2004 WL 5355799 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
New York County

Robert J. MASSIE, Jr., Plaintiff,
v.
CARNEGIE HALL CORP. and Tishman, Construction Corporation of New York, Defendants;
Carnegie Hall Corp. and Tishman Construction Corporation of New York, Third-Party Plaintiff,
v.
Stokes Industries, Inc., Third-Party Defendant.

No. 124269/00.
December 7, 2004.

(Transcript of Thomas Kolb, M.D.)

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:

Messrs. Friedman, Levy & Goldfarb P.C., Attorneys for Plaintiff, 250 West 57th Street, New York, New York, By: Ira H. Goldfarb, Esq., of Counsel.

Messrs. Harrington Ocko & Monk, LLP, Attorneys for Defendants and Third Party Plaintiffs, 81 Main Street -- suite 215, White Plains, New York 10601, By: Steven R. Kramer, Esq.,of counsel.

Law Office of Charles J. Siegel, Esq., Attorneys for Third-Part Defendant, 40 Wall Street, New York, New York 10005, By: Peter E. Vairo, Esq., of Counsel.

Before: The Honorable Alice Schlesinger, Justice. (And a jury.).

Evelyn Mysch, C.S.R., R.P.R.

Official Court Reporter

(MRIs are marked Plaintiff's Exhibits 3A. For identification.)

(The jury entered the courtroom and the following occurred:)

THE COURT: Good morning, everybody. Nice to see you, please be seated, and I really appreciate the fact that you are all here on time. Despite the bad weather and everything else, and we have to attend to a couple of things but now we are ready, so Mr. Goldfarb, if you call your next witness please.

MR. GOLDFARB: Thank you. Plaintiff calls Doctor Thomas Kolb to the stand.

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THE COURT: Doctor, please step up, please. DR. THOMAS KOLB, called as a witness having been duly sworn, testified as follows:

THE COURT OFFICER: Please have a seat.

And in the loud and clear voice, state your name, address, spelling both your first and last name.

THE WITNESS: Thomas Kolb, T-H-O-M-A-S K-O-L-B, 222 East 68th Street, New York 10021.

THE COURT: Good morning, Doctor Kolb. Nice to see you. We ask that you keep your voice up because we are interested in what you have to say.

THE WITNESS: Thank you.

MR. GOLDFARB: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. GOLDFARB:

Q. Could you please describe for us -- withdrawn. You have a license to practice medicine in the State of New York?

A. I do.

Q. Could you please describe for us your educational background and professional background.

A. I attended college here in New York, Queens college and medical school from 1979 through 1983 in Brooklyn at Downstate Medical Center, graduated with an M.D. degree, and became licensed in 1983 to practice medicine. I then did a pediatric internship and residency for three years and became a board certified pediatrician in 1986. In 1986 through 1990, I did a second residency in radiology, diagnostic radiology, and finished that in 1990, and again became board certified in radiology as well, so it was two certifications, one in pediatrics and one in radiology in 1990 through the current. I have been practicing diagnostic radiology from 1991 to the present, in Manhattan.

Q. What hospital affiliations do you have?

A. I did my residency in radiology in Columbia-Presbyterian Medical Center and assistant clinical professor at Columbia University College Of Physicians and Surgeons, here in New York.

Q. What professional affiliations do you have?

A. Many affiliations. I belong to the Radiologic Society of North America, American Roentographic Society, New York Metropolitan Breast Cancer Group and so on, American Board of Pediatrics, American Board of radiology.

THE COURT: Do you still practice any pediatrics or is it purely radiology?

THE WITNESS: No, just on my own son.

THE COURT: I don't know if that's a good thing.

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THE WITNESS: No, I don't.

Q. Doctor, have you ever testified as an expert in a court proceeding, such as this before today?

A. Yes, I have.

Q. And approximately how often do you do that?

A. Approximately five times per year over the course of a number of years.

Q. Have you ever testified in a case at the request of my office prior to today?

A. Yes, once prior.

Q. And are you being paid for your time away from your office here today?

A. Yes, absolutely.

Q. And can you please tell the jury what ??our fee here.

A. $5,500.

Q. Were you asked by my office, Doctor, to review certain MRI films in connection with your appearance here today?

A. Yes.

Q. Doctor, I'm going to show you what's previously been marked as Plaintiff's Exhibit 2 in evidence. Would you please take a look at the films?

MR. GOLDFARB: Can I approach?

THE COURT: You can approach.

Are those the films you were asked to review.

THE WITNESS: Yes.

Q. Were you provided with some background information as well at the time you reviewed the films?

A. I was.

Q. What type of films are those?

A. These are MRI films of the lower back, lumbar spine.

Q. And were those films taken on June 13, 2001?

A. Yes. They were.

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Q. Do they indicate they are of Robert Massie spine?

A. It does indicate that.

Q. Could you explain to the jury, Doctor, what an MRI is, how it differs from a x-ray or CAT scan?

A. Yes, MRI stands for magnetic resonance imaging and using magnetic rays instead of x-ray which is used in x-rays. Magnetic rays are very safe and basically the way we perform it, there's a very large machine that an MRI is and the bulk of the machine is because it's a powerful magnet, and we have a computer that's able to tell the magnet when to pulse waves into other bodies and the magnetic waves when they come into the bodies, interact with parts of your body, protons and so on. In any case, we are able to make pictures of the body from the reaction of the -- to the magnetic waves and these pictures that we can make are very detailed and we are able to actually print them out on sheets of film and look an them and we can put the magnetic waves into the body at different waves, different strength of the wave. We have a different time period that they go into the body, a different angle that they go into the body, and by doing these different things, we can make watery substance look one way and another like fat look another way.

By talking all of this information we can look on film and make a diagnosis. It is a very powerful test and differs very much from x-rays because in regular x-rays, for example, of the back, we really just see the bones because x-rays just looks at the difference between things that are hard and soft, so hard in the back are bones, and soft are the muscles, the tendons, ligaments, disks that are in between the bones and you can't see them on a regular x-ray. But on MRI scan, not only do you see the bone, but you see inside the bone, the bone marrow and in between the disks and the also the -- as well as muscles around the spine. So MRI shows us that. It is becomes the test of choice when necessary to look at the back if a patient that has a problem or symptom.

