2003 WL 24190054 (N.Y.Sup.) (Expert Trial Transcript)

Jan MROZ, Plaintiffs,

Supreme Court of New York.

v.

RAC HOLDING, LLC, Empire Interior Systems, INC. and Racanelli Realty Services, INC., Defendants.

No. 30357/00.
September 19, 2003.

(Transcript)

Name of Expert: Thomas M. **Kolb**, M.D.
Area of Expertise: Medical & Surgical >> Radiology
Area of Expertise: Medical & Surgical >> Pediatrics
Representing: Plaintiff
Jurisdiction: N.Y.Sup.

APPEARANCES:.

Law Offices of Samuel J. Lurie, Attorneys for Plaintiff, 475 Park Avenue South, New York, New York 10016, By: William J. Ryan, Esq.

White, Quinlan & Staley, Esqs., Attorneys for Defendants Rac Holding, LLC, and Racacelli Realty Services, Inc., 377 Oak Street, Garden City, New York 11530, By: Elleen Faarrell, Esq.

The Honorable James P. Dollard Justice, Supreme Court

Abstract of Frial Minutes Testimony of Dr. Thomas Kolb

(whereupon, five MRI films were received and marked as Plaintiff's Exhibits 10A through 10E in evidence.)

MR. RYAN: Your Honor, prior to the jury entering, I would just like to inform the Court that counsel have stipulated that the five MRI films from St. John's Hospital, Queens, have been stipulated and put into evidence, and they've been marked Plaintiff's Exhibits 10A through E.

THE COURT: All right. We're ready for the jury.

COURT OFFICER: All set. Jury's entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning, jurors.

THE JURORS: Good morning.

THE COURT: Mr. Ryan, do you have a witness?

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MR. RYAN: Yes, your Honor. At this time the plaintiff calls Dr. Thomas Kolb to the stand.

COURT OFFICER: Please step in the witness box and remain standing.

THOMAS KOLB, called as a witness by the Plaintiff, having been duly sworn by the Clerk of the Court was examined and testified as follows:

THE CLERK: In a loud, clear voice, state your name and place of business.

THE WITNESS: Dr. Thomas Kolb, K-O-L-B: 222 East 68th Street, New York 13021.

THE COURT: You may inquire.

MR. RYAN: Thank you, Judge.

DIRECT EXAMINATION

BY MR. RYAN:

Q Good morning, Doctor.

A Good morning.

Q Doctor, are you a physician licensed to practice in the State of New York?

A Yes, I am.

Q And Doctor, when were you so licensed?

A 1983.

Q Now, Doctor, for the benefit of the Court and the jury, can you please give as a brief synopsis of your educational background.

A Yes. I went to Queens College here in Queens, actually, graduated in 1979, and then began medical school since 1979 through 1983 at Downstate Medical Center in Brooklyn, graduated in ‘83 with an M.D. degree. I then did. an internship and a residency, which is three years, until 1986, in pediatrics, and i became Board certified in pediatrics. I then went back and did a second residency in diagnostic radiology at Columbia Presbyterian Medical Center in Manhattan from 1986 through 1990,and became Board certified again in diagnostic radiology. So I'm certified both as a pediatrician and a diagnostic radiologist. From 1990 to the present I've been in private practice practicing just diagnostic radiology.

Q Doctor, what does it mean to be Board certified in radiology?

A. Board certified means you have to take a written examination and that if you pass that you take an oral examination. If you pass that you become a member or a diplomate of the American Board - in my case, both the American Board of Pediatrics and American Board of Radiology.

Q Doctor, what does the medical field of radiology entail?

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A Radiologists use various tests to look inside the body for abnormalities or for a disease. The first test we ever used were. X-rays. We also use now CAT scans, MRI scans, mammograms, ultrasound examinations and so forth. So we use all these different tests to look for abnormalities inside the body.

Q Doctor, have you received any awards or honors in your academic career?

A Yes.

Q And what are they?

A I've published some papers on breast cancer on diagnosis, which I spend a lot of my time involved in breast cancer diagnosis. My last paper published in 2002 won the American Medical Association Science Writers award, and I presented that paper in Washington back in September 2002. That's the most recent one.

Q Doctor, the jury knows from prior testimony in this case that MRIs were taken of the plaintiff in this case, Mr. Mroz, back on October 11th of 2000. Could you explain for us what the difference is between an X-ray and an MRI.

A They're two very different tests. X-rays use X-rays and are shot through the body and are captured on a film on the other side. So if you were to take an X-ray of the hand or the back, X-rays only look at the difference between how dense something is, or how hard something is. So, for example, bone is a very hard structure, but what's around the bone, like muscles, tendons, ligaments, disks, all these different softer tissues are all the gray on an X-ray. So if you take an X-ray of the back you will see the bones, you'll see space between the bones in which there are disks, but you won't actually see the disks.

MRI scans work very differently. MRI scans you pulse a magnetic wave into the body. The computer - you tell the computer how frequently to do that, and actually, there's a change in the protons,very small part of your body, and the computer can actually draw a picture based on the way your body reacts to magnetic waves. But they're sensitive. In using an MRI scan, not only can you see the bone, you can see inside the bone, the bone narrow, you can also see the soft tissue structures, the tendons, ligaments, muscles, disks, all these different soft tissue structures.

So x-rays are a pretty quick test to look at something, maybe to look for a fracture. That would be a good reason to do an X-ray, if somebody was in an emergency room. But an MRI is more frequently used nowadays to really look for abnormalities inside the body in various parts of the body.

Q Doctor, do you have any expertise or experience in MRIs that you can tell us about?

A well, back in the 1980s I helped develop a newer state-of-the-art MRI technology. I worked as a consultant to a company called Advanced NMR actually in 1587, 1988, and whose technology now is incorporated into current MRI machines. And since 19 - and through my residency till now I've read, you know, large numbers of MRIs. I wrote one of the earliest papers on cardiac MRI, which is MRI of the Heart,”and I think that was back in 1988.

Q Now, Doctor, are you being compensated for your: time in court here today?

A Yes.

Q And how much are you,being compensated?

A $5,000.

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Q Now, Doctor, at our request did you review MRIs that were taken of Mr. Mroz at St. Joan's Hospital back on October 11th of 2000?

