2003 WL 25558779 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
New York County

Shawn DELL & Joann Dell, Plaintiffs,

v.

THE PORT AUTHORITY OF NEW YORK and New Jersey & Turner Construction, Defendants;

The Port Authority of New York and New Jersey, Third-Party Plaintiff,

v.

John P. Moroney & Kelliann Dell, Third-Party Defendants.

No. 111026/01.
October 10, 2003.

(Transcript of Dr. Thomas Kolb)

Name of Expert: Thomas M. **Kolb**, M.D.
Area of Expertise: Medical & Surgical >> Radiology
Area of Expertise: Medical & Surgical >> Pediatrics
Representing: Unknown
Jurisdiction: New York County, New York

Appearances:

Sacks & Sacks, Esqs., Attorneys for Plaintiffs, 150 Broadway, New York, New York 10038, by: Jeffrey A. Morse, Esq., of counsel.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Attorneys for Defendants, 3 3 Gannett Drive, White Plains, New York 10604, by: Michael W. Coffey, Esq., of counsel.

Quirk and Bakalor, P.C., Attorneys for Third-Party Defendants, 845 Third Avenue, New York, New York 10022, by: Stephen K. Blunda, Esq., of counsel.

Before: Hon. Leland DeGrasse, Justice, and a jury.

60 Centre Street

New York, New York

Lee Ruthen & Denise Williams

Official Court Reporters

[Note: Pages 610-622 missing in original document]

THE COURT: That's the application?

MR. MORSE: Causation is not something that an ordinary radiologist can testify to, only a neuroradiologist.

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THE COURT: Okay. Go ahead.

MR. COFFEY: I think that's more for cross-examination. If he is an expert and testifies as to that, I have not seen -- Mr. Morse is an attorney. I don't know how he has such a full specialty of what doctors can testify to.

We served him with a C.V. I've never heard this objection before just a moment ago, and I would say there are conclusions in Dr. Kolb's report. He had a full time to object to those because this was exchanged October, 2001.

THE COURT: If I told you -- okay. I'll give you the citation later, but there are no cases in the PJI which stand for the proposition that any physician may give opinion testimony regarding subjects that are outside of his particular specialty, so your motion is denied.

We'll bring them back in.

COURT OFFICER: Jury entering.

(Jury enters courtroom)

THE COURT: Please be seated.

Call your witness.

MR. MORSE: Dr. Thomas Kolb.

THE CLERK: Raise your right hand.

DR. THOMAS KOLB, a witness called on behalf of the

Defendant, after having first been duly sworn by the

Court Clerk, was examined and testified as follows:

THE CLERK: Spell your last name.

THE WITNESS: K-o-l-b.

THE CLERK: Your first name?

THE WITNESS: Thomas.

THE CLERK Your business address?

THE WITNESS: 222 East 68th Street, New York, 10021.

THE CLERK: Thank you. You may be seated.

THE COURT: You may inquire.

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DIRECT EXAMINATION

BY MR. COFFEY:

Q Good morning, Doctor.

A Good morning.

Q Where is your office located?

A On 68th Street in Manhattan.

Q What type of MD are you?

A I'm a diagnostic radiologist.

Q Tell the jury a little bit about your background and your qualifications.

A I went to college here, Queens College, City of New York, and graduated 1979. From 1979 through 1983 I went to medical school in Brooklyn at Downstate Medical Center, graduated with an MD degree. I then did a three-year pediatric internship and residency from 1983 through 1986 and became board certified in pediatrics. I then went back and did a second four-year residency in diagnostic radiology. The pediatric internship and residency was done at Albert Einstein College of Medicine in the Bronx. I did a four-year residency in diagnostic radiology at Columbia Presbyterian Medical Center from 1986 through 1990, and became again board certified in diagnostic radiology in 1990.

From 1990 till now I been in the private practice of diagnostic radiology.

Q And are you board certified?

A Yes.

Q In what disciplines are you board certified?

A Both in pediatrics and in diagnostic radiology.

Q And what does one have to do to become board certified in radiology?

A You have to take a written examination and upon passing that you travel actually to Lexington, Kentucky and take an oral examination and you have to pass that examination as well and you become part of the American Board of Radiology.

Q Do you currently have any academic positions?

A Yes. I'm an assistant clinical professor of radiology at Columbia Presbyterian College of Physicians and Surgeons, department of radiology.

Q Do you specialize in anything in your private practice?

A Our practice has two major aspects: One is breast imaging. I have done extensive research and published in breast cancer diagnosis, was responsible for utilizing breast ultrasound for finding breast tumors that are not apparent on mammography or on

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physical examination, and that's been a pretty large area of research of mine. And the second part of my practice is orthopedic radiology, doing MRI scans on different parts of the body that relate to the spine or joints of the body or head.

Q What states are you currently licensed in?

A New York and New Jersey.

Q And have you done any publications?

A Yes. I published in two different areas. My major area of publishing has been in breast cancer diagnosis, as I said I published some major papers in 1998 and 2002. My most recent paper 2002 was cited by the American Medical Association by the paper of the year by a scientific writers group and I presented that in Washington this past year, and another area that I published in was MRI imaging, magnetic resonance imaging. I published one of the earlier papers in cardiac or heart MRI back in the 1980s and I lectured extensively throughout the country as well.

Q Are there any societies that you currently are a member of?

A The Radiologic Society of North America, American Breast Cancer Group, those types of societies that many doctors belong to.

MR. COFFEY: At this time I would offer Dr.

Thomas Kolb as an expert in the field of radiology.

MR. MORSE: I consent if its if he is an expert in radiology only but not beyond if that's the question.

MR. BLUNDA: No objection.

THE COURT: Members of the Jury, the motion is granted. This witness may give his opinion in matters concerning the field of medicine.

You may inquire.

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

A Yes, most certainly.

Q How much are you being compensated for your time here today?

A $5,000.

Q And do you have a practice at your East 68th Street location?

A Yes, absolutely.

Q And being here today takes you away from that practice?

A Absolutely.

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Q Have you testified in court before?

A Yes, I have.

Q And you've testified in litigation matters before?

A Yes.

Q And have you testified for both plaintiffs and defendants?

A Yes, I have.

Q At some point did you review any MRI magnetic resonance images of Mr. Dell in this matter?

A Yes, I did.

Q Why don't you explain to the jury about what MRIs are.

A MRI are very different than X-rays. X-rays are a very common test we all heard about. X-rays are a more crude test in that the way an X-ray works is that you shoot a beam of X-rays through the body and its captured on film, let's say if you are shooting it through the spine it would be captured on a film behind the spine, and all X-rays tell you are differences between substances that are hard or soft for example, the bones in the spine are very hard but there are structures many structures around the bones such as the discs, that we will talk about, that are in between the bones, there are muscles, there are ligaments, those are all more soft structures and you can't tell the difference between those structures on an X-ray.

So when you do an X-ray of the back you see the bones. Its a very good test for looking for fractures and arthritis, things of that sort, but not as good a test to look at the discs in the spine or the ligaments and those types of structures.

MRIs are different. They use magnetic waves, they are not X-rays, and based on the way we pulse these magnetic waves in the body there is a change on a very molecular level, atomic level and we can generate a picture of what things look like. So if we do an MRI scan of the back not only can we see the bones but we can see inside the bones, we can tell the differences between all those softer tissues, so we can see the bone marrow, we can see the disc, ligaments, muscles, all these different structures and make a more accurate diagnosis than by using plain X-rays.