THE COURT: Doctor, that was fine. Could you go slower in the future?

THE WITNESS: Yes.

THE COURT: Thank you.

Q. And do the MRIs have different diagnostic abilities from the x-rays that you mentioned?

A. Very different diagnostic abilities. We talked about the MRIs being able to look at the actual disks that are situated between the bones that we will look at in a few minutes, whereas x-rays can't do that.

X-ray can only show the bones and a space between the bones and we know the disk is but you can't actually see what the disk looks like, you just a space. So there's a very different diagnostic capability between an MRI and plain x-ray. Very different teat.

Q. Doctor, in this particular case, were you asked to review the films to determine whether there any abnormalities in the soft tissue structures in Mr. Massie's lumbar spine?

A. Yes.

Q. I'm going to put forward a model.

Would this be of assistance to you in explaining different structures of the spine to the jury?

A. Yes.

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MR. GOLDFARB: May I just put that up there.

May the witness leave the seat, if he needs to?

THE COURT: Yes.

Q. Doctor, is the model anatomically correct?

A. Yes. It is.

Q. Could you just explain to the jury the structures that you just describing?

A. Well, this model is of the entire spine. This is the bottom of the skull, and this is the neck, and this is the back, our back, mid-back, and then we have the lower back here.

And we are going to be focusing in on the lower back.

Now, there are a number of bones in each part of the spine. We all have the same number of bones, and in the lumbar part of the spine, there are five bones, and since we are -- we -- we want to convey information, we want to be on the same page, we number these bones L for lumbar, L1 for the first bone, L2, L3, L4, and L5.

And after those five lumbars coming down here from the lower of the back is the sacrum. So the first bone in the sacrum is called S, for sacrum, 1. So we are going to be looking from L1, first lumbar bone, which is going to be this bone right here, through S1 here. (Indicating.)

Now, these bones are there to stabilize our spine but also most importantly to protect the spinal cord and the nerves that come out from the spine. So, from the brain, which we talked about this being the base of the brain, the spinal cord begins and goes down the back. The spinal cord actually goes back till about the 12th bona of the mid back, the thoracic spine which we are really not going to talk about.

But the point is in every single level of the spine, nerves have to come out to go either to the arms or legs, every part of the body.

The way these nerves come out spine is through these holes on the side. If you turn either looking straight, you will see the jello projections. Those are called the nerve roots. And each one of these roots, this is on the right side of the body, this is on the left side of the body, each one of these roots will go to a specific area. So, there will be a specific nerve that will go to the buttocks. There will be a right side. There will be a specific nerve on the right that goes to the thigh and specific nerve that goes to the calf, both on the right, both on the left. These nerves come out of the holes in between the bones, and fancy name for these holes is called foramen.

So the nerve that goes through the hole, this hole is called neural foramen, or the hole in which the nerve goes through, and we are symmetric, left and right, so there's one on left and one on the right.

When we talk about the bones, we said there was L1, 2, so on. There's a foramen and hole between the first and second on left and one on right. S we would call that left L1 -- 2 neural foramen. The left between the first bone and second neural foramen, and the right, L1, the right here, L1 -- 2 neural foramen, and that happens throughout the entire spine, no matter what we are talking about, but we are going to focus on the lower part here.

In between the bones, when we move around, jump up and down, the bones don't crunch into each other. There are these rubbery substances called disks, and these are the disks that we may have heard about, the disks in the back.

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These are gelatinous substances like jelly, so when we move around, they are like little shock absorbers or springs so the bones don't crunch into each other.

Now, what keeps these disks in place, why don't they spurt out like jelly or tooth paste, they are kept in place by ligaments and there is a ligament that runs down the front of the spine and runs down the back, up and down the back of the spine. One in the front of the spine is called the anterior or front, longitudinal, long, ligament; and the one in the back is called the posterior, or back longitudinal ligament.

So we have these ligaments hold the disk in place.

Finally we have one other ligament that goes around the disks in every level and that is called the annulus. The point is and only point is that the disks are held tightly in place, so when you look at a normal lumbar spine, the disk should go to the edge of bone and stop it, shouldn't go beyond the margin of the bone, because the ligaments hold it in place.

Now, let's say there is a partial tear to one of the ligaments, then the disk will bulge out, push the ligament out, but not completely break through and that's a disk bullet. If there's complete tear, the disk will then push through and that's a disk herniation, a herniated disk. That's the difference between bulges and herniation?

Now, that's all the anatomy you really need to know. Bones in the back are just completing the spine, but the spinal cord runs in between here, in between the front bones and the back bones here, and at every level the nerve roots come out, and I think that's really all the anatomy that you need to know.

Q. Doctor, if we do have a situation where there is a bulge or a herniation which affects the nerve roots, what would be the result?

A. Well, the nerves control pain. You could feel pain, you could feel a difference in sensation for vibration or hot or cold, and it could also affect motion, because each one of these nerves go to a specific area of the body, to different muscles. So if the nerve is affected, being bothered, you can feel pain to that certain area or difficulty moving that certain area. Those are the two of the functions of the nerves, so those are two possibilities that you would feel if a nerve was being bothered or pushed on by a structure.

Q. And when you say sensation, would that include the feeling of numbness?

MR. KRAMER: Objection. Leading

THE COURT: Yes. Try not to lead the witness, okay.

MR. GOLDFARB: “Sensation” came from his -- the witness' own word?

THE COURT: Still leading, as long as Mr. Objected.

MR. GOLDFARB: I apologize, Judge.

A. There are a number of things that the nerve controls. We talked about pain, we talked about motion, we talk about motion, tingling, you can lose the reflex. We take the reflexes, the nerves control that as well. That's another sign of having an abnormality.

The ability to differentiate hot and cold. Those are the major functions of the nerves.

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Q. Doctor, could you please -- you had an opportunity to review the MRI films which have been marked as Exhibit 2 in evidence, Doctor?

A. Yes.

Q. Could you please tell the jury what your findings were upon your examination of those films?

A. Well, there --

MR. GOLDFARB: One second, I will be requesting the easel.