A Yes.

Q Doctor, the MRIs have already been marked in evidence, and with the Court's permission we have a shadow box here at the table, so I'd like to ask you to step down to take a look at the MRIs.

MR. RYAN: Is that Okay with you, Judge?

THE COURT: Yes. It's plugged in, all right.

MR. RYAN: Yes, it is.

MS. FARRELL: Judge, can I move around overthere?

THE COURT: Yes, certainly, whenever you can seebest.

Q Doctor, if I could, before we go into the findings on these MRIs, can you just describe for us what part of the anatomy we're looking it.

A On this sheet, which is label 10A, we're looking at the patient's back. It's this patient's back, and the way it's set up is that it's on one sheet, there are 11 pictures. Each one of these rectangles is a separate, complete picture. We just put then all together on one sleet. Be reasons they're on one sheet is because we started from one side of the patient and we're going over to the other side of the patient. In other words, we start on the left side of the patient, and then we take a little - we take an image of the patient from left to right. So the middle of the picture will go down the center of the page, and we're able to pull that picture out and put it on the view box and look at it. So this picture here, which is the sixth picture, and this picture here, the seventh picture, are about the middle of the patient. Going over to - back to the first picture and last picture, that's all the way over to the side of the patient.

Sow, on this - on this - on this scan here, you'll see - and this is all of the back. Our anatomy is all the same. Male, female, big, small, we're all the same. We all have the same number of bones in the back and the same structures in our back.

In the lumbar spine there are five bones and these bones are - the way we look at then is here from that side view that I told you about, they're square. They look square. Okay, and these are called vertebral bodies. Vertebra. Everything will have a fancy medical name. So that's the bones, these grayish squares.

In between the squares you will see these whitish more football shaped or longer structures, and those are disks. And the reason we have disks is because they act as shock absorbers so that the bones don't crunch against each other in all of our backs,becanse if the bones touch each other it's a bad thing, we have pain and would develop arthritis and bad things would happen if they get too close to each other. So when we jump up and down there are actually little shock absorbers at each level that don't allow the bones to crunch into each other.

So we have these disks. How, the disks have to be held in place by structures or else they would just - disks are gelatinous, they're like jelly, like shock-absorbing, squishy. So they have to be held in place because if you jumped up and down they would just sport out. So they're held in place by ligaments, by tough coverings. You can't actually see the ligaments on the MRI, but they're there.

There are actually three coverings that hold the disk in place. There's a covering behind the bone here, and that's called the - that's a ligament. That's just a tough, fibrous covering, and since it's behind the bone it's called the posterior, or back, longitudinal,

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long, ligament. And then there's another ligament in the front which is the anterior, or front, longitudinal ligament. So they all have fancy names, but the point is there's a covering along the front of the bones and along the back or the bones. And then there's a third covering which goes around the disk at each level, and that's called an annulus. You can't see that on the MRI either because it's very, very, very thin other it's a bad thing, we have pain and would develop arthritis and bad things would happen if they get too close to each other. So when we jump up and down there are actually little shock absorbers at each level that don't allow the bones to crunch into each other.

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The point is that the normal disk material, because of the ligaments, because of the annulus, goes to the edge of the tone and stops because it can't go anymore. It's held in place, and in fact, if you lock at these disks here - and one thing I told you is that we a11 have the same number of bones. We have five bones. So we save to label these so that I know what level I'm talking about, and I can convey that information to you. So between the first and second bone is called L, for lumbar, 1-2, between the first lumbar vertebra and the second lumbar vertebra is called Ll-2. So I'm just going to mark the numbers here on the sheet and you'll see this better on an enlarged version of it. But just to get through the basic?? right now, you'll see between the first and second here, between the second and third, the third and fourth, tie disk material that we talked about goes right to the edge of the bone, which is this gray square, and then stops. The reason it stops is because the ligaments are there and the annulus is there. If you look at the next two levels down, you'll see that, and you see the end of the bone here and the end of the bone here, end of the bone here, end of tie bone here. You'll see that there's actually a large gray bulbus area. There's a large gray structure that goes beyond the edge of the bone and that is disk material. But what's happened is that the coverings have developed a hole in them and since the coverings now are torn, the disk material, instead of stopping right there, goes through and pushes through, and that's what's called a disk herniation.

Now, there are two types of things that can happen with these tears. They could partially tear; in other words, it would just bulge out like that, but not completely tear, and the disk material will stay within the ligament and the annulus and it will just bulge out, and that's called a bulge. And if it tears completely, it goes through and that's called a herniation. And what's happened here, you can see that this disk material is actually pinched off. In other words, it comes out, like we talked about, and then it gets a little narrow and then it expands again. Once it gets past the bone, that's called a disk herniation and that's between the five bone, L5, and the next part of the spine, which is the sacrum, which is S1. So that's between L5 and S1. So there's a disk herniation here between 5 and 1.

Now, if you also look here, you will see that at the level above it, which was 4-5, L4-5, this disk material also pushes through, but to a slightly lesser degree than, 5-1. In other words, there's a rather larger herniation at 5-1 and the same thing is happening at-4-5 as it pushes through, and there's a smaller herniation at 4-5. Now, why is this important is because you see this white line going down here, that's the spinal canal and that's the cerebral spinal fluid. When you do a spinal tap and take fluid out that's where the fluid is. It is there because these gray structures, these gray lines coming down are the nerve roots.

All of our nerves come from the brain down the spinal cord and travel down our spinal cord, just like here, and the spinal cord actually ends about L1 here, and gives off nerve roots which are little strings of nerves. The nerves have to go to our arms,

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have to go to our legs. The way they get there is that there are holes on the side of our spinal column, and I'm going to show them to you, and these - the nerve comes down from the spinal cord, and let's say it's a nerve that has to go down to your thigh, the correct nerve will come down and go out the appropriate hole and then travel down to your thigh, so that's how it gets out of the spinal canal.

Now, the spinal canal is a pretty small place. It's only a few millimeters here. It's only measured from the back of this bone to the back of this bone here. It's only that white area in between, and you can see here, for example, that the herniation at 5-1 is pushing back into the spinal canal.