So plain X-rays are a more crude, quick way of looking at the back but a more precise way of looking would be using an MRI scan.

Q How are the MRIs important for -- as diagnostic tools?

A We can look at the discs and see if they are in the correct position or not in the correct position, we can look at the bones as well but we can look at the relationship of the ligaments and other structures in the spine that we can't do on regular X-rays.

Q At some point did you review some MRIs of Mr. Dell?

A Yes.

MR. COFFEY: Is there a box up there? You want to put that up.

(the witness complied.)

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MR. COFFEY: I will hand you what's --

THE COURT: Identify it.

MR. COFFEY: I will hand you what's previously been marked as Defendant's Exhibit 11 through 4.

THE COURT: And, Doctor, as you refer to each plate give its exhibit number, please.

THE WITNESS: Yes.

Is there a pointer or another pen?

MR. COFFEY: I will give you another pen.

MR. MORSE: Judge, is it all right if I step to the side so I can see?

THE COURT: Excuse me?

MR. MORSE: Is it all right if I step over there?

THE COURT: Certainly, you may.

THE WITNESS: Now this is Exhibit 12 and you will see there are multiple pictures here, there is one big picture here, then there are smaller pictures, there's two here, two here, so there's 10 pictures on this one sheet. This is one single patient and the reason there are 10 pictures is because we are starting from the left side of the patient and we are taking pictures going from left to right and each picture is just a few millimeters thick so we take the picture toward the left side, we pull it out and look at it here, and I will explain to you what it all means, but just so we are all on the same page we know what we are looking at, then we go toward the center of the body, more towards the middle. These two pictures number five and six are have this big white stripe down the middle here, and we are going to talk about that in a second. Those are the middle, that's in the middle of the body, then we go off to the right side of the body, so we are cutting the body from left to right. No one is cutting, these are just pictures. We are talking about these are all pictures of the lumbar spine and just so we are all we all understand each other, we have a numbering system everywhere in the spine including the lower spine which is the lumbar spine and there are five bones in the lumbar spine we call them L for lumbar 1, 2, 3, 4 and 5 and this is actually the fist bone here, I will write that in here, I will put a little blue mark, above it is the 4th, and 3rd and 2nd and the 1st, then we get above that into the mid-back which we are not looking at and so there are these bones and each of these squares that you can see is a bone and each of the bones are called the vertebral body or vertebra so the spine has vertebra in it and we all have the same number male, female, big, small, it doesn't make a difference. So we have these gray squares or vertebral bodies.

Then in between these squares are the discs. The reason we have discs in between the squares is that because they act like little shock absorbers. They are gelatinous material, material like toothpaste, and the function is to keep bone away from each other. In other words, if we jump around or move around these bones if they didn't have anything between them would crunch together and when the bones crunch together we don't like that, we feel pain and bad things can happen. So we are born with these discs which are these little shock absorbers and normally they are white and you can see each of these discs between 1 and 2, there is white between 2 and 3, between 3 and 4 and if you look between 4 and 5 you will see it has a different color and shape than between the bones 3 and 4 and the bones 5 and 1. In other words, all of these are identical in color and size except for this one disc which is between 4 and 5.

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Now we can make things appear a certain way on the MRI by changing how these magnetic waves are pulsed in. The way we do it in this particular sequence anything that has water in it is white. Anything that has less water is dark. So bones or bone marrow don't have a lot of water so they are gray. The discs as I tell you are gelatinous, watery, they are white. What's happened to this disc between 4 and 5 is that two things have happened, number one, the disc has lost its color, its become dark, its lost its whiteness and number two the height of the disc if we measure each disc from the top of the white to the bottom of the white its pretty much the same at all levels except 4-5 which is narrow. So there are two things that have happened to this disc, this disc has lost its water and has lost its height and those are the first two manifestations of a degenerating disc, a disc that has become arthritic. The first thing that happens is the disc will lose water and the second thing is the disc will lose its height and the reason why this is important is when a disc loses its height it loses its shock-absorber property and the bones come together. When the bones come together the body doesn't like that.

Now you can also see that very important thing as I just told you the discs are like shock absorbers and gelatinous so why don't they just spurt out when we jump up and down. They don't spurt out because they are held in place. The bones have to have covering in the front and back there are ligaments that run in the front of the spine and back of the spine that keep the discs in place and there is a third covering which runs around the disc at each level which has a fancy name called an annulus. The point is these discs have tight coverings that keep it in place.

Now you know that a disc is in place close to the edge of the bone and stops because there are ligaments that hold it in place and the ligaments run along the back of the bone. So each of these discs comes to the edge of the bone, which is the ray, and then stops because its being correctly held in place. But at 4-5 when you look at that disc you will see it extends a little bit out beyond the bone and that means that that disc is bulging from its normal position that one disc that we are talking about is bulging from its normal position.

Now why do we keep talking about discs, just to finish up with the anatomy that's important to know we talked about this white stripe coming down behind the bones and behind the disc. That's the spinal canal. If you put a needle in there you will get out spinal fluid so a spinal tap is putting a needle into the back and pulling out that fluid. And if you look inside the white area here you will see gray there are gray fibers coming down, there is a gray line that gets thinner and thinner and thinner. These gray lines are the nerve. They start out in the brain, they go down the spinal cord, the spinal cord ends at around here where you say this grayness and only these thin gray lines come down and those are the nerves. We need to have those nerves come to all parts of our body so we can move, we can feel pain, we can feel the differences between hot and cold. The way these nerves come out of the spine is that there are holes on the side of the spine, left side of the spine and right side of the spine there are holes. So the nerves come down and each nerve knows where it has to go, the nerve has to go down to the toe or the knee or the hamstrings it goes out at the appropriate hole between 3 and 4 between 4 and 5 between 5 and 1, one to the left side one to the right side, nerves go where they have to go. So its important to know that there is a lot of action here in terms of nerves, just that the area we are talking about.

If we go to Exhibit number I3 -- I'm sorry, if we go to number I4 you will see the same pictures, the same anatomy that we talked about but what was white is going to turn dark and whats's dark turns white because as I told you we can tell the machine whatever is watery make it look white or whatever is watery make it look dark. We do that so we get a better idea of what's really going on. All we are doing is we are changing the way the magnetic waves come into the body. Same anatomy but on I4 again you see the squares, the gray squares and those are the vertebral bodies here and in between them are the discs and the discs now are all gray because we are telling the machine to show us everything that's white, everything that has water in it show it to us as being gray not as white. So we are not interested in looking at water verses non-water on these sequences but what is white on these pictures here is fat. So we told the machine that anything that has water in it don't make it white any more, make it dark, and we are telling the machine whatever is fat make it white because we want to look at the fat.

Now if you look here in between at these levels number 5 and 1 and we told you -- I slowed you a disc with normal water in it we are not looking at water now, this has normal water in it, we talked about 4 and 5 which has lost its height, which lost its height and is narrower we can still see that, you can see the disc extends a tiny bit beyond the bone at this level at 4-5 which we

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talked about where there is a bulge but you see at 5-1 it stays at within the confines of the bone because its held in place. Same with 3-4 it goes to the edge of the bone and stops. But if you look at what's at the anatomy you will see there is a white stripe right behind the bones and that's fat, as I told you everything on this picture that's fat is white, and in fact if you look here you now see little keyhole shape structures to the level and to the right here and little dots in there and if you remember I told you there are holes where the nerves come out on the sides and each side the left and the right, those dots are the nerves coming out to the side like that and the white around the dots is fat and that's cushioning for the nerves so the nerve doesn't bump against the bones. So the nerves have their own cushioning and that's fat. That's normal.