THE COURT: Okay.

(Pause in proceedings.)

Q. Doctor, did you ask that certain of the panels on the films being enlarged for purposes of your testimony today?

A. Yes.

Q. Would they be of assistance to you in explaining your findings to the jury?

A. Yes.

MR. GOLDFARB: I have one marked already as Exhibit 4 for identification, and I would like these two marked as Exhibits 5 and 6 for identification.

THE COURT: Sure, other counsel have seen it?

MR. GOLDFARB: Yes, Judge.

(Films marked Plaintiff's Exhibits 5 and 6 for identification.)

MR. KRAMER: No objection.

MR. VAIRO: Just identification.

THE COURT OFFICER: Marked for identification, counsel.

MR. GOLDFARB: Just leave it standing there for a little bit.

Thank you very much.

Q. Doctor, prior to taking the stand, did you have an opportunity to look at these three exhibits?

A. Yes.

Q. Are they fair and accurate enlargements of films that have been marked as Plaintiff's Exhibit 2 in evidence?

A. Yes.

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Q. Please feel free to use these at this time, Doctor, if it would be of assistance to you in explaining your findings to the jury.

THE COURT: It would be helpful, use each one. If you could tell us which plate it represents so that the record will be clear on that, okay.

THE WITNESS: Okay.

A. Enlargement is a picture of an MRI scan of this patient, Robert Massie, and just to go over a little bit of the anatomy that we just learned, these gray structures here, and remember what I told you, we can position the magnetic waves into the body in different ways, we can change the whiteness and the darkness of what I'm going to show you in order to make a better diagnosis. The bottom line is, I'm going to -- we talked about the number of bones in the back and this is L5 here. So this is L4, and L3. L2, L1.

This is on --

THE COURT: This is 4 for identification.

THE WITNESS: All right. 4 for identification.

A. These are bones here and we talk about the in between the bones are disks, the white structure are the disks and lower down, between 4 and 5, and between S5 and S1 the disks are darker between here and here and here and here. (Indicating.)

Now, we also talked about the disks coming to the edge of the bone and stopping, not going further than that. And you will see that when you look at the disk between 4 and 5 and the disk between 5 and 1, it comes out beyond the limit of the bone here.

Let me just start and backtrack for one second and say that when we take the pictures, looking at the patient from the side, the side of this model, I'm going to put this model on the side, just to line it up with the MRI pictures. So we are looking at it from the side here. Now there's a left side and there's a right side. But these pictures are just a few millimeters thick, so on the real MRI, we blew this up so it's easier to see, but on the regular MRI there are many pictures because we take pictures going from right to left, so we take a pictures of right side of the spine, a little bit more to the center and more to the center and each one is just a couple of millimeters.

In this case we took ten pictures, going from right to left. This picture here is dead center, in the middle of the patient. We chose the center picture to pull out there so what we are looking at is the very center of the spine, which you really don't see when you look to the side, because you are seeing the whole spine. We are looking at one very thin slice of the center of the spine. These gray lines are the nerve roots. They come down from the spinal cord from the brain and they come out towards you to the left of the patient, or away from you, to the left and right. Remember we are not looking at just the center of the slides, but the nerve root also comes that way and that way. (Indicating.)

So we are looking at the center here. So we have noted that these disks, these bottom once look different than the others, the two bottom ones.

If we switch the view to look at the right and the left of the patient, we will then -- we would expect to see those holes neural foramen, the holes. They are on the side, spine is in the center. The nerves come down and travel out.

So if we look at number 5, for example, and I am just remarks the numbers here, S1, L5, L4, L3, L2, L1, you will see again -- you will see the bones which are gray and now we will see the disks are dark in this picture but we made them dark for a purpose.

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We took a certain picture in a certain way. We remove from that fat, then we are in the jelly-like watery disk. The reason why we are interested in fat is we talk about the neural foramen, the holes that nerves come out of, what cushions the nerves so it doesn't hit against the bone is fat, so it's another cushioning device that the body has.

These -- this structure right here, between L1 and L2 is a normal -- this is normal. I will put “N” here for normal. Normal neural foramen.

Look at the shape, like a key hole shape, and this black dot to the nerve root that comes out, so we are seeing that on the right side.

Compare this normal one and see what happens as you go down the spine. As you go down the spine, you will see that there's a little bit of pushing in here by the disk, between L2 and L3. There's even more bushing between L3 and L. There's a lot of pushing in between L4 and L5, but look how the top of the neuroforamen in a normal hole is equal to the bottom, the width it was if I would measure out from the top of it, from here to here, and the bottom of it here to here. That's about the same. (Indicating.)

Look what happens here, between 4 and 5. Into being pushed out. What's the result of that? When the bottom is being pushed in by the disk and the disk is doing the pushing, this nerve root touches or gets shoved up a little bit higher and what happens at L5-S1 is that the neural foramen of the hole is completely pushed in, compared to the normal, and what has happened to the nerve root, its pushed up. There's no more fluid around it, no white around this nerve root. This is pushing directly on bone, and that's lost it's ability to be protected, it's being pushed against the bone and may be affected, depending on the patient's symptoms, so what you are seeing here, after the each level, L2-L3, L3-L4, and L4-L5, the disk is pushing beyond the confines of the bone which is a disk bulge and pushes into the neural foramen and narrowing the neural foramen at the whole. The lowest level of the disk has pushed threw a much greater degree, which we saw on the central picture behind it, which was number of 4, here, as this being pushed out. (Indicating.)

And you can see the indentation here, but this is the center. We are looking at the side now, and there's a herniation laterally pushed out to the side, to the right side on this picture number 5. That's narrowing this for foreman and causing pressure upon this nerve.

Now, if you go to the left side of the patient, which is number 6, most likely, yes, number 6, you will see something very similar. I will just mark them again. S1, L5, L4, L3, L2, L1.

Here again, on the normal disk, a normal foramen, sorry, here, between L2-L3, being pushed in, L3-L4 being pushed in a lot more on the left side, L4-L5, you can see the disk beyond the bone pushed in here and L5-S1 being pushed in more on left than the right, but being pushed in on both sides.

