets better, may not go away completely, but the frequency and severity of the rolling usually improves with successful surgery.

Q With the successful surgery he would not necessarily need the conservative treatment that he's now getting; correct?

A He would not need conservative treatment for no plate

or the ligaments. Although, if the ligament surgery doesn't go according to plan he may still need support.

Q I understand.

A But injections he's getting now is really for the arthritis. So he would still need treatment, but not for the ligament or the plate.

Q So the initial surgery, with 90 percent certainty, in your opinion, corrects two of his three problems; correct?

A I wouldn't say correct. I would say hopefully improve. It would solve the metal problem because the metal is gone, but as far as ligament let's hope it would give some improvement to his ankle.

Q Okay. When examining his ankle obviously you look at the films, you can tell there's hardware in there.

A When I examine had his ankle?

Q Withdrawn.

We can tell by looking at the films hardware pins and screws are still in his ankle.

A Yes. They're still there.

Q Now the fracture has healed; is that correct?

A That is correct.

Q And the reason do you an open reduction internal fixation to treat a bimalleolar fracture that he had, the reason you put in that hardware is to fix the fracture; correct?

A The idea is to fix the fracture and hope that it will

heal, yes.

Q And in fact the hardware that was put in has done its job; correct?

A That is correct.

Q The fracture is healed; correct?

A That is correct.

Q The hardware is serving him no benefit at this time.

A That is correct.

Q It is only potentially causing him unnecessary pain and discomfort; correct?

A We believe the lateral hardware is causing the symptoms.

Q So the best thing to do would be to spend the $20,000 for the surgery and the inpatient anesthesia, all that stuff, and the $13,000 for the follow-up, physical therapy and get that hardware out; correct? Yes or no. Is that your recommendation?

A That's my recommendation, yes.

THE COURT: On that note we'll break for the day.

It is by the order of chief judge of this state courtroom must be closed by 4:30.

Don't discuss the case among yourself. You certainly haven't heard the law on the case and please report tomorrow morning at 10:00.

(Whereupon, jury exited the courtroom.)

(Whereupon, the trial was adjourned to following

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morning.)

(Continue on next page.)

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

William D. Leone
Senior Court Reporter.

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