The point here is that even though there's a bulge here at 4-5 meaning its pushing out a little bit it hasn't completely torn through the ligament but its pushing out a little bit beyond the ligament, its pushing on fat and we talked about the spinal canal containing the nerves, we talked about the spinal canal containing the spinal fluid, this bulge here is pushing out and only pushing on fat here its not pushing on any of the nerves in the spinal canal and if you go out to the sides you will see that the holes where the neuroforamina are that contain the nerve roots that come out are not being pushed upon either. So we have three things here, bottom line is we are finished with the anatomy, we have three things in this case, we have a disc which has degenerated, we have in other words its lost its water, its lost its height and its bulging. This disc has degenerated. Second thing is that its a degenerated disc that is bulged and the third thing is even though its bulging back its not pushing on any structures that you would imagine would cause a problem meaning that its only pushing on fat and its not pushing on the nerves in the spinal canal and in fact you can see this white line coming down in the middle of the gray now and that's a nerve coming down and you can see the distance it is from the disc.

So we have a degenerating disc which is bulging and not touching any of the nerves and that's the finding on these MRIs.

Q The other thing, Doctor, was there anything -- explain what Schmorl's nodes are and what the relevance is.

A Yes. We talked about the squares here as being the vertebral bodies and I told you they are square for example, this is a perfect square but you can see that in some of them there's a little blip from the disc not going back but going up and so its not a sharp line on the bottom of this bone at L3 for example, the bottom of L3 has a little blip and this bone up here has blips in it and those are called Schmorl's nodes for I guess Dr. Schmorl who, I guess, first described it and the bottom line is those are degenerative changes or they can be at least degenerative changes in the disc actually pushing upward into the bone. Its another sign of what can be degenerative change.

Q Are they generally long-standing?

A Yes.

MR. MORSE: Objection, leading.

THE COURT: Sustained. The answer is stricken and the jury will disregard it.

MR. MORSE: I also move to strike any testimony as to what can be.

THE COURT: Motion denied.

Q What is important in the assessment of the Schmorl's nodes?

A Well, to put the whole case together we talked about degeneration of the disc and the bulge and we talked about Schmorl's nodes which are these little blips going in there.

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The degeneration we talked about the loss of water and narrowing of the discs are generally long-standing processes, in other words it doesn't happen overnight. Its very much more likely to happen over a course of 10 years than over 10 months, very much likely. Its highly unlikely for it to occur in a very short time after an incident to the back. So we are talking about long-standing changes. Things would be very different if there were a herniation, which there isn't here, and the disc contained water and it was of normal height but that's not the case here. The disc is arthritic and degenerative and arthritic changes take a long time to occur as to Schmorl's nodes often take a long time to occur. So that's the significance of timing with these findings.

Q Is there any loss of height in this disc?

A In 4-5?

Q Yes.

MR. MORSE: Asked and answered.

THE COURT: Overruled.

A Yes.

Q What is the importance of the loss of height?

A There are two things that have occurred to this disc that are arthritic or degenerative, the first is there is loss of water, that we talked about, that's the first thing that happened. Once its lost its water the disc becomes brittle and when it becomes brittle it starts narrowing, losing its height, it doesn't have that shock absorber quality any more. Those two things are a sign of arthritis that take a while to occur.

MR. MORSE: Objection, that's outside the scope of his report, no mention of arthritis.

THE COURT: Overruled.

Q What is desiccation?

A The word desiccation means loss of water and that's what we have been talking about, the medical word for what we have been talking about loss of water is desiccation, the disc has desiccated and lost height.

Q Were these changes more likely be a chronic condition?

MR. MORSE: Objection, leading.

THE COURT: Sustained.

Q Is it likely that these changes had longer standing than three months?

MR. MORSE: Objection, leading.

THE COURT: Sustained.

Q Doctor, did you come to any conclusions with a reasonable degree of medical certainty?

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A Yes, I did.

Q What were those conclusions?

A I wrote in my report what we talked about disc bulge, loss of height and desiccation of L4-5, that impinges, which means pushes on the anterior epidural fat, does not affect the thecal sack which is the spinal canal that we were talking about here or the neurostructures and I wrote the appearance of this disc indicates that it is long-standing most likely greater than three months from the time of the patient's reported trauma and therefore cannot be causally associated with that trauma. In other words, I'm saying that the changes that I am describing are extremely unlikely to occur in a short period, much more likely to occur over a longer period of time and certainly within three months are unlikely to have occurred.

Q I am going to assume a couple of things --

THE COURT: One moment. Are you finished with the shadow box?

MR. COFFEY: Yes, I am.

THE COURT: We will take it down and the witness will take his seat.

MR. MORSE: I'm going to object to the assumptions. Its outside the scope of his report.

THE COURT: Motion denied.

MR. MORSE: Can we approach on this matter?

THE COURT: No.

MR. MORSE: An expert witness --

THE COURT: No, have a seat.

Q 1 want you to assume there were multiple traumas and prior back injury --

MR. MORSE: Objection. There is no foundation for that?

THE COURT: Overruled.

Q And that the assumption there was a surgery three years later and assume no other testimony from a radiologist.

Would you say it was related to the 1998 trauma?

MR. MORSE: Objection.

THE COURT: Overruled.

A No, as I stated very clearly there are scientific reasons that are shown here on the MRI that its not related to the trauma that occurred three months prior to taking these pictures.

MR. COFFEY: Thank you.

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I have no further questions.

THE COURT: Are you ready to cross-examine?

MR. MORSE: I certainly am, Judge.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. MORSE:

Q Hello, Dr. Kolb.

A Hello.

Q Does my name sound familiar to you?

A You told me your name outside there in the hall.

Q Right.

A I didn't catch it.

Q My name is Jeffrey Morse.

A Okay.

Q I have about 100 of your reports in my office; do I not?

A If you say so. I wouldn't know.

Q You do this quite a bit; right?

A About six times a year I testify.

Q Now you also write reports; correct?

A I do.

Q And you write two kinds of reports, correct, one for a doctor who wants the test done and there's another report that you write for counsel; correct?

A They are both the same reports. I interpret films and whoever wants the interpretation can have it.

Q There's one you send to doctors and there's one you send to lawyers?

A Its the same report, whoever asks for it can have it.

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Q Do you always put causation in all your reports to other doctors?

A If I am asked for it yes.

Q If you're not asked for it you don't?

A If its not necessary, not asked for then I may not.

Q Its not part of your standard practice when a doctor asks that an MRI be performed at your facility as you call standard practice you don't put causation language in there; correct?

A Only if its asked of me.

Q Right, and doctors don't ask that; do they?

A Well, sometimes they do.

Q Most of the times they don't; correct?

A I can't tell you most or I can't tell you exact percentages but when they do I put it in and when they don't I may not.

Q What is a neuroradiologist?

A A radiologist who specializes in the neuraxis, brain nerves.

Q Isn't a neuroradiologist a radiologist who specializes in causation of certain disc-type injuries and pathologies; isn't that true?

A No, I disagree with that statement.

Q And you are not a neuroradiologist; correct?

A No, I'm not.

Q As a matter of fact your main area of specialty is in mammograms and breast scans; correct?

A And as I said joint bone and joint MRI.

Q And that's bones and joints like throughout the body; correct?

A Yes.