The Bottom line is, disk bulges between these top, L2-L3, L3-L4, L4-L5, where there's a partial tear and L5-S1, there is a disk herniation and the result of that is that there's pushing on these neural foramen that contain the nerve roots here which may affect the function of these nerve roots.

And just to go pack to the beginning, the final point is that there's also beginning to be some lost water. We talked about the disk as being gelatinous jelly like and shock absorbers, and the reason that it's shock absorbers is because it contains a lot of water.

And this particular scan here, where we talk about the nerve roots and whiteness around the nerve roots -- by the way is the spinal fluid -- you do a spinal tap to 9 spinal fluid out. That's white. Everything on this picture, water is white. If you look at the disk, they are all white, but these two here are a little darker than the ones above, and we talk about the meaning of that. But the bottom line, the findings are there are multiple disk bulges, between L2-L3, L3-L4, L4-L5 and they are pushing out to the sides and narrowing those holes and there's a disk herniation at L5-S1 also pushing out laterally and affecting the neural foramen and there's a loss of water or it's called desiccation, loss of water, at L4-L5 and L5- and those are the major findings of the MRI scan.

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Q. Doctor, for purposes of your testimony here today, I would like you to assume the following things:

First, that the person of whose lumbar spine these films were taken was 30 years old at the time they were taken, his birthday was the February of that year, these were taken in June, so he was 30 years old.

I would like you to assume that nine months prior, in August of the preceding year, the person who was involved in this accident was involved in an accident where he was belted into a forklift which, as the result of a failed elevator or hoist, went down in the elevator shaft and crashed into the bottom.

I would like you to assume that that person had no prior history of back trouble.

I would like you to assume that that person had never been treated for any back problems.

I would like you to assume that prior to that accident, the person was doing a physically demanding job involving much twisting and turning and lengthy time in the operating seat of that forklift.

I would like you to assume that within one week of that accident, that person was in a doctor's office complaining of back pain in his lumbar area.

would like you to assume that within one month of that accident, the doctor went to a neurologist who found certain findings consistent with lumbar radiculopathy and believed that the radiculopathy was at the L -- involved the L5 nerve root. L5-S1.

I would like you to assume that that person complained of stiffness in his back of pain in his back, of numbness in his left thigh, and of pain traveling from his back to his left thigh.

I would like you to assume that those symptoms remained consistent from the time he first presented to the neurologist up until June of the year 2001 when he had this MRI.

Based on those assumptions, Doctor, are you able to form an opinion with a reasonable degree of medical certainty whether that person suffered any jury in the accident of August 22, 2000.

MR. KRAMER. Objection.

THE COURT: Any injury to his lower back?

MR. GOLDFARB: To the lumbar area.

A. Yes.

Q. And what would your opinion be as to what the injury was?

A. My opinion is, based on the fact that he didn't have any complaints about his lower back prior to a trauma, then had complaints soon after and documented as well, had an MRI within the year showing these findings, and my opinion is that these findings are causally related to the trauma, just out of more common sense than not.

Q. And when you say your findings, could you be specific what your findings are?

A. The findings of the multiple disk bulges that push on the foramen which may affect the nerve roots on both sides.

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The finding at herniation of L5-S1 which does the same but to a greater degree which correlates to what you just told me about a physical examination of the patient, and finding of the early degenerative change in the back at L4-L5.

We are dealing with a very young patient. To me 29 is pretty young. L4-L5, L5-S1 is now desiccating or losing water and is becoming arthritic and so this MRI was done nine months after the trauma with findings of bulges and herniations at those sites that are becoming arthritic without any complaints referrible to the back before the trauma, but only after, so to sum the whole thing up, everything was a result of the trauma.

THE COURT: Desiccation or the loss of water, does that actually lead to arthritis?

THE WITNESS: That's the early sign of arthritic change. The process is that you first will lose water in a disk, because you lose water, the disk becomes brittle instead of being more gelatinous.

When it becomes brittle, and with the use of the back, the bones will get closer together and then the body tries to stabilize that by forming struts or bone spurs or osteophytes, so the earliest seen is desiccation, and this is a very early sign of arthritis, which will progress on to a more severe form, so when I say loss of water, I do mean it as an early sign of arthritic change.

Q. Doctor, you used the word for the first time during your description there, you used the word degeneration. Could you please explain to the jury what you mean when you discuss degeneration in this context?

A. Well, we talked about the back having these different structures-like disk. We talked about losing water from the disk and we just talked about the process of the disk becoming brittle, and the bones coming together. Those are forms of arthritis or arthritic change which obviously this patient is relatively young. But there are signs of early arthritic changes in the back co- existent with the bulges and herniations, from which the patient has become symptomatic within the past nine months from that MRI.

Q. Doctor, based on the facts that I just asked you to assume, would you be able to form an opinion with a reasonable degree of medical certainty whether the findings that you described, the bulging disk and herniated disk were a result of degeneration or something else?

A. Well, more likely a result of trauma, and not more likely the result of something beginning the ball rolling to become degenerative.

MR. VAIRO: Objection. Move to strike.

THE COURT: Because the Doctor said more probably?

MR. VAIRO: Yes.

THE COURT: Well, when you say more probably, it still has to be within a with a reasonable degree of medical certainty. Is your opinion within a degree of medical certainty?

THE WITNESS: Yes.

THE COURT: I'll allow it.

Q. Doctor, within a with a reasonable degree of medical certainty, would this be the kind of a back that -- condition of a back, are you able to form an opinion with a with a reasonable degree of medical certainty that this would be the condition of a back of a healthy 29 year old?

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MR. VAIRO: Objection.

MR. KRAMER: Objection.

THE COURT: Well, objection sustained. I think that's essentially been asked and answered.

Q. Doctor, the symptoms that I asked you to assume in my question, are those symptoms, again, all of these questions if you would, please, tell us whether are you able to form an opinion with a reasonable degree of medical certainty, are these symptoms consistent with the findings you make on these films?

A. Yes.

Q. Doctor, are you able to form an opinion with a with a reasonable degree of medical certainty whether these injuries are permanent in nature?