If you look over to the sides, you see on this picture here we have these, more keyhole structures, the structure here, round and round and round, and then we start losing it on the next two. These are the foramina. These are the holes. So the nerves some down and out, and here the nerve is going to come straight at you the other nerve is going the other way. These nerves are actually pushing on the foramina, or the hole which the nerves come out, and in fact it's pushing on both sides, but the herniation at 5-1 that we talked about is pushing more to the left side than the right side, and in fact, as I'll show you, it's pushing on the nerve that comes out at that level, the S1 nerve that comes out at 5-1. The herniatian is actually pushing it and touching the nerve, actually, making the nerve swollen because it's pushing it. So there are herniations at 4-5 and at 5-1, disk herniations, and 5-1 is the larger one. You can see it on all these pictures.?? took a lot of pictures because we like to look at things at different - but you can see it pretty strikingly.

Q Doctor, if I can just interrupt you a second, the exhibit you were referring to, can you tall us what that was?

A That was 10A and this one is 10D. Again, you can see how, different this is here from any of the ones more above as well as this. You can see that at 4-5 and 5-1 and regular, the large ones, you will see there's an abnormality of the disk.

Now, if you measure the height of the disk remember, we talked about disks. There are other things that we can talk about the disks and that Is whether disks axe becoming arthritic or not, whether there's arthritis of the disk, and there are two things that generally happen when a disk becomes arthritic. It starts losing water, and we have a fancy name for it; it's called desiccation, because it dries out and becomes more brittle, so it's less squishy.

Then that happens, you lose some of the shock- absorber property because it's becoming more brittle, what happens is then it starts narrowing. It loses its height. So take it to the extreme, what could happen to disks - not here - but what could happen to a disk is that it narrows at - actually, it narrows very?? so the bones start getting closer and closer to each other. If you measure the heights of these disks, in other words, you're measuring from here to here and from here to here, and all those other disks that are normally not herniated disks - you don't have to be a doctor yourself - you will see that the height is the same on all these disks. In other words, there's no loss of height of the disk, and this can be measured by anybody. You know, you just - we can look at it and see that the disk hasn't degenerated.

If you look at this picture here, I told you - I didn't tell you - I told you that the disks are watery,that they're squishy, and that they have shock absorber- like properties and the reason is because they are watery. And the whiteness, whiteness tells you there's a lot of water in then. We can tell the MRI how we want to look at the picture; in other words, we can make the white areas watery and the dark areas nonwater, or vice versa, and we do that in order to diagnose what's going on. And you can see that these disks have a certain whiteness in them here and still whiteness between 4-5 and 5-1, and in fact if you look down at the next disk between S1 and 2 you will see it's pretty?? the same as 5-1 and 4-5. So while there's a darker area in the middle here which could have been caused by the herniation, there's still water in the disk and he hasn't

So those are the major findings. There's disk herniation at 3-1 which is larger than the herniation at 4-5. It's pushing on the foramina which are the holes where the nerves come out, much more so on the left than the right, and it's pushing actually on the nerve root, the S1 nerve root, which is the nerve root that, comes out between 5 and 1.

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And if you look at number 10B, this is another way of looking at the spine. This is our favorite picture right here where we see the squares as being the vertebra and. so on. we just looked at it, but instead of cutting the patient sideways,- we cut the patient from top to bottom: So now the squares;don't like they looked before. They look round. The vertebra are actually round bodies. If you look at then like this, they look round. If you put them like this, It's more square, a front, too and back.

Is any case, the round circle hers in the middle is the thecal sac. That's the sac, that white, a spot of fluid in the nerve roots. It's dark here because we told the machine to make everything watery dark. we reversed the process. We do that to make a better diagnosis and look at it in a different way.

And continuing down here is the disk. Sere is the herniatlon that I showed you, and you'll see that it's a little dark if you look at these two arrows. and I think this is blown up. so you see there's a little small dot, here and a much bigger space here. Ton compara the right to the left. This is the normal exiting normal root, the S1 nerve root that we talked about on the right side. The left side is very big because the nerve root is being pushed can and swollen by the disk herniation. These are the major findings on the MRI.

Q Doctor, at your request we're made a number of blow-ups of what the jury is looking at today; is that. correct?

A yes.

MR. RYAN: At this tine I'd like to I have?? Barked; if I Could, for identificationt. Ther's three (?? three MRI blow-ups were received and marked as Plaintiff's Exhibits ?? and 11c for identificatian.)

Q Doctor, I'm going to show these these blow-ups that have been marked for identification as Plaintiff's Exhibits 11A, B and C. And Doctor, are these blow-ops of just some of the MRIs that you've been shown here this morning?

A yes, the blow-ups are the?? you've looked at.

Q Are they fair and accurata?

X5. FARaELL: Judge, can we??, please?

THE COURT: Let him pose the question first. Go ahead.

Q Are these a fair and accurate represantation of the films that we've just shown here today that have been marked into evidence?

A They're positive images of tie MRI scan.

MH. RYAN: Your Honor, at this??ne I would request that they be put into evidence.

THE COURT: Do you have any voir dire before?

MS. FARRELL: Well, okay, I'll voir dire. just a few questions.

THE COURT: You have to keep your voice up VOIR DIRE EXAMINATION

BY MS. FARRELL:

Q The images shown on the blow-ups you can see from the writing on the blow-ups that they're not clear, it's not as clear as it is in the one on the shadow box; is that correct?

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A I think that these are - I think that there's an additional - like there's a little blurriness there, and I think there's additional blurriness of the writing on there.

Q And would you disagree then, Doctor, that there's also blurriness then on the blow-ups? Would you agree, Doctor, then that because there's blurriness on the writing there's also blurriness on the actual blow-up?

A I would say there's a little - I think it's very readable and not a problem, but I would say that there's some blurriness that you can see there.

MS. FARRELL: Your Honor, I would object to them going into evidence.

THE COURT: I'll overrule it. That is a fair and accurate representation of what's on the film itself? THE WITNESS: Yes.

THE COURT: And would the blurriness such as it is interfere with showing what you intend to show? THE WITNESS: No, I don't believe so at all. THE COURT: I'll permit it. (Whereupon,: Plaintiff's Exhibits 11A, 11B and 11C, previously marked for identification, were received in evidence.)