Q Now you have never done any surgeries yourself; correct?

A That's correct.

Q And your practice is just limited to taking and reading films; correct?

A Yes.

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Q That's a diagnostic tools other doctors use; correct?

A Yes.

Q Isn't it true a lot of neuros and orthos read the films themselves and they don't rely on your report?

A I wouldn't know why they would ask for a report if they don't rely on the report.

Q Isn't it true that a neurosurgeon is going to read an MRI film himself?

A I --

MR. COFFEY: Objection.

THE COURT: Sustained.

The answer is stricken.

Q Doctor, you have -- you are familiar with circumstances where doctors read films themselves, correct?

A I'm not sure what you mean by familiar with circumstances. Any doctor can read any film.

Q Correct.

A Yes.

Q And that's because reading films is a matter of interpretation, is it not?

A Films are sent to me to be interpreted, and my report goes to a doctor who I would assume would read my report, and that's why they are asking me to interpret it.

Q But it is an interpretation, correct?

A Sure, of course.

Q Have you seen the MRI films that were taken in August of 2000?

A No.

Q Do you know films like that were even taken?

MR. COFFEY: Objection.

THE COURT: Overruled.

A No, I'm not aware.

Q Now, you've never examined Shawn Dell, correct?

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A Correct.

Q And you've only seen this one set of films as far as Shawn Dell is concerned, correct?

A Yes.

Q You haven't seen any other medical records, correct?

A Not that I recall.

Q Isn't it true that in forming a diagnosis that most doctors use various tools? They use a history, they use a visual observation say taken during surgery, they use other medical records when they form a diagnosis?

A Yes, they can.

Q And the MRI film is just one tool in that arsenal, correct?

A Yes.

Q So if a diagnosis is made by a doctor, it may not be consistent with your interpretation of a film, isn't that correct?

A Anything is possible.

Q I didn't ask you if it's possible. Isn't it true that does happen?

A It's possible that it can happen.

Q It's never happened to you, to your knowledge?

A It's possible that it happens.

MR. COFFEY: Objection.

THE COURT: Overruled.

Q Have you seen the report from the original radiologist from this case?

A No.

MR. COFFEY: Objection.

THE COURT: Overruled.

Q Have you seen the report from the radiologist who took these films, his report?

A I'm sorry?

Q Have you seen his report?

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A Not to my recollection.

Q Don't you think that would have been helpful to see what he thought?

A No, absolutely not.

Q And it is not helpful what Dr. Hollis thought or Dr. Jupiter, or even Dr. Rosenblum and Dr. Godsick, it doesn't affect your opinion, correct?

A I'm not sure -- the answer to that is I don't know who any of those doctors are. If they clinically examined the patient as we talked about before, they may have information to add.

Q They all did, all four examined him. If they disagreed with you, you'd be right and they'd be wrong?

MR. COFFEY: Objection.

THE COURT: Sustained.

Q I want you to assume that Dr. Godsick -- and that's the doctor that examined the plaintiff on behalf of the defendant, who is an orthopedist -- testified that in his opinion in this case the herniation was caused by the accident, the injury in May of 1998. Do you disagree with him?

MR. COURT: Objection.

THE COURT: Sustained.

Q I want you to assume Dr. Godsick testified that in his opinion that this herniation was not something that spontaneously occurred, that it occurred as a result of the May 28, '98 accident. Do you disagree with that opinion?

MR. COFFEY: Objection.

THE COURT: Sustained.

MR. MORSE: May we approach?

THE COURT: No.

Q I want you to assume --

THE COURT; Mr. Morse, an expert can be called upon to assume facts. Opinions given by other experts are not facts, they are opinions. Understand?

Q Assume this fact.

Dr. Jupiter testified in this court that the first radiologist read this film as a disc herniation in L4-L5. Do you disagree with that?

MR. COFFEY: Objection.

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THE COURT: Sustained.

MR. MORSE: Can we put the shadow box back up, please, Judge?

THE COURT: Yes.

MR. MORSE: I'd ask the witness to put the last film he testified about up on the box.

Q Now, this film you told us was prepared with instructions to the computer --

THE COURT: The exhibit number, please, Mr. Morse?

MR. MORSE: This is I -- I don't see the mark. There is it is. 14, your Honor.

THE COURT: Thank you.

Q This film you told us was taken with an instruction to the computer that areas that contain water show up dark and areas that don't contain water show up light.

A I said areas that have fat show up light.

Q How about areas that contain water?

A Gray or dark, as you said.

Q Let's take a look at L4-L5 here. It is here, it is here, it is there. Does that gray appear any grayer or any different than any of the other grays to your eye, doctor?

A If --

Q Yes or no.

A It does to my eye because there is a perceptible difference to that being grayer above it.

Q How about as compared to that one up there or that one down there? It also appears to your eye to be darker, doctor?

Q Yes or no.

A Yes.

Q I think the jury can see, too.

You said this L4-L5 space is narrower than the other disc space, correct?

A Yes.

Q That's a matter of opinion, isn't it?

A No, that's fact. We can measure it.

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Q So you are saying that the L4-L5 space is narrower than the space up here. What is this, 4, 3, 2? So the 2-3 space is bigger than the L4-L5 space, is that what you are telling the jury?

A I'm telling the jury that this 4-5 is narrower than --

THE COURT: Mr. Morse, you are cutting the witness off.

Q The question is a yes or no question.

Yes or no. Are you telling this jury that the L4-L5 space is bigger than L1-L2, L2-L3 and L3-L4?

A You mean smaller.

Q Smaller.

A I'm saying that's smaller than L3-L4.

Q But not smaller than L2 and L3, correct?

A Correct, because it is not supposed to be.

MR. MORSE: Objection, move to strike that part.

THE COURT: Everything after correct is stricken and the jury will disregard it.

Q Now, bulge versus herniation, doctor.

Is it not true that a bulge is a pancaking-like effect with a disc bulging out in all directions? Isn't that so?

A No, it's wrong.

Q You've never testified to that ever before?

A I've testified as follows: The answer is no.

Q And the distinction you are making here between a bulge and a disc is what?

A A bulge is a partial tear of the ligament such that the disc pushes and stretches the ligament that holds it in place but it doesn't penetrate through, so it is an incomplete tear of the ligament, and a herniation is a complete tear where the disc goes completely through a hole in the ligament.

Q So it is a matter of degree, not shape.

A It is a matter of degree, partial tear versus complete tear.

Q Not a matter of shape?

A Not necessarily. Shape can lead you as to whether it is a partial tear or complete tear.

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Q Isn't it true different radiologists and different doctors use different terminology for bulge versus herniation?

A I don't know whether it's true, it's possible.

Q Doctor, if I said to you this is a subligamentous disc herniation at L4-L5, would you agree or disagree with that statement?

A I disagree for the reasons I said.

Q Subligamentous disc herniation hasn't begun through the ligaments yet.

A I disagree with that.

Q Didn't you tell us when it breaks through the ligament that is when it's a herniation?

A A subligamentous herniation is when the ligament is torn away from the bone and therefore there is now a space between the bone and the ligament for the disc to herniate down. There is a tear of the ligament away from the bone.

Q So if Dr. Godsick testified that this was a subligamentous L4-L5 disc herniation he would be wrong?

THE COURT: Sustained, the answer is stricken, the jury will disregard it.

Q In your report, doctor, I think -- let's talk about your report.

You rendered a report in this case on July 30, 2001. That's regarding the 8/26/98 MRI film.