A. Yes.

Q. What is your opinion?

A. Yes. Once the ligaments are torn, once disks are bulged or herniated, they were permanent. Oce you lose water from the disk you can never reform that water and that's permanent as well and it can either stay the same, possibly, or progress on, but never revert back to a normal state, so the answer is yes, permanent.

THE COURT: Can I ask a question about losing water?

Do the disks losses water because a slow leak or something? I know that sounds silly, but that's the mechanism, why do disks lose water?

THE WITNESS: Right. When the ligament changes, the disk then become exposed to an environment that it's not usually exposed to. It was in a contained environment. Now it's uncontained, and there are changes that occur to the vascular or the blood flow to the disk that didn't occur before.

The disk may not get enough blood flow. That's one possibility. One theory why these disks lose water, once you enter a new environment that change occurs.

THE COURT: So there are no precise reason why.

THE WITNESS: One reason is the vascular changes.

THE COURT: All right. Thanks.

BY MR. GOLDFARB:

Q. Doctor, are you able to form an opinion with a reasonable degree of medical certainty whether this particular patient, based on the questions that I gave you, whether the condition, which you described in the lumbar spine the stay same, get better or worse?

A. We have seen already a patient who is a symptomatic relatively young with loss of water. There's no reason to believe it's going to stay ??he same. It will most likely progress on and get worse, being he's a relatively young person, it's just going to get worse.

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Q. And what would the result be of that progressive -- withdrawn?

MR. KRAMER: Objection.

Q. Would you call that a progressive condition?

THE COURT: Well, yes.

MR. KRAMER: I object.

THE COURT: I will sustain that.

That's been asked and answered. That's leading.

Q. How would you characterize that condition, Doctor?

MR. KRAMER: Objection. I think that's beyond the scope.

THE COURT: I don't know about beyond the scope.

We talked about 3101(d) notice.

MR. KRAMER: May I approach?

THE COURT: Do you have 3101(d).

MR. KRAMER: Yes.

THE COURT: Let me see it.

(Bench conference held among Court and Counsel.)

THE COURT: Objection overruled.

Q. You can answer the question.

THE COURT: Do you remember the question?

THE WITNESS: It is progressive.

A. The answer is yes, it is progressive, a progressive change, a progressive abnormality.

Q. And within a reasonable degree of medical certainty, Doctor, are you able to form an opinion what this person could expect in the future with regard to these progressive degenerative changes?

MR. KRAMER: Objection.

THE COURT: If you are able to tell us again within that particular standard, I will allow it.

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A. If it progresses on, again we talked about the disk will start narrowing and the bones will get closer to each other each other than they are supposed to and form bone spurs, that has the potential to impact even more upon the nerves and cause further pain, stiffness, numbness, the symptoms that when talked about earlier, so those potentials certainly exist with the progressive abnormality.

Q. Do you see bone spurs in these films that you displayed to the jury?

A No.

Q. And would that be an indication as to how long the condition existed?

A. It can be.

Q. And if it had -- if this condition had existed far beyond the date of the accident, would you expect to see bone spurs?

MR. KRAMER: Objection.

MR. VAIRO: Objection. Far beyond.

MR. GOLDFARB: For years -- allow me to amend the question -- years prior to the accident.

THE COURT; Yes, I mean Mr. Vairo's point is really doesn't seem to be covered by the notice. I will sustain it.

Although presumably it goes to causation. So, it's close. All right. Rephrase the question.

MR. GOLDFARB: Okay.

Q. Doctor, please assume that the degenerative process in this person's spine began at least four to five years prior to the accident, and then this film was taken. Would you expect to see bone spurs?

MR. VAIRO: Objection.

THE COURT: Yes. Sustained as to that.

Are you able to opine with a reasonable degree of medical certainty how recent or age -- it's your belief that a trauma under these circumstances that trauma caused these changes, correct?

THE WITNESS: Correct.

THE COURT: Okay. Are you able to further say with a reasonable degree of medical certainty how long ago, approximately, that trauma occurred by the way that the structures look?

THE WITNESS: You can just say that it's relatively recent, as opposed to being in the distant past, because these change. As we said, are early forms of degeneration, and so, all -- the best you can say is that they are relatively recent, but you cannot date them. In a vacuum, they cannot be dated.

Q. And, Doctor, is there any other indication on the film that these are -- these changes were related to the trauma of August 22nd, 2000 as opposed to something else?

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A. No, I don't think so. That's it.

Q. And returning to the question that the Judge allowed me to ask, what would you reasonably expect from these types of changes in the future?

A. You would expect progression.

Q. When you say, “Progression,” how would that affect the symptoms?

A. They could get worse.

MR. GOLDFARB: Nothing further.

THE COURT: Mr. Kramer, cross-examination.

MR. KRAMER: Thank you your Honor.

CROSS-EXAMINATION

BY MR. KRAMER:

MR. KRAMER: Can I look at witness' file for a minute? We don't have to take a break.

THE COURT: Do you have a file? That's it? Come and get it, Mr. Kramer, and you can look it over.

Do you want to read what Dr. Kolb showed you.

MR. KRAMER: It's his report.

Q. That was your report?

A. Yes.

THE COURT: You have been given a copy.

Q. Doctor, you talk about desiccation and loss of water correct?

A. Yes.

Q. Isn't it true on page 1 of your report, let's go to paragraph 2, don't you say in your report that the disks have normal height and hydration?

A. Hang on one second.

Q. Look at the paragraph.

A. Yes, but then you have to read the next paragraph.

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Q. We will get to that.

Doesn't your report say, quote, “The disks are of normal height and hydration”?

A. Yes. If you don't want to read the rest of it in a vacuum it talks about L2, L3, L2 --

Q. It's yes or no. It's pretty easy.

Doctor, you have testified many times before?

A. Let's make it easy, yes.

Q. Well, Doctor, let's talk about -- let's go back to your credentials, Doctor.

You testified many times in the area of mammography, breast cancer?

A. Many times? Well, if we can be more specific.

Q. Well, Doctor, your CV --

A. Yes.

Q. -- was produced in this case?

A. Yes.

Q. Okay. And it indicates on there multiple publications that you have. How many publications do you have?

A. Yes, there are -- you can count them. There are multiple.

Q. How many, Doctor?

A. Well, let's count them up.

THE COURT: Well, more than 25?