FURTHER DIRECT EXAMINATION

BY MR. RYAN:

Q Can you account for us why there's some blurriness in the actual films themselves as well as the blow-ups we made of these films?

A Why there is, there may have been some motion when the copy process was occurring or when it was put to the laser printer.

Q But it in no way impedes your ability to read these large blow-ups as you did the films that we already marked into evidence?

A No, I do not believe so.

Q Why don't you select which one you want to look at, Doctor, and we can put it up.

MR. RYAN: Can everybody see?

A This picture is the exact same blow-up of the picture we looked at before, 10D.

THE COURT: 10B?

A D like David. I think I'm talking about 10D, yeah, and this is a blow-up of that. And just to - I'm going to just put the numbers of the bones there like we did before. And you can see very well here; I'm marking the edges of the bone-where the bones come to (indicating). And you can see at 5-1 there's a relatively large area that comes out beyond the edge of the bone, and that's the disk herniation that we talked about here. You can see that this disk is very different than the disk between 1 and 2, 2 and 3, 3 and 4. This disk comes way out and pushes into the sac where the nerve roots are that we talked about. You can see also a pushing out at 4-5. You can see it better over here as well. If you take one slice over and this pushing out at 4-5 - you can see it well here (indicating). Pushing out beyond the confines of the bone. This is also a herniation, but a smaller herniation than at 5-1.

We talked about the holes of the neural foramina. This is a normal one at 3-4 (indicating). And then the next one down, the next one down. And the foramina - foramen should look just like that. That's a normal keyhole apperance of the foramen. You

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see the bottom here on this one is cut off, and 5-1 is much further cut off, and that's because the disk material is pushing into the hole there.

THE COURT: Doctor, if I can just interrupt. I see there are six pictures on this print. When you just refer to which one, just refer to the number in the upper left, so just for the record.

THE WITNESS: Yeah, there are 11 images on this one picture and on the number six - I'm sorry - the ones we,were talking-about the holes that I just put circles on are the second image; top left, second image on this exhibit.

Q And the image that you were talking about showing the herniation of L5 and where you numbered the bones would be the sixth?

A Right, the sixth image.

Q And the number of the exhibit, Doctor, is in the lower left. Which one is that? Right there, the yellow tag.

A That's number 11B.

Q B as in boy?

A Yeah.

Okay, so that's going over what we looked at before. This is just - this is what's marked 11C. This was blown up. So we took one picture out of the eleven and just made it really big in case anybody - you can see this from across the room. And again, it's showing you what I showed you before. This is all the herniation, all this disk material here. In other words, the disk should stop right at the edge of the bone here, and you see that it extends out beyond there, and you see that this one pushes through as well. If you compare this one to this one above, this is much smaller than at 5-1, but it pushes through at 4-5 as well. So this is just a much larger representation.

Again, if you measure the height, you're talking about the heights of the disk If you measure that, you a ruler to that, to that, to that, that would be measuring the height of the disks, and if you took a ruler and just measured from here to here, here to here, and here to here, you would see they're all the same size. So that's the discussion of this height.

Q Doctor, if I may, just so there's no confusion, in the exhibit you're referring to, llC in evidence, you've been pointing to the disk herination at the L5S1 level. This whole area that is protruding out here, if that were not a herniation and it were normal, would it look like the disks up here at L2, L3 and L1L2?

A This is normal. These are both normal. The disk material comes to the end of the bone and stops. Here it pushes out a little bit. I mean, here it's unmistakable. That's not a question whether it's pushed through. You don't need to be a radiologist to see a difference here than at any of the other levels. It should stop right here. Everything beyond my hand is disk herniation.

Q So this white line you referred to is one of the ligaments going down the posterior side of the vertebrae. That would normally continue in a straight line down the way you described without these protrusions and herniations coming out?

A Again, we're looking at the backs of the bones. a ruler to that, to that, to that, that would be measuring the height of the disks, and if you took a ruler and just measured from here to here, here to here, and here to here, you would see they're all the same size. So that's the discussion of this height.

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A Again, we're looking at the backs of the bones and the ligaments and the annular complex. You can't separate those on MRI. It should look like a straight line coming down and all of a sudden bump. It should look like a straight line coming down and we get a very big bump.

Q Now, you had an opportunity to review the MRI report from St. John's Hospital which is in evidence, have you not?

A Yes, I have seen it.

Q And Doctor, I have a copy here to let you look at, but the MRI report talks about the L5S1 disk completely obscuring the SI nerve root within the spinal canal. Now, where on this blow-up in 11C is the spinal canal?

A The spinal canal is between the back of this bone and the front of this bone, so it's this, and in this picture it's a dark area. That's the spinal canal.

Q Now, the L5S1 disk that you talked about, and it's talked about in the hospital MRI report, is this that disk that you've marked in red down here; is that correct?

A Yes, that's the disk herniation.

Q Can you explain to the jury how it obscures the nerve root in the spinal canal and what, if any, is the significance of that.

A Well, you can see it. We talked about it. We just finished talking about it on this other - I showed you this one before and this is 11A. 11A. And we talked about obscuring the spinal canal, and their word is obscuring the left S1 nerve root, and this

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is what they're talking about and what I'm talking about. And what's happening here is this is normal again. Here is the end of the bone and the disk material. This is normal. This is three - hold on one second. The way they cut it they did 1 to 2, 3, 4, 5. 1, 2, 3, 4, 5. This is 4-5. And this is 5-1.

Q And you're referring to the second and sixth images on Plaintiff's Exhibit 11A?

A Right. So at 4-5, instead of being a straight line going across, there's a little dip right there, a small dip that I'm outlining between here and here, and that's at 4-5. That's what we were talking about at 4-5 being a herniation.

At 5-1 you see a much larger dip. This whole area here is a herniated disk and you see it comes down and this is a very - this is the left side of the patient. This is the right side of the patient. The herniation pushes all the way over to the left side.