A Yes.

Q You signed that report?

A Yes.

Q Have you got a copy of that with you?

A Yes.

Q Doctor, is it not true that you described this loss of disc height as slight in your report?

A Yes, I used the word, “Slight.”

Q And here in court today you still agree that it's a slight lose of disc height?

A I don't differ from what I said, yes, that's correct.

Q And slight is a matter of opinion, is it not? Slight versus medium versus a lot?

A I guess it is.

Q Versus not at all?

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A well, that I disagree with.

Q Now, do you know that Shawn Dell was 26 when this film was taken?

A I don't know his age.

Q I want you to assume he was 26 when this film was taken.

Are you telling this jury that this problem started when he was 16?

A I don't know exactly when it started but it started a long while ago.

Q Isn't it true most degeneration doesn't start at least until age 20, doctor?

A I don't know what this patient's history is.

Q I'm not asking about this patient, patients in general.

Isn't it true that disc degeneration doesn't start until at least age 20?

MR. COFFEY: Objection.

THE COURT: Overruled.

A Degeneration is individual and can start at anytime.

Q Most of the time age 20, correct, doctor? Most of the time it starts at age 20 or after, correct?

A Disc degeneration generally starts at a later age than a younger age.

Q As a matter of fact, the older someone gets the more likely it would be that they have a degeneration.

A Absolutely.

Q And, doctor, wouldn't you also agree with me that disc degeneration caused by aging more likely occurs at multiple levels than just one level?

A No, that I would disagree with. It has to start at one level. It is less likely it would be simultaneous at multiple levels.

Q And then it would appear at other levels, correct?

A It can.

Q Now, did you know that other doctors in this case have testified that there was no loss in disc height at any other level as recently as the surgery of April, 2001?

MR. COFFEY: Objection.

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THE COURT: Sustained. Don't answer the question.

Q Did you note any difference in the disc height or loss of disc height in the other discs other than this one?

A No.

Q And you don't know, do you, what subsequent MRI films showed, correct?

A Correct.

Q Arthritis. Arthritis -- I think you called this an arthritic disc?

A Arthritic or degenerative.

Q Did you mention the word, “Arthritis,” or, “Arthritic disc” in your report?

A Yes. I used the word, “Degenerative.”

Q But not the word, “Arthritic?”

A No. I used, “Degenerative.”

Q Today now it is, “Arthritic?”

A To me they are both the same.

Q Isn't arthritis a condition of the joints and of the bones?

A Yes.

Q And isn't it usually accompanied by a condition called osteophytes, bone spurs on the vertebrae?

A It can be. Eventually it will.

Q But there is no evidence of that on this MRI, correct?

A No, that's correct.

Q And Schmorl nodes, isn't it true that's a harmless condition?

A Yes.

Q And isn't it true that can be caused by things other than degeneration?

A Again, it is possible.

Q You said during direct, correct, that it could be caused by other things?

A Yes, that's possible.

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Q Let's talk about the chicken and the egg, doctor.

By that I mean what comes first? Isn't it not true that someone could have a degenerated disc with no herniation and then sustains a trauma and then that disc herniates?

A It's possible.

Q And isn't it also true that a disc that's already been degenerated or lost some disc height is more likely to herniate than a healthy disc?

A I think that's true.

Q So then it could have happened here that Shawn Dell had a disc that was somewhat degenerated but not herniated before May 28, '98, correct?

A Always possible.

Q Isn't it also true, doctor, by matter of sequence, someone could sustain a herniation of a disc and then subsequent to that the disc tends to degenerate after the herniation.

A Yes.

Q And that could happen when the herniation was first caused by trauma, correct?

A It's possible.

Q Wouldn't you agree with me that a slight loss of disc height standing alone wouldn't cause any significant symptoms?

A Not necessarily.

Q How can it cause symptoms, doctor, a slight loss of disc height? Could you explain?

A There could have been some reason for the loss of height that can cause symptoms.

Q Assume it is part of the aging process and there is a slight loss of disc height. Is that responsible for symptoms?

A I can't say that it would be.

Q Would it be responsible for pain that was radiating down someone's leg?

A I wouldn't think in and of itself it would be.

Q Would it be responsible for back spasms that put someone on the floor to the point where they couldn't stand up?

A Again, it depends on the reason for the loss of height.

Q Assume it was caused by aging, a slight loss of disc height. Could that cause a 26 year old man to fall down and have no use of his legs and severe back spasm, just that slight loss of disc height?

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A No, not in and of itself.

Q And could not someone who had a slight loss of disc height who was trying to hold up, raise up, one end of a steel tube weighing between 300 and 700 pounds, swaying side to side, sliding towards him and he is wrestling with it, could that not cause a disc herniation?

MR. COFFEY: Objection.

THE COURT: Overruled.

A It could.

MR. MORSE: I have nothing further.

MR. BLUNDA: No questions.

THE COURT: Redirect.

MR. COFFEY: No.

THE COURT: You may step down, you are excused.

Yes.

MR. COFFEY: I call Shawn Dell to the stand.

MR. MORSE: Objection.

THE COURT: I'll have the jury step out for one moment.

(Jury leaves courtroom).

THE COURT: Mr. Morse, what is your objection?

MR. MORSE: I want an offer of proof as to the area that counsel intends to get into.

If he is going to go over the subject of his cross then he is buttressing and repeating himself, and it is my understanding he is going to ask him abo??out of court records, which would be improper, and I'm objecting in advance to once again asking this witness questions about documents not in evidence from State Farm, which is where I think he is going.

THE COURT: Yes.

MR. COFFEY: I'm going to ask him if he was treated by Rockaway Chiropractic Office in August of 1995, and I'm going to ask him if he was treated by Rockaway Family Chiropractic Office in 1995. That's my two questions.

THE COURT: The objection is overruled.

MR. MORSE: I ask that he not show the documents not in evidence.

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MR. COFFEY: I won't show him, Judge.

THE COURT: Okay.

COURT OFFICER: Jury entering.

(Jury enters courtroom).

THE COURT: Call your witness, Mr. Coffey.

MR. COFFEY: At this time I call Shawn Dell.

(whereupon, the witness, Shawn Dell, resumed the witness stand).

THE COURT: The witness is still under oath.

DIRECT EXAMINATION

BY MR. COFFEY:

Q Mr. Dell, between August 4 of 1995 and August 23, 1995, did you receive chiropractic treatment at the Rockaway Chiropractic Office?

A No.

Q On August -- on December 21 of 1995, did you receive chiropractic treatment at Rockaway Family Chiropractlc Office?

A No.

MR. COFFEY: I ask this be marked for identification.

MR. MORSE: Objection. Here we go again.

THE COURT: For identification, yes. One document?

MR. COFFEY: Yes, three pages. Four.

THE COURT: Exhibit J for identification.

(Received and marked Defendant's Exhibit J for Identification.)

MR. MORSE: Objection. He is now showing it to the witness.

THE COURT: Overruled.

Q I ask that you review those documents.

(Reading.)

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Q Does that -- does reviewing those documents refresh your recollection as to the treatment you received --

MR. MORSE: Objection.

THE COURT: Objection sustained.

Q Does that refresh your recollection --

THE COURT: Sustained.

MR. COFFEY: I have no further questions.

MR. BLUNDA: No questions.

MR. MORSE: I have just one follow-up question for this witness.

CROSS-EXAMINATION

BY MR. MORSE:

Q Did you ever meet anybody else named Shawn Dell in your life?