THE WITNESS: No, no. Less than ten.

Q. About 21, I think, I counted.

A. No, not even close. No.

Q. Doctor, correct me if I am wrong, but when I looked at your CV of all of the publications that you have, every single one of them, except one, concerns mammography for breast cancer?

A. That's right, concerns breast cancer diagnosis.

Q. And the lectures that you gave, I count eleven on your CV, ten of the 11 were in breast cancer?

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A. Yes, that's correct.

Q. Now, how many MRI films do you review a year?

A. I can't give you an exact number, but certainly way over and in excess of a thousand.

Q. Would it be two thousand?

A. It could very well be two thousand.

Q. And how many mammographies do you read a year?

A. Roughly 8,000.

Q. Take a look at your CV. Doesn't it say 10,000 on this?

A. That's why I said roughly. If you want to help me, the CV, I will be more than happy to read it back to the Court.

Q. You don't have your C V with you?

A. No, I'm sorry.

MR. KRAMER: May I approach the wit ??s?

THE COURT: Yes.

A. Yes, it says interpret 10,000 mammograms per year in addition to what else?

Q. You review five times as many mammograms a year as do you do MRI films.

A. I think that's a reasonable statement.

Q. Now, one of the things that you said was that the nerve irritation could, I think you said, could affect a person, depending upon the patient's symptoms, correct?

A. No, I didn't say that. I never used the word irritation.

Q. Nerve problems. If a nerve is being pushed against a bone, that's what you are saying these films show?

A. Yes, at one level, yes.

Q. Now, if a nerve was being pushed against the bone, it would cause pain, right?

A. It could.

Q. Okay. You would expect a patient, if a nerve was being pushed against a bone, and this is permanent in nature, right?

A. Yes.

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Q. Permanently pushing against the bone, it would cause pain?

A. Could. I just answered it. Every patient is an individual.

Q. I want you -- you had a couple of assumptions.

I want you to assume that Mr. Massie testified in this case, same chair you are in, he never said he had pain in his back today. Okay?

A. Okay.

Q. Does that affect your opinion one way or another?

A. No, absolutely not.

Q. You said one of the things the nerve root being pushed against the bone, it could affect the person's sensation so determine hot or cold?

A. Yes, it could.

Q. I want you to assume that Mr. Massie never said, with respect to his back, he can't determine hot or cold. Does that affect your opinion?

A. No, I accept that.

Q. If you said that the nerves being pressed against the bone permanently, it could affect the person's motor coordination, right?

A. Motor function.

Q. Motor function.

I want you to assume that Mr. Massie never said he had problems walking or any motor coordination. Does that fact your opinions in this case?

A. No.

Q. Okay. And you said that he could lose his reflexes if his bones is pushed against the nerve against the bone?

A. Yes.

Q. I want you to assume he never lost any of his reflexes.

A. Yes.

Q. Does it affect your opinion either way?

A. No.

Q. And so some patients, a nerve being pressed against the bone could cause all of these things and some patients it couldn't?

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A. That's right.

Q. So the fact that he had a herniated disk in and of itself doesn't tell us what the symptoms are going to be, we have to look on it as a case-by-case basis?

A. Absolutely correct.

Q. And in this case, we have to look at what Mr. Massie says about him, right?

A. Correct.

MR. KRAMER: That's all I have, Judge.

MR. VAIRO: I have two.

THE COURT: You can even have three or four. Whatever you want.

CROSS EXAMINATION

BY MR. VAIRO:

Q. Good morning, Dr. Kolb.

A. Good morning.

Q. You talked about desiccation and the loss of liquid in the disks.

A. Yes.

Q. When does that start in the body?

A. There's no way anyone can date when it starts. It's an impossible to question to answer, when it starts.

Q. Doesn't it start as soon as you start aging, almost from birth change take place in the spine?

A. I am sure that question can't be answered. When you mean from birth.

Q. If we take an MRI of a new born and one year, would you expect desiccation?

A. Absolutely not.

Q. The body starts to degenerate in some point in time?

A. In general, the older you get, rather than of the younger you are.

Q. When does the body stop growing generally?

A. Growing?

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Q. Well, the bones, the disks and so forth of the back?

A. You mean not having to do with degeneration.

Q. That's a different question. I just finished that question.

A. Generally in teenage years.

Q. So by the time Mr. Massie's body stopped growing, his disks were the size they were going to be?

A. Yes.

Q. And his bones were the size they were going to be?

A. Right.

Q. Now, isn't it true, Doctor, that is that the point when the body starts to degenerate, including the disks and the bones?

A. No, you can't make that -- that's a totally false statement. There's no medical basis for that statement.

Q. Well, as the body gets older, it degenerates?

A. Let me be clear. The older you are, the more likely you are to have degeneration.

Q. Including in the disc?

A. Yes, that is what we are talking about. The disk.

Q. That's all I have on that, sir. Thank you.

A. Okay.

Q. Now, the MRI that we looked at are taken of a side slice?

A. All the way across, and the ones that are blown up were the center and two sides.

Q. Now, there's other ways to take an MRI view, isn't it?

A. Um-hm.

Q. Tell the jury.

A. There are axial, cuts straight down from the top down and from the front to back.

Q. Did you take these MRI films?

A. No, I did not.

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Q. You didn't?

THE COURT: You didn't actually take them. You did not take them?

THE WITNESS: They were not generated at the my facility.

Q. But you have the capacity to do that?

A. Yes.

Q. So if you wanted the best view of this man's problem, of his disk, you are going to take the best picture that you can see that from, right?

A. Yes.

Q. And isn't it true, Doctor, and I don't have anything to draw on here we are out of paper, but I will use my pen, if that's all right, that the disk looks something like this, a roundish shaped piece. Can you see?

A. No, no, I disagree.

Q. And inside there's something of a jelly-type -- sorry.

MR. VAIRO: Sorry, Judge. I need a different pen.