And we talked about the nerve root. This little dot there is the nerve root, and this dot on the left side is part of the nerve root which is enlarged because it's being pushed on and pressed on by the disk herniation. All this is abnormal. All this here inside that is the same as this. If you go over to the left side of the patient - in other words, this is the middle of the patient, and the middle of the patient is right here. So you see the herniation in the middle, but when you come over to the left side it gets larger; and the nerve root, instead of being up here where it should be, is being pushed down to the bottom here and is swollen. So that's what they mean by obscuring the spinal canal; actually pushing into the spinal canal as you see here in 11C, and obscures the left S1 nerve root within the spinal canal. That's what they're talking about; it obscures this nerve root.

Q Now, Doctor, did your findings upon reading these MRIs conform with the findings that were made by the radiologist who read and prepared the report at St. John's Hospital on October 11th, 2000?

A Not completely.

Q In what way did your report or your reading of the MRIs differ in any way?

A Well, I believe - well, first of all, I agree with everything that the radiologist said at 5-1, that it could be obscuring the canal, that it's pushing on the nerve root, and there's a herniation there at. 5-1. There are other things in the report that I agree with as well.

But at 4-5, I think based on these pictures here that I showed that there is also something going on at 4-5 that wasn't mentioned in the original radiology report from the hospital. So I think there's also a herniation at 4-5 for the reasons that I gave you. As you can see on 11B, I think there's also something going on here at 4-5. Yes, it's much smaller than 5-1, but I do think there's something also abnormal. Look there at 4-5 compared to everything above it which is normal. So I disagree with that one level.

Q Now, Doctor, the reading of the MRI report from the hospital, did the MRI report note any arthritis in the findings contained in that report?

A No, there's no arthritis mentioned in the report.

Q Now, Doctor, if there was arthritis seen on the MRI by the radiologist at St. John's Hospital, is that something, in your opinion, within a reasonable degree of medical certainty that would have to be or should be reported on an MRI?

A Yes, it should be reported.

Q And there's no evidence of any findings of it. there? A No, there's no mention of any arthritic changes on the MRI report at all.

Q And in your review of the films, Doctor, did you note any evidence of arthritic changes?

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A No, I did not. So that's what I meant about other parts that I agree with this report, that there are no arthritic changes in the spine.

Q Now, the other things that you mentioned as being a factor in arthritis, Doctor, the loss of height and the loss of water, what you referred to as desiccation, is there anything in the report from St. John's Hospital which indicates that there's any loss of height in any of the disks at either L5S1 or anywhere else, or there is desiccation in any of those disks?

A No, there's no mention of any loss of height, which I agree with, and there's no mention of any desiccation of any of the disks in the back, which I also agree with.

Q Now, Doctor, the jury has heard the term degeneration and chronic degeneration as it refers to the lumbar spine. Can you tell us what that is?

A Well, the degeneration, or arthritis of the spine, starts with loss of water in the disks, which they then become brittle, and because they become brittle they become thinner and lose height. When that happens, the bones start getting closer together. When the bones start getting closer together, the body doesn't like that and reacts to it. The skeleton is actually a living thing. It's not something you look at on the stand, but our bones are actual living cells. But it reacts to this change and what is considered abnormal, abnormal pressure on the bones, by forming bone spurs that you may have heard of, or osteophytes, and the body would do that in order to try and balance out an imbalance in the body.

And so there are those stages. And then the bones will thicken up also or become hypertrophied. The bones will get thicker, especially the bones here in the back.

So there's brittleness of the disks. There's loss of height of the disks. There are bony spurs, osteophytes that are formed, and there's thickening of the bone, or hypertrophy. All those are signs of arthritis of the back.

Q Doctor, you've had an opportunity to review the report of the defendants' radiologist in this case, have you not, Dr. Tantleff?

A Yes.

Q And Doctor, you're aware that Dr. Tantleff not only claims that there's slight loss of height of the disk, but degeneration and desiccation, but he also says there's discovertebral osteoarthritic changes. What are they?

A That's just what we talked about. Discovertebral, disk and bone. Discovertebral osteoarthritic, which is another fancy word for degeneration, osteoarthritic changes. That doctor is saying there's arthritis involving the bones and the disks of the back.

Q Now, Doctor, Dr. Tantleff also finds facet, F-A-C-E-T, osteoarthritic changes at the L5S1 level particularly. Do you see any evidence of that in your review of the films?

A No. The facets are actually the bones that are in the back here, the back of the spine; and neither I, nor my reading of the MRI, the original MRI report done in the hospital, mention that at all, and so I disagree with that finding as well.

Q Now, Doctor, are X-rays some method by which a doctor can tell whether there's an arthritic condition in the lumbar spine?

A Yes, X-ray would be a rather good way because you can look at the X-rays; and again, we see bones and measure the distance between the bones. We could also see if the bones have thickened, or become hypertrophied. We can also see the facets that we just talked about in the bones in the back, and if they become thick, and we can see that. The only thing you can't see from things we talked about - the only thing you can't see if the disks are drying out or desiccation on a regular X-ray. The other things we talked about, the height, hypertrophy, the thickening, all those other things can be seen on X-rays, regular, plain X-ray.

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Q Doctor, the St. John's Hospital record is in evidence, and I'd like you to assume that the hospital record reflects that upon admission to the hospital, either in the emergency room or immediately after being admitted to the hospital,-X-rays were taken of Mr. Mroz's pelvis and lumbosacral spine, the area of the spine that we're talking about now, and those X-rays were read as negative.

If in fact there were any arthritic changes noted in those X-rays, Doctor, would that be something that would be contained and noted in a hospital record?

A Yes. If you see arthritic changes it is common practice to report them in the report. So I would agree with that report as well that in the X-rays there are no arthritic changes.

Q Especially when it relates to the lumbosacral spine, the very area of which the plaintiff is complaining of pain when he went in the hospital, correct?

A It would be important to note that if it was there, and it wasn't noted and I agree with that.

Q Now, Doctor, you mentioned earlier about the herniation pushing on the SI nerve root. In your opinion, Doctor, is that a competent producing'cause of pain?

A Well, anything;that pushes on a nerve root - the nerve is what allows us to feel pain, among other things that a nerve does. It allows us to feel pain, and so anything.that presses on a structure that allows us to feel pain can cause the person to feel pain. Yes.