MR. COFFEY: Objection.

THE COURT: Overruled.

A I have a friend named Dell.

Q Did you ever meet any people with the last name Dell?

A Yes.

MR. MORSE: I have nothing else.

THE COURT: Any redirect based on that?

MR. COFFEY: No.

THE COURT: You may step down, you are excused.

MR. COFFEY: Defendant rests.

THE COURT: Jurors, there are matters which I have to discuss with the attorneys in your absence. Therefore, I will excuse you until 2. It is unlikely that you are going to get the case today, you'll get the case tomorrow most likely, so I'll see you at 2 o'clock.

Have a good lunch and do not discuss the case. Thank you for your cooperation.

(Jury leaves courtroom)

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THE COURT: Mr. Blunda, I'll hear your motion.

MR. BLUNDA: Your Honor, at this time I'd like to renew my motion to dismiss the third-party complaint for failure to make out a prima facie case on all the grounds set forth on the record on Friday.

If you care for me to reiterate I'll be happy to.

THE COURT: No, you don't have to.

MR. COFFEY: Your Honor, I understand now after my review of the case of Maria S. v. Willow Enterprises. I saw what you said, that we would talk about that further, and it does go to causation here.

I just think that in this case, from the expert testimony of Jean Miele, wherein Mr. Miele stated that there was -- that the installation of the marble at the top step was improper, combined with the credibility of the plaintiff, which I believe has throughout the pendency of this trial been severely undermined, I believe those two factors in and of itself has produced enough information to allow the case to go to the jury.

That's my opposition to his motion.

THE COURT: You have the transcript.

MR. COFFEY: Yes.

THE COURT: With word indexing. Now or never.

Show me one word of testimony -- not expert, by fact witness -- in which it is stated that the accident was caused by any of the factors cited by Mr. Miele.

MR. COFFEY: There are none, but --

THE COURT: Did you say, “None?”

MR. COFFEY: There are none.

THE COURT: The motion is granted, you're excused. The clerk shall enter judgement dismissing the third-party complaint against John Moroney and Kelliann Dell.

MR. BLUNDA: Thank you, your Honor.

THE COURT: I cut you off, I'm sorry. I heard the word “none” and went crazy.

MR. COFFEY: The thing is, and I just say, your Honor, I think it is analogous to a fall in a pothole or other type of accident of that nature under the logic of dismissal, there is nothing of a factual record, an unwitnessed accident could never be defended because it would have to be granted as a matter of law anytime it is unwitnessed, and it would be impossible to get a comparative charge based upon that.

I think that the case law holds in New York that the case law does show that, as here, with the Appellate Division's other ruling, combined with the other factors, I think it is enough to get to the jury.

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I have respectfully -- that's my position. If you use that analogy, if it was ever an unwitnessed accident there could never be liability if a plaintiff never said I wasn't looking where I was walking, I didn't see the hole, in barring circumstances like that, we could never defend any type of case, and I think there is some case law out there -- I apologize for not having the motions on this subject, I've been before the Court with every other subject under the sun -- but I think there is case law out there that does say under that proposition that it does go -- that there can be a case.

That's my only opposition.

THE COURT: I disagree, and I will point out that the Appellate Division's ruling addressed the credibility of the expert witness' affidavit.

I don't know that the Appellate Division or I -- I was the judge who had the case at the motion level -- I don't know if Mr. Dell's testimony at his deposition was considered or submitted in conjunction with that motion.

So the third-party complaint is dismissed. The clerk shall enter judgement accordingly.

MR. BLUNDA: Thank you, your Honor.

THE COURT: We have some housekeeping.

MR. MORSE: Judge, I want to make an application for rebuttal testimony.

THE COURT: I'll hear that.

MR. MORSE: Your Honor, as part of the defense case there was an exhibit introduced into evidence, a transcript of a hospital record that makes reference to a history supposedly given by Shawn Dell at JFK Hospital on May 28, 1998.

I'd like an opportunity to recall Shawn Dell on the issue of that entry as to whether or not he told anybody that.

Secondly, during the testimony of -- that's it.

THE COURT: Mr. Coffey.

MR. COFFEY: I didn't put a contention on my case, one thing, I put the record in, your Honor, and the thing is I think the record speaks for itself.

There is no -- nothing that would rise to the level of causing a rebuttal because it is his history that he gave. The opportunity Mr. Morse had to voir dire the executive director of the Kennedy Medical Center, went through with what he thought was improper record keeping or whatever he thought, the record speaks for itself.

Mr. Dell denied on his direct, the issue came up, Mr. Dell denied any prior back injuries. It is in the copy of the transcript. He specifically said I never had prior back injuries.

Now to put a rebuttal case on where he is really rebutting his own testimony where he said that because we found that, I think is surreptitious.

THE COURT: Read into the record the portion of the medical record. Read that history into the record.

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MR. COFFEY: May I approach to get the record?

MR. MORSE: I've got it, your Honor.

THE COURT: Read it from the copy.

MR. MORSE: “History of trauma to lower back while lifting two years ago. Diagnosis not known, but was treated with Methocarbamol.”

MR. COFFEY: He denied Methocarbamol use and he did not --

THE COURT: One moment.

MR. COFFEY: He said there was no --

THE COURT: One moment.

MR. COFFEY: Your Honor, pages 251 to 252 on the recross of Shawn Dell.

THE COURT: The subject was covered during the testimony that Mr. Dell has already given.

MR. MORSE: Not the issue of him giving a history of prior back trauma two years earlier, and certainly not during direct.

This hospital record came in as part of the defendant's case. I'm going to ask him one question, did you ever tell anybody that.

THE COURT: I do recall he denied any prior injury to his back.

MR. MORSE: No, he didn't. That was part of an EBT page that counsel read, but it wasn't part of the testimony.

THE COURT: It is testimony on this record at trial.

MR. MORSE: But I want to be able to rebut that he reported -- that he supposedly told someone at the hospital that, and he has not had a chance to do that.

All it is is one question.

THE COURT: Your application is denied.

MR. MORSE: I have a further application for rebuttal, that I be permitted to call John Moroney to testify he saw the plaintiff on a weekly basis prior to May 28, '98, and has testimony that he never complained of any back pain, he never observed any back problems or any conditions vis-a-vis his back.

And defense counsel has constantly been raising the issue of degeneration and prior back problems by way of innuendo, like the one hospital record. I ask a chance to present that --

THE COURT: What affirmative proof are you calling

Mr. Moroney to rebut?

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MR. MORSE: The fact that there was any prior back injury or any prior back --

THE COURT: Did it come through someone's testimony?

MR. MORSE: Did what come through --

THE COURT: The testimony that you would like to rebut by calling Mr. Moroney.

MR. MORSE: It comes in the form of the hospital record that's in evidence.

THE COURT: So you are calling his brother-in-law to rebut something in the hospital record.

MR. MORSE: To rebut the allegation that he reported a prior back trauma two years before the accident.

If he is at his brother-in-law's house and he had personal knowledge of whether he had a back injury, I feel that's relevant --

THE COURT: That application is denied. Any other applications?

MR. MORSE: Yes, Judge.

At this time I would ask that the witness list which was provided to the Court be marked as a court exhibit.

THE COURT: Was that provided to me?

MR. MORSE: Yes.

THE COURT: Show me.

MR. MORSE: I didn't get a copy. Counsel handed you up what he described --

MR. COFFEY: I hand wrote what the witnesses would be.

THE COURT: Do this -- I don't have it. State on the record who they were.