Q. -- but there is a jelly-type of substance inside the disk, almost like a jelly donut?

A. If you will.

Q. And you said there is a membrane outside here, that then if it's ruptured would let out some of this material?

A. Um-hm.

Q. And what is this material?

A. That's the disk and what you are referring to is the nucleus pulposus, which is the jelly-like material?

Q. What type of -- how would you describe the type of material?

A. Jelly like is reasonable.

Q. What type of material do we have here?

A. More fibrous.

Q. And this material?

A. I assume you are drawing the annulus. Fibrous covering that we talked about.

Q. That's even stronger?

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A. Yes.

Q. Now, if I wanted to see if there was any bulging or any herniation, sir, wouldn't it be true that you could take a picture of this gentleman's back from the top down, a side view, sliced this way, to see if there was any type of impingement or pushing out of the disk into the nerve, isn't that right?

A. Sure, three-way, three views to take pictures that we discussed.

Q. You didn't do that?

MR. GOLDFARB: I object to that.

THE COURT: Again, it's clear that the doctor had nothing to do with production of the film.

Q. Did you ask for it to be done so he that you could make a different picture for the jury to see?

A. I wasn't involved in the production of the films. There's nothing that -- I can't bring the patient back two years later.

Q. Did you call up plaintiff's counsel and say, Sir, I think we are going to come to court here. It would be much better to have a view like this to show this jury, the real jury, and where this disk protrudes out into the nerve. Did you ever do that?

A. You are making an assumption that what I showed --

Q. Just yes or no?

THE COURT: No, no. Wait a minute. I'm going to allow Dr. Kolb to answer it in the way he started to because there's a certain assumption you made in the question, and that's unfair to the witness to compel him to answer it in a yes or no because he may not agree with the assumption, so, therefore, I will allow Dr. Kolb to continue his answer.

MR. VAIRO: Thank you.

THE COURT: Continue.

A. With the films that were provided to me, it's clear what the injuries that are I have shown, and that's all that I have shown.

Q. And you are a radiologist?

A. I am.

Q. Do we have any radiologists in the jury that you know of?

A. I don't know. I don't know.

Q. And wouldn't you -- wouldn't it be fair to say, Doctor, that a view of this type, more accurately -- withdrawn.

A view of this type would show the bulge coming out from the circular shape of the disk, wouldn't it show that, yes or no?

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A. It may show even more than I have shown now. In other words, I was able to show from the films what the injuries are? It may have shown it even worse. You are right.

Q. Or it may have shown it less?

A. It can't.

Q. It may have?

A. I disagree with your statement.

Q. You talk about a progressive condition. You don't have a crystal ball here to tell us what the plaintiff is going to be like in ten or 20 years from now, do you?

A. Correct, I don't.

Q. By the way, you are looking at Mr. Massie there. Do you see the size of him, he's a big guy?

A. I do.

Q. Does his weight have any Impact on his disks and how they grow and desiccation, and things of that sort?

A. It's all individual, per patient.

Q. Does it have an impact on the disks?

A. The answer is not necessarily; depends on the patient.

Q. Well --

A. The answer is not necessarily.

Q. Does it have an impact on the disks at all?

A. The answer is not necessarily.

Q. Are you aware, sir, of studies where people that are overweight are told to lose weight so that they can relief on any pressure on the disk?

A. ON disks, no, I'm not. Absolutely not.

THE COURT: Redirect?

MR. GOLDFARB: Yes, briefly, Judge.

REDIRECT EXAMINATION

BY MR. GOLDFARB:

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Q. Doctor, were you asked to come to court today to discuss those films?

A. Yes.

Q. Were you asked to do anything with regard to treating this patient, making recommendations for this patient, anything like that?

A. No.

MR. GOLDFARB: Can I just see the three films?

THE COURT: Yes.

Q. Could you look at that sheet --

MR. GOLDFARB: Judge, it's one of the three sheets marked as Exhibit 2.

THE COURT: I'm not a radiologist.

A. Yes.

Q. What type of a view does that sheet contain, Doctor?

A. That's an axial view. The same that he was drawing.

Q. What he was just talking about?

A. Yes.

Q. So the person, the doctor who supervised this MRI, in fact, took the axial views?

A. Yes.

Q. Have you examined them, Doctor?

A. Yes.

Q. Do you think out of these films that is the best film to illustrate the jury?

THE COURT: What do you mean by that? You mean the axial film?

MR. GOLDFARB: Yes.

THE COURT: Ask it again.

Q. Do you believe the axial images that were taken in this particular MRI beet illustrate to the jury what you wanted to explain to them?

MR. VAIRO: Objection.

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THE COURT: Well, it is leading, but which of the films that -- well, I assume that you looked at all of those?

THE WITNESS: Yes.

THE COURT: And which one do you think was best able to display what you wanted to display to the jury?

THE WITNESS: They all show the same injuries. The easiest one to show, to convey were the ones that were blown up?

THE COURT: Did you have anything to do with which ones were blown up?

THE WITNESS: Yes.

THE COURT: What did you have to ??ith them?

THE WITNESS: I chose which ones I thought were the easiest to convey the information.

THE COURT: I see.

Q. Are the axial views in this particular MRI consistent with the sagittal views?

A. Oh, yes absolutely.

Q. Doctor, you were questioned about symptomology that could be caused by the injuries and your answer was they could be caused?

A. Yes.

Q. Is it possible that a person can have symptoms on one day and not on another.

A. it's possible.

Q. That would not mean that the person would have the same symptoms all day, every day?

A. It's variable.

MR. VAIRO: Objection.

THE COURT: I will allow it.

Q. Each patient can have different symptoms, based on the injury?

A. At different times, sure, of course.

Q. And the question that was asked to you, we have to ask the patients what is his complaints were in order to know, is that accurate?

A. Yes.

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Q. Won't another factor, Doctor --

THE COURT: Well --

Q. -- would another factor --

THE COURT: But it's another leading question.

Q. What role would a clinical examination play in that determination, Doctor?

MR. VAIRO: Objection.

THE COURT: Well, of course, the issue is whether or not that's proper redirect in light of your questions.

MR. GOLDFARB: It's exactly on point.

THE COURT: I know. I got the point.

I am going to sustain it.

Q. What else could you use to determine whether the symptomology was caused by the injury you described, Doctor?

MR. KRAMER: Objection.