Q Doctor, I'd also like you to assume that Dr. Kaplan was here on the stand yesterday, testified that - just give me a moment, I'll find it - that Mr. Mroz had a EMG which was administered by Dr. Finkelstein at Dr. Kaplan's office, and the EMG which was done sometime in the latter part of 2001, I think specifically in August or September. The findings of that EMG was abnormal study and showed L5S1 radiculopathy. Of what significance is that finding to you?

A Well, they're locating the source of the pain to L5S1 which is on the radiology side of it, the area where we see the largest herniation, so it puts the pieces of the puzzle together that one test is agreeing with the other test, that there's a problem in a particular site.

Q Doctor, if I also told you that one of Dr. Tantleff's findings, meaning the defendants radiologist, is that he sees no evidence of compression or displacement of the nerve roots at L5S1, would you agree with that?

A I certainly disagree with that. I mean, again, not to belabor this, but on 11A to say that there's no depression or displacement of the nerve root is very much - I very much disagree with that. I think it's - this is the nerve root here on the left. This is the nerve root on the right, and to say that it's not displaced or pushed is something that I would totally disagree with.

Q And Dr. Tantleff also says there's no evidence of compression of the lumbar thecal sac or protrusion into the neural foramen. Would you agree with that?

A L5S1?

Q Yes.

A There's the thecal sac here. If there's no extrusion into the thecal sac - are those his words?

Q Yes, it is.

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A This is the thecal sac here, and to say there's nothing pressing into the thecal sac is - I disagree with it, you know, very much disagree with that.

Q Just one final question, Doctor. I'd like you to assume that Mr. Mroz testified in court here the other day that while he was working on a scaffold back on October 9th of 2000 with another coworker, they were installing sheetrock, and the sheetrock fell, and Mr. Mroz, in reaching for the sheetrock, was pulled over the side of the scaffold, sustaining some extension to his lower back. He immediately felt pain in his lower back, and that pain radiated to his left leg. The next day he still had a severe pain in his back and was barely able to move or to get out of bed.

He went to St. John's Hospital in Queens, as you know, had an MRI taken of the lumbar spine. He was also complaining at that time of continued pain in his back radiating into his left leg. The MRI at St. John's, as you know, showed an L5S1 herniated disk and, as we said, it completely obscured the left SI nerve root within the spinal canal, resulting in posterior displacement of the left SI nerve root, as you've already described.

I'd also like you to assume, Doctor, that there's been no evidence, and Mr. Mroz denies any prior history of any back complaints or injuries. He's never missed time from work because of any injuries, specifically any injuries with respect to his back or to his left leg.

Doctor, I'd like to ask you if you have an opinion within a reasonable degree of medical certainty based upon your review of these films and your report from St. John's Hospital and the description of the accident that I've just given you whether or not this accident that Mr. Mroz had on October 9th of 2000 was a competent producing cause of his back injury and the herniated disks that you've talked about here today.

A Yes, based on these findings and what you're telling me about the patient's history of not having pain and then having an accident and having pain, it would certainly be due to - these findings would be due to an accident.

Q In your opinion, based on review of these films, is Mr. Mroz a candidate for spinal surgery as a result of the herniation that we've looked at at the L5S1 level of the spine?

MS. FARRELL: Objection.

THE COURT: Overruled.

A I can't tell you. I'm not a spine surgeon. And I can't tell you whether he's a candidate or not or to the level of his symptoms. I can just tell you what's there.

Q If I told you he was referred to a spinal surgeon and he made that recommendation, would you defer to him on that?

A Of course I would defer to a spinal surgeon. MR. RYAN: Thank you, Doctor. I have no further questions, your Honor.

THE COURT: All right. You may retake the stand, Doctor. Do any of the jurors need a break at this point? Don't be embarrassed. All right, we'll continue with the cross.

CROSS-EXAMINATION

BY MS. FARRELL:

Q Doctor, good morning.

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A Good morning.

Q You've testified before in court; is that correct?

A Yes, I have.

Q And in addition to testifying in court, you've prepared reports for various attorneys?

A Yes, I have.

Q And generally speaking, are most of the reports and testimony that you do for plaintiffs attorneys?

A In the last couple of years they've been half plaintiff, half defense. Q And have you had occasion to testify in court before for the office of Samuel Lurie?

A I think I have.

Q And some of the reports that you have done for Mr. Lurie's office or for other attorneys, on some of those cases that you've reviewed has the treating orthopedist been Dr. Jeffrey Kaplan?

A I can't tell you for sure if they have or haven't because that information is not always given to me.

Q How many times have you testified in court in the past?

A I testify about five to six times per year.

Q And how much are you receiving for your testimony today?

A $5,000.

Q And in addition to the $5,000, the report that you prepared for Mr. Lurie's office, how much was that report?

A Either 200 or $250.

Q And it's fair to say that a lot of the cases that you review are MRIs or X-rays for attorneys offices that don't come to court; they resolve themselves before it gets to this point; is that correct?

A I would assume so.

Q- And on those reports you also get the 200 or $250?

A Yes.

Q When you read the report for this particular case, you were aware at that time that the case was coming up for trial; is that right?

A Yes.

Q In fact, you reviewed these MRIs only back in August of this year, 2003; is that correct?

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A That's correct.

Q So you were aware that you were going to be coming into court and testifying and giving evidence in this case, right?

A I was aware there was a possibility of that happening, yes.

Q Doctor, if I may ask you just to step down for a minute.

A Yes.

Q On this film that's been marked as Plaintiff's Exhibit 10A, you explained basically what it shows. And the lighter portions on the film, what is that?

A Water.

Q And are you telling this jury that the color on 1, 2, and 3 and 4 is the same as down here on these two end ones?

I'm saying that - yeah, I'm saying that, for example, between 12 and 1 and 4-5 and 5-1 there's very little difference. I think they brighten up in the middle. Yes, I'm saying that structures at the edges of scans are less bright even though they may contain the same amount of water as structures in the center of scans. And that's why the top two disks here with writing here you can see the disk at 11-12 and the 12-1 are less bright than 1-2, 2-3 and 3-4. And 4-5 and 5-1, again, there's a brightness around the center.

Q But it's very different from the ones above it; is that correct?