MR. MORSE: I know that one of them on the list was Dr. Pascuitti and I know that a list was handed up to the Court and I didn't get a copy of it and I don't know where it is now.

MR. COFFEY: I will address that pretty quickly.

The pleadings were given over. If you look at the Verified Bill of Particulars and the Supplemental Bill of Particulars the reason -- he is not a doctor, Jim Pascuitti was retained as a vocational rehabilitation specialist was because contained within the pleadings as this case developed the Plaintiffs put out there that there was a diminution and lost wage claim out there. During this case the record is devoid of evidence that shows that there is a future diminution and they presented no evidence to show that.

Now in the absence of that Dr -- Jim Pascuitti we do not have to put him on the stand. Its his burden --

MR. MORSE: I just want this marked as an exhibit. I don't want --

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THE COURT: Let's do this, what he is seeking as a representation by you is you indicated to the Court that you would call Dr. Pascuitti.

MR. COFFEY: I mentioned him in my opening and I am bound by that.

THE COURT: Did you indicate that you would call him?

MR. COFFEY: Yes, I did in my opening, yes, I did, Your Honor.

MR. MORSE: Also on the witness list it was handed up to the court. I don't know where this document went. I never got a copy. Counsel made specific reference to it when he handed up his papers pre-trial and I would like to get it marked as an exhibit.

THE COURT: Let's assume that his name -- that it was handed up and Pascuitti's name was on it.

MR. MORSE: I just want it marked as a Court exhibit, that's it, nothing further.

THE COURT: I can't find it. It is established that he admitted that he handed it up with Pascuitti's name on it.

MR. MORSE: All right. That's fine.

MR. COFFEY: Yeah, no problem.

MR. MORSE: Okay.

MR. COFFEY: I handed and a--

MR. MORSE: I have one more motion, too, first.

THE COURT: Yes?

MR. MORSE: At this time I would move to conform the pleadings to the proof and to add in a violation of Section 2.3-c of the regulations Tag Lines a copy of which I already furnished to the Court.

THE COURT: You did furnish that already?

MR. MORSE: Yes. I just want to make it part of the record.

THE COURT: That's fine. You are alleging three Industrial Code Violations?

MR. MORSE: That's correct.

THE COURT: That motion is granted.

MR. COFFEY: I have three, the first is the motion to dismiss the claims that he amended yesterday because I was not aware of that motion to conform to the pleadings until yesterday.

THE COURT: I have nine more Court Exhibits, many of which are memorandums from your office. We will mark these as a Court Exhibit.

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MR. COFFEY: Yes.

THE COURT: Do you have anything new that you have not already handed up?

MR. COFFEY: Yes.

THE COURT: That's fine.

(handed to the Court)

MR. COFFEY: The liability one first which would be the Motion in Limine to dismiss the 241(6) claim based on Violation 12 NYCRR Section 23-2.3(c), 23-6.2(d) and 23.1.7, for the same reasons, Your Honor. I did look at did some research on the 23.1.7. It just doesn't appear that its applicable to this case because the 23.1.7(d) is speaks about elevated working surface which is in a slippery condition ice, snow, water, grease and any other foreign substance which may cause slippery footage --

MR. MORSE: I don't mean to interrupt but --

THE COURT: Well, then don't.

MR. MORSE: I thought the Court decided this.

THE COURT: Don't.

MR. COFFEY: Yesterday I was told I had the wrong subdivision by Attorney Morse so I went back and read that last night, and although he alleges he slipped he did not testify the area which he was working was covered in ice, snow, water, grease or foreign substances as contemplated by the code. The case that I found was pertinent is Johnson verses City of Corning, 702 NY supp. 2d 489 and where plaintiff slipped or tripped on electrical wires and fell into a waste-water treatment tank alleging a violation of slipping hazard the city was found not liable based upon the electrical wire condition the electrical wires, and --

THE COURT: Did they distinguish the case because he was not at an elevated height?

MR. COFFEY: They, no they did not.

THE COURT: So that's the argument you are making.

What do we learn from that case that we can bring to this case?

MR. COFFEY: That he was not -- well, that he slipped or tripped on electrical wires which is much like the debris that was explained in this case and that that is not a 23-1.7(d).

THE COURT: The electrical wires are not?

MR. COFFEY: Right.

THE COURT: What about sawdust and plywood?

MR. COFFEY: I would say the sawdust and plywood is analogous to electrical wires.

THE COURT: So if he slipped on anything 23.1.7 doesn't apply, is that it?

MR. COFFEY: No, I think it goes to a slippery condition being ice, snow, water, grease --

THE COURT: What about other foreign substances as stated in the section?

MR. COFFEY: I think other foreign substances meant to be things where -- the reason for the Industrial Code is things are put down to clean -- to absorb things to be cleaned up, wet conditions, liquid-condition that's what I believe. That's how I think the code is -- under the way the code was designed I think that's what it was intended to provide work place safety from.

THE COURT: So if it had been wet sawdust, for example, no problem?

MR. COFFEY: No, I'm not going to say that.

THE COURT: No?

MR. COFFEY: Then I will move on.

Under 23-2.3(c) with the steel that provides while steel panels--

THE COURT: I'm sorry to interrupt you but all of this is set forth in your memorandum, right?

MR. COFFEY: Right.

THE COURT: So I have them all. They will be marked as Court Exhibits and we wall move on with the charge conference.

MR. COFFEY: The other one is for a missing witness for Plaintiffs' failure to call Steve.

THE COURT: Steve who?

MR. COFFEY: I know, that's the question.

THE COURT: Excuse me?

MR. COFFEY: I agree.

MR. MORSE: We don't know either so how can we possibly find him? We tried. He is not under our control.

THE COURT: Was Steve's last name ever put on this record?

MR. COFFEY: No, it was disclosed as Steve. It was disclosed as a witness named Steve.

THE COURT: I know plenty of people named Steve.

You won't get a missing witness charge on Steve.

MR. COFFEY: Okay.

The final one is a Motion in Limine to dismiss lost wage claim --

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THE COURT: That's all in your memorandum, right?

MR. COFFEY: Yes.

THE COURT: We have it, believe me.

MR. COFFEY: Thank you, Your Honor.

THE COURT: We will go to the charge conference.

Is there any objection -- by the way, the Plaintiffs' request to charge has been marked as Court Exhibit XIV. The Defendant's request Court Exhibit XV.

Is there any objection to any request the Plaintiff has made?

MR. MORSE: I haven't seen his and he hasn't seen mine. I have a copy of mine here.

THE COURT: You are supposed to furnish each other with whatever --

MR. MORSE: The Court is quite correct. I am furnishing a copy of mine now.

Judge, I take it that you are going to take up the questions separately?

THE COURT: I will.

MR. COFFEY: I will review it now. I e-mailed it to you, I didn't print a copy for myself and didn't bring a copy for my adversary.

THE COURT: I have an extra copy of the --take a few seconds and read each others requests.

MR. MORSE: May I approach to get that copy, Your Honor?

THE COURT: You may.

MR. MORSE: Thank you, Judge.

THE COURT: While you are doing that, I will read into the record with the reporter other items that will be marked as Court Exhibits.

Court Exhibit XIII is the Defendant's Motion in Limine with respect to 23-1.7 of the Industrial Code.

Court Exhibit -- that's Court Exhibit VIII instead of XIII.

Court Exhibit IX is the Motion in Limine with respect to Labor Law Section 241(6).