THE COURT: Yes. I think Dr. Kolb is a radiologist, not a clinician.

Do you see patients?

THE WITNESS: Not in terms of lumbar spines, MRIs, no.

THE COURT: So sustained.

MR. GOLDFARB: Nothing further.

THE COURT: Anything, gentlemen?

MR. KRAMER: One more question.

RECROSS EXAMINATION.

BY MR. KRAMER:

Q. You said the patient could get different symptoms day to day.

A. Yes.

Q. The patient could also not have symptoms day to day. In other words, a patient who says I don't have pain, cannot have pain?

A. That's correct, of course.

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MR. KRAMER: Thank you.

THE COURT: Anything else?

MR. VAIRO: No, thank you.

THE COURT: Thank you very much.

THE WITNESS: Thank you.

(Witness is excused.)

THE COURT: Do you have another witness?

MR. GOLDFARB: I would like to take a five-minute break to get myself together.

THE COURT: We will take about a ten-minute break and then we will have the next witness.

(Jury exits the courtroom.)

THE COURT: The record is yours.

MR. KRAMER: Yes, your Honor, this morning I had indicated to your Honor that I wanted to make a motion to strike certain portions of Dr. Fleischer's testimony and you said we will do it later. I want to do that now.

I want to strike that portion of the testimony concerning the potential for future surgery. The doctor admitted and, in fact, your Honor questioned the doctor about whether it was a certainty for the need for it, and he said I'm not sure. He said it could be, probably. That doesn't meet the task of scientific certainty. He doesn't have to use the magic words. The Appellate Division says you don't have to use the magic words to say, but you have to give the indicia of certainty at least and he said basically he said I don't know, it could be, probably. That doesn't cut it. I think that should be stricken and the other thing I'm moving to strike is his opinion concerning future physical therapy.

Now, he never gave any guide post. He said indefinitely, and he said you are not saying for life. He said no. Give us the period of time. He said, Well, as needed, as it flares up.

Well, we don't have any goal posts to give the jury. They have absolutely no way to project into the future what is going to be the need for physical therapy, because the doctor never gave them any guide posts.

It's the same thing with the need for future neurologic visits. Same thing. He said I don't mean for life. What's the guide post? He couldn't give any. It's completely speculative for the jury to give an ward for future physical therapy and future neurology visits because we have no guide posts to give the jury.

THE COURT: Mr. Vairo, are you joining in?

MR. VAIRO: Yes, your Honor I join.

THE COURT: Mr. Goldfarb, why don't you respond.

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MR. GOLDFARB: That's a complete spin on what the doctor said. That's totally twisting it from its meaning.

THE COURT: There are two things that Mr. Kramer brought up, deal with each one individually.

MR. GOLDFARB: All right. The doctor gave na answer saying that it was his opinion that it was medically recommended, medically required that he have followup visits. He used the words, “for the foreseeable future” and “indefinitely.” It's up to the jury to determine what length of time they are going to award these costs for, but to say that he didn't give any guide posts is a total spin on what was said on the stand. He said they were medically required, they were for the foreseeable future, he recommended them and he said indefinitely.

Now, now the jury will decide --

THE COURT: Now, why don't you deal with the surgery, because it's my recollection that he never could say -- I think I agree with Mr. Kramer.

MR. GOLDFARB: And that's why I'm not going to ask for any damages for surgery.

THE COURT: That was my understanding as well, that he said, frankly, he didn't know about the surgery. I agree with you. I agree with your interpretation, Mr. Kramer, and that why that should not be part of future damages.

As far as physical therapy, he said he thinks it would help, but once or twice a month in order to relieve symptoms and depended on when the symptoms came, but that's life.

In other words, juries have to make difficult decisions all the time, as far as future awards. Pain and suffering and medical expenses and the like. They evaluate, they, you know, they come to suppositions and Mr. Massie's case, it may be a little bit more difficult because his symptoms come and go. That's better for him from a life living point of view, but perhaps not as good from a recovery of an award point of view. Sobeit.

MR. KRAMER: Judge, just let me respond. It's one thing for a jury to evaluate a case. It's another to speculate. You are going to give him his life expectancy and say he's going to live for 60-something years, so if the jury projects out for 60-something years, that is pure speculation. The other reason why they can't get it and I'm not make a directed verdict motion now --

THE COURT: Can't get it?

MR. KRAMER: Can't get a case to give future PT is Mr. Massie said I'm not going to go for PT. I am going to stay home.

THE COURT: First of all, he didn't say that. All of these things, my opinion, leads not to a conclusion to give the jury physical therapy as a possibility, or to allow argument on it, but rather it's argument. Those are the kinds of things that you make to the jury, the arguments you make to the jury, but it seems to me that there's certainly enough now to continue with this and we can have further discussion of these -- before the charge conference.

Let me make it clear that surgery won't be here, won't be in the case, because, again, your interpretation, which I think everybody is sharing, as to what Doctor Fleischer said.

MR. GOLDFARB: That was my request for clarification. I have intention for asking for damages for future surgery; however, I would like to be able to comment on the -- what Mr. Massie potentially -- what risks are associated with the condition he suffers from.

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THE COURT: Well, to the extent that -- we can talk about that. I really don't, unfortunately, if we were up to summations and I would be fortunate, we would be talking about it in more depth, but there's no need to talk about it for now. Suffice it to say that future surgery will not be part of damages for the future.

MR. GOLDFARB: I will wait until the charge conference.

THE COURT: We will talk about it more.

MR. GOLDFARB: Can I have a couple of minutes my witness just got here literally two or three minutes?

THE COURT: Sure, sure.

(Pause in proceedings.)

(Brief recess taken.)

(Jury enters the courtroom.)

THE COURT: Sorry for the delay. Somebody had come in totally unrelated to the case so I has to see for a while, so I spoke for a few minutes and that's why we are delayed. Only hold it against me, and I am sorry.

See, Mr. Goldfarb, if you call your next witness, please.

MR. GOLDFARB: Plaintiff calls doctor John Sherman to the stand, your Honor.

DR. JOHN SHERMAN, called as a witness, having been first duly sworn, testified as follows:

THE COURT OFFICER:

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