A I think it's the same as 11-12, so above it it's different than 1-2, 2-3, 3-4, and the same as Tll-12 and T12-1.

Q Speaking solely regarding the lumbar disks, you would agree, would you not, that what's shown on Plaintiff's Exhibit 10A, the upper 1, 2, 3 are much brighter in color than L4-5, L5S1?

A Yeah, I think that's a machine factor and not a patient factor, yes.

Q And that's - when something like this is shown on MRI where there's difference in brightness, that's an indication of less water?

A If there would be less water it would be darker than that, yes. The answer is yes.

Q And when there's less water, that's an indication that there's desiccation in those disks; is that correct?

A Yes, less water means desiccation.

Q And would you agree you had some testimony earlier that arthritic changes, one of the manifestations of that would be desiccation; is that true?

A Yes.

Q You can take your seat again. Doctor, when you showed the MRI films to the jury, you can see that the top of the lumbar spine is basically straight and then it comes down towards the bottom.

A Yes.

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Q That's a natural curve that we have in the human spine?

A Yes.

Q Would it surprise you to learn that when Dr. Kaplan testified yesterday upon his review of the MRI films he stated that there was degeneration showing and desiccation?

A He said there was arthritis?

Q He said there is degeneration and desiccation, yes.

A I don't see degeneration for the reasons that I just described; therefore, I agree with the hospital reports that there isn't degeneration.

Q And if there was an X-ray taken and there was bone thickening as you described, that would show up on the X-ray; is that right?

A Yes.

Q Doctor, I would ask you to assume that yesterday Dr. Kaplan testified that there are occasions when there's a herniated disk and the disk or the tissue and nerve around it become inflamed. Do you agree with that, that that can occur?

A Yes.

Q And assume further that Dr. Kaplan testified that with bed rest or medication, that inflammation might subside.

A Okay.

Q Would you agree with that?

A Again, I don't treat, but I would - I would assume that he may have said that. I'll agree that he said it. I don't -

Q Does an inflammation as you say in your report indicate that there was - let me get your language - swelling?

A Swelling, yes.

Q Is swelling the same thing as inflammation?

A Inflammation is more of a scientific word. It means that there are inflammatory cells that occur in the structure you're looking at. The bottom line is something that's inflamed is often swollen or thicker than it is. So inflammation is more of a scientific word. Swollen is more of a word, a common word, that just says thicker than it should be.

Q And if something was swollen it would be increased in size; is that accurate?

A Yes.

Q And then after bed rest or medication, whatever the treatment might be, that swollenness would recede?

A I'd have to defer to Dr. Kaplan on this, if he says that can happen.

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Q And other than the MRIs that you showed us today, you have not reviewed any other MRIs taken of Mr. Mroz; is that correct?

A That's correct.

Q Doctor, the spinal canal that you spoke about, is that wider towards the lower back than it is in the upper back?

A It can vary in different patients. It's not a set number.

Q Can you tell us by looking at these MRIs?

A Yeah, you can tell.

Q Is Mr. Mroz's spinal canal wider toward the lower back or something else?

A No, we can actually measure it. I mean, it varies, as I said. I mean, if I can get up and measure it, you will see that in the upper part of the back the spinal canal is the exact same size as the lower part of the back, but the middle part of the back is narrower where there is no herniation. So the answer to your question is that - I can go up there and point it out, but the upper part of the lumbar spine is the same width throughout the spinal canal as the lower part of the lumbar spine.

Q Doctor, do you have your report with you?

A No.

Q I'm just going to ask - I'll show you it after I ask a question, okay?

A Okay.

Q On your report you use words such as impinges, and in your testimony earlier you also use displacement and pushes back. Are those three separate words?

A No.

Q You're using those interchangeably?

A Yes.

Q And in your impression that you wrote on your report, you make no indication that the herniation is pushing or displacing the nerve root. I'll show you the report.

A I think I do say it in my report.

Q Well, I'm talking about the impression that you gave (handing).A No, I mean in the body of my report where I describe everything, I say it, and then I just sum up in the impression, so I don't - I say the left nerve root is swollen, but I don't say - I say that it's displaced. There is displacement of the exiting nerve roots, and I also say that the herniations impinge upon the fat as well as on the thecal sac, but I don't repeat my words again in the impression.

Q In the body of the report nor in the impression you do not say that there is - there is impingement on the nerve root. You have that there's impingement on the fat and impingement on the thecal sac.

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A No, I say there's displacement of the exiting nerve roots bilaterally. I'm saying the herniations are pushing the nerve roots on both sides, and I say that the left-sided nerve root is swollen because of its being pushed. So basically I'm saying the left side is worse than the right side.

Q But my question, Doctor, is there's no statement on that report that says that the herniation is impinging on the nerve root, not the fat and not the thecal sac.

A It is, quote, "There is displacement of the exiting nerve roots bilaterally within each foramen superiorly due to the displacement of the herniations."It says, that exactly.

Q That's what the report says, but my question was does it say that there's impingement on the nerve root?

MR. RYAN: Your Honor, asked and answered. The doctor has explained.

MS. FARRELL: He's not answering my question.

A Yeah, I said impingement and displacement are the same. You asked me that and I agreed. I said there is displacement of the exiting nerve roots, which is the same thing as impingement.

Q In your opinion or your definition, displacement is the same as impingement?

A Impinge means to push on, and displacement means to push away. Push on and push away. For this particular case I don't think it really makes much of a difference which word is used.

MS. FARRELL: I have nothing further.

REDIRECT EXAMINATION

BY MR. RYAN:

Q Doctor, whether you use the term displacement or impingement, in either case does that mean that the nerve root is being pushed by the herniation at the L5S1 level?

A Yes.

Q And the significance of the nerve root being pushed, whether it's impinged or displaced, is that a competent producing cause of pain, whether it's displaced or impinged?

A It can be.

Q Now, I'd like you to assume that Dr. Tantleff in his report used the terms compression, displacement or deviation of the nerve roots. Again, if we use the term compression, there's a compression of the L5S1 herniated disk on the nerve root, is that a competent producing cause of pain?

A It can be.

Q Displacement, if we use the term displacement at the L5S1 herniation, displacement of the SI nerve root in the spinal canal, is that a competent producing cause of pain?