Court Exhibit is the Motion in Limine again with respect to Labor Law 241(6), this one is dated October 16, 2003.

Court Exhibit XI is a Motion in Limine with respect to the issue of causation.

Court Exhibit XII is a Motion to Strike Dr. Ron Missun's testimony.

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Court Exhibit XIII is the Defendant's trial brief.

Court Exhibit XVI is the Plaintiffs' proposed verdict sheet.

Court Exhibit XVII is the Defendant's proposed verdict sheet.

Court Exhibit XVIII is the Defendant's Motion in Limine with respect to Labor Law 241(6) and this one is dated October 21, 2003.

Court Exhibit XVIIII is a memorandum with respect to the Defendant's request for a missing witness charge.

Court Exhibit XX is a motion with respect to Plaintiffs' claim for lost earnings.

Have you had enough time to read these over?

MR. MORSE: Yes, Judge.

THE COURT: Is there any objection to anything the Plaintiff has requested?

MR. COFFEY: I object to the failure to produce witness --

THE COURT: Which witness --

MR. COFFEY: Jim Pascuitti for the reason I stated before. I think there's not a claim that needed to be rebutted. Mr. Dell said that he would be able to go back to work. There was no testimony that said that he could not go back to work. There was no testimony that was elicited throughout the pendency of the trial that said that he could go back to work in a diminished capacity. So for that reason we chose not to put James Pascuitti on the stand.

MR. MORSE: There was testimony from Plaintiff's treating doctor, Dr. Jupiter and testimony from Hollis which was uncontradicted by the defense doctors that he could not go back to iron work and there was further testimony from Dr. Jupiter he could go back to sedentary work and the question becomes is how much was the sedentary work going to pay. This was the exchange by Defendants of this expert. There was testimony from the Plaintiff that he saw the expert, took some tests and was interviewed. We relied on that. That issue has already been put on the record, now he's failed to call a critical witness and I submit that under the circumstances that a missing witness is appropriate.

THE COURT: Decision reserved.

My first question is whether -- decision reserved.

Next?

MR. MORSE: Judge, just for the record, I withdraw my request under 2:285 because I didn't present any proof of medical expenses.

THE COURT: Yes.

MR. COFFEY: The next one is under Labor Law 2:216(a) as to the Plaintiff's contentions I believe the statute should be read in. I know I disagree with the testimony adduced at trial whether those contentions were made.

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MR. MORSE: Well, they are simply my contentions. I don't see how counsel can disagree with what my contention is. If its my contention its my contention.

THE COURT: I will do it the following way, I will state that the Plaintiff asserts that there were violations by his employer of 23-1.7(d), 23-6.2(d)1 and 23-2.3(c). I will read to the jury the pertinent substance of the sections.

Go ahead.

MR. COFFEY: And I also the final one is 2:306 as to subsequent injury and accident. I think the charge is --

THE COURT: You think its --

MR. COFFEY: Its inappropriate for this case. I do believe that there are separate cases that separate accidents. I think its for summation whether they are interrelated or not.

MR. MORSE: Judge, that charge specifically makes reference to those situations where the original injury causes a second accident and in this case the uncontroverted testimony was that his back went into spasm causing him to fall and that's caused by the original injury and certainly an appropriate section to be read to the jury.

THE COURT: 2:306 is definitely appropriate under the facts of this case.

MR. COFFEY: That's it.

THE COURT: Is there anything objected to with respect to the Defendant's request?

MR. MORSE: First -- just generally to the extent that the Defendant's request do not exactly quote the P.J.I. sections, I would object to anything that departs from the P.J.I. and I haven't had a chance to compare all 20 pages --

THE COURT: With respect to each one I will give what is in the P.J.I.

MR. MORSE: Thank you.

The first one I have an objection to is Judicial Notice. I don't think it applies in this case, that's all.

THE COURT: Mr. Coffey?

MR. COFFEY: Judicial Notice of the sections of the Penal Code they are cited to in the Certificate of Conviction.

THE COURT: No way.

Next?

MR. MORSE: Next is direct and circumstantial evidence, we are not offering circumstantial evidence here.

THE COURT: Mr. Coffey?

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MR. COFFEY: I think there is some circumstantial evidence that was given that was elicited during this trial. Circumstantial evidence was given during this trial being in the use of certain instruments and he how they were used. He didn't know how they were used and I don't think it was direct evidence so I think its more on line with circumstantial. But that's okay.

THE COURT: You are withdrawing it?

MR. COFFEY: I will withdraw it.

THE COURT: Okay.

Impeachment by prior inconsistent testimony, what are we talking about?

MR. COFFEY: The inconsistent deposition transcript that was read into the record at the end of day --

MR. MORSE: I consent to that, Judge.

THE COURT: You consent to that charge?

MR. MORSE: I do.

Implied assumption of risk I object to, Judge.

I don't think there is an assumption of risk applies to Labor Law Section 241 sub 6 cases whatsoever. He doesn't assume the risk of a statutory violation.

THE COURT: Before we get to that, I will give the charge under 241(6) implied assumption of risk. What is that?

MR. COFFEY: I think it is an implied assumption of risk Mr. Dell was working that area, he testified several times during his direct, his re-cross -- his cross, re-cross, re-direct there was debris that he would continually kick out of his way when he was working. So I believe that's in line with the assumption of risk and the case law would show that is an assumption of risk.

THE COURT: I decline to give that charge.

Next?

MR. MORSE: Counsel has asked for the aggravation of the preexisting injury charge. I'm not sure if it applies but I have no objection to it.

I have nothing further.

MR. COFFEY: I will withdraw it, Your Honor.

THE COURT: One party doesn't object, the other party withdraws it.

MR. COFFEY: I will withdraw it.

THE COURT: You withdraw it?

MR. COFFEY: Yes. I just want to get this over with.

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THE COURT: So that's it. Summations.

I will show you the verdict -- this is not the final verdict sheet, so I won't mark it. I don't have the comparative negligence questions in it but what you will have will be this with the comparative negligence questions. Take a look at it particularly the 23 -- 241(6) questions.

MR. MORSE: I just have one question, is the Court going to charge comparative negligence as to the accident of December 1, 1998 -- no December 1, 2000?

THE COURT: No, the May 28, 1998, accident.

MR. MORSE: I would agree that's correct, yes.

(Whereupon, there was a pause in the proceedings.)

THE COURT: Anything, Mr. Coffey?

MR. COFFEY: No. The comparative portion will be put into --

THE COURT: Yes, it will be was Shawn Dell negligent on May 28, 1998, was his negligence a substantial factor in causing injury to himself, then there will be the apportionment part between Shawn Dell and his employer.

MR. MORSE: I have no objection to that, Your Honor.

I just have one question for the Court. I see the Court has included a separate question as to each of the regs whether that violation was a failure to use reasonable care. Some Courts do it, some Courts don't. I would ask it not be done in this case.

THE COURT: I tried the questions they have in P.J.I.

MR. MORSE: I understand why the Court did it, I am just saying some judges do some judges don't right in this very courthouse and I prefer they not be in there but because its in the charge for sure. But that's my preference.

MR. COFFEY: My preference would be to use what's in the P.J.I.

THE COURT: That's -- the Court of Appeals is the best guide, the Appellate Division second, P.J.I. is the third. Its denied.

2 o'clock.

MR. COFFEY: We will have summations at that time, Your Honor?

THE COURT: Yes.

(the luncheon recess was taken and the trial continued at 2:00 p.m.)

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