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A Again, it can be.

Q And using the term deviation, there's a deviation by the L5S1 herniation onto the SI nerve root in the spinal canal, can that be a competent producing cause of pain?

A Can be.

Q So Dr. Tantleff doesn't use the word impinge either, he uses the word compression, displacement or deviation. Whatever term we use, if there's impingement on the nerve it can be a competent producing cause of pain?

A Yes.

Q Is there any doubt in your mind as you sit here today that the herniation that Mr. Mroz sustained at L5S1 impinges on the SI nerve root and is a competent producing cause of pain?

A It definitely impinges on it and whether it causes pain or not, it certainly can cause pain.

Q And based on your testimony earlier with the results of the EMG as performed by Dr. Kaplan, Dr. Finkelstein at Dr. Kaplan's office, which confirmed the L5S1 radiculopathy, that's just another factor that would lead you to believe there's not only a herniation but also a competent producing cause of pain at the L5S1 level, correct?

A Yes, absolutely.

Q You were asked earlier about the swelling of the left side exiting the L5S1 nerve root. Of what significance is the swelling at that area?

MS. FARRELL: Objection, your Honor.

A Well -

MR. RYAN: It just goes into what was done on cross.

THE COURT: Overruled.

A If the nerve root is swollen, it tells you that there's something abnormal going on in it, and since you get pain from nerves, and you also told me the EMG localizes to that nerve as well, so everything fits together that there's a herniation that pushes on a nerve root that is causing it to swell that causes the patient to have pain.

Q Is that swelling in your opinion still present today?

A Today?

Q Yes.

MS. FARRELL: Objection.

THE COURT: Sustained.

Q The swelling of the left-sided exiting L5S1 nerve root, is that something that will subside over time?

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A It can. It depends - I think I was asked about Dr. Kaplan, if Dr. Kaplan said it could change based on his therapy, so I have to defer to Dr. Kaplan.

Q The fact that Dr. Kaplan testified here yesterday that he is still recommending surgery for Mr. Mroz because of the problems that he's still experiencing today, the lower back pain radiating into his left leg, does that lead you within a reasonable degree of medical certainty as to whether or not he is still experiencing pain in that nerve root in the L5S1 area?

MS. FARRELL: Objection.

THE COURT: Sustained.

Q Doctor, you talked about measuring the spinal canal. Could you come down here for one second. Now, what significance, if any, in responding to Miss Farrell's question is the difference in the size of the spinal canal, whether it be at the upper or lower level?

A The spinal canal is this dark area. This is one. This is bone, front and back, and the spinal canal is ere. You see it as you come down, it narrows. In other ords, the bones get closer not because of the herniation, it ust gets narrower. If I measure to here it is narrower. At She bottom it gets higher. Again, there's a normal variation That we all have in the size of our spinal canal. So it raries in this particular patient. It's wider here, narrower lere, and wider again where the herniation is.

Q Would you still agree with the findings with the 3t. John's Hospital report that the herniation at that level does obscure the spinal canal?

A Yeah, I agree with their report.

MS. FARRELL: Objection.

THE COURT: I'm sorry. I couldn't hear the question.

Q Does the herniation at that level, at the L5S1 level, does it obscure the spinal canal in that area?

THE COURT: Does it what?

MR. RYAN: Obscure the spinal canal in that area.

MS. FARRELL: Objection; asked and answered,

THE COURT: Overruled.

A Yes, I agree with the St. John's report that it does.

MR. RYAN: Thank you, Doctor. I have no further questions.bone. This is bone, front and back, and the spinal canal is here. You see it as you come down, it narrows. In other words, the bones get closer not because of the herniation, it just gets narrower. If I measure to here it is narrower. At the bottom it gets higher. Again, there's a normal variation that we all have in the size of our spinal canal. So it varies in this particular patient. It's wider here, narrower here, and wider again where the herniation is.

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A Yeah, I agree with their report.

MS. FARRELL: Objection.

THE COURT: I'm sorry. I couldn't hear the question.

Q Does the herniation at that level, at the L5S1 Level, does it obscure the spinal canal in that area?

THE COURT: Does it what?

MR. RYAN: Obscure the spinal canal in that area.

MS. FARRELL: Objection; asked and answered.

THE COURT: Overruled.

A Yes, I agree with the St. John's report that it does.

MR. RYAN: Thank you, Doctor. I have no further questions. bone. This is bone, front and back, and the spinal canal is here. You see it as you come down, it narrows. In other words, the bones get closer not because of the herniation, it just gets narrower. If I measure to here it is narrower. At the bottom it gets higher. Again, there's a normal variation that we all have in the size of our spinal canal. So it varies in this particular patient. It's wider here, narrower here, and wider again where the herniation is.

Q Would you still agree with the findings with the St. John's Hospital report that the herniation at that level does obscure the spinal canal?

A Yeah, I agree with their report.

MS. FARRELL: Objection.

THE COURT: I'm sorry. I couldn't hear the question.

Q Does the herniation at that level, at the L5S1 level, does it obscure the spinal canal, in that area?

THE COURT: Does it what?

MR. RYAN: Obscure the spinal canal in that area.

MS. FARRELL: Objection; asked and answered.

THE COURT: Overruled.

A Yes, I agree with the St. John's report that it does.

MR. RYAN: Thank you, Doctor. I have no further questions.

THE COURT: Do you have any follow-up?

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MS. FARRELL: No, I don't.

THE COURT: Okay, thank you, Doctor. You may leave.

THE WITNESS: Thank you.

MR. RYAN: Thank you.

(Whereupon, the witness exited the courtroom.)

THE COURT: You have a witness at 2:00; is that correct?

MR. RYAN: Yes, Judge.

THE COURT: All right, take our - nothing else at this point for the jury?

MR. RYAN: Nothing else, Judge.

THE COURT: We'll take our recess now. We'll take the next witness at 2:00.

Again, please don't discuss the case and please don't make your mind up about the case.

(Whereupon, the jury exited the courtroom, luncheon recess.)

Certified that the foregoing is a true and accurate transcript of the original stenographic minutes in this case.

Mary Benci

Official Court Reporter

End of Document

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