2006 WL 6650335 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
Westchester County

Jonathan A. KORN, M.D., Plaintiff,
v.
FIRST UNUM LIFE INSURANCE COMPANY, Defendant.

No. 2001-05958.
January 11, 2006.

Testimony of Plaintiffs' Expert Witness, Dr. Thomas Kolb

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

For the Plaintiff: Quadrino Schwartz by: Richard Quadrino, Esq., William J. O'Mahony, Esq. and Michael Sepe, Esq., 666 Old Country Road Garden City, N.Y. 11530.

For the Defendant: Begos & Horgan, LLP, 327 Riverside Avenue Westport, Ct. 06880.

by: Patrick W. Begos, Esq. and Evan L. Gordon, Esq., 150 East 58th Street - Suite 2310 New York, N.Y. 10155.

Hon. Nicholas A. Colabella.

MR. SEPE: Thank you, your Honor. Your Honor, the plaintiff calls Dr. Thomas Kolb.

THOMAS KOLB, MD, Having been called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Please be seated, doctor. Speaking into the microphone, give us your full name, spell your last name and for the record your occupation, please.

THE WITNESS: Dr. Thomas Kolb, K-O-L-B. My occupation is diagnostic radiologist.

THE COURT: Thank you.

MR. SEPE: Your Honor, may I inquire?

THE COURT: Please.

DIRECT EXAMINATION

BY MR. SEPE:

Q. Good morning, Dr. Kolb.

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A. Good morning.

Q. Dr. Kolb, can you give the jury a sense of your educational background?

A. Went to college in Queens College City of New York, graduated in 1979. I then went to medical school at Downstate Medical School from 1979 through 1983.

From 1983 through 1986, I did an internship for one year and a residency for two years in pediatrics and became board certified as a pediatrician.

I then went back and did a second residency for four years from 1986 through 1990 at Columbia Presbyterian Medical Center in Manhattan in diagnostic radiology and I've been practicing diagnostic radiology from 1990 to the present.

Q. And what, if any, states are you licensed to practice medicine in?

A. New York.

Q. Do you have any teaching experience?

A. I'm an assistant clinical professor of radiology. It's a teaching position at Columbia University College of Physicians and Surgeons.

Q. And have you published any articles in the field of radiology?

A. Yes, I have.

Q. Approximately how many?

A. Approximately four, four to five articles.

Q. And are you a member of any medical organizations?

A. Yes. American Medical Association, Radiologic Society of North America, American Roentgen Ray Society, New York Metropolitan Breast Cancer Group, and so on.

Q. What, if any, hospital affiliations do you have?

A. Just my teaching position at Columbia University.

Q. Doctor, have you previously been involved in the invention and/or development of the modern magnetic resonance image instrument?

A. Yes. In the 1980s, I was a clinical advisor for a new technology that subsequently came into common usage for the use of MRIs, magnetic resonance imaging.

Q. And have you previously been qualified as an expert in diagnostic radiology in the courts of New York State?

A. Yes, I have.

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Q. Do you know approximately how many times?

A. Approximately five to six times per year over the past ten years.

Q. So that would be between 50 and 60 to times?

A. Yes.

Q. Doctor, I'm showing you what's been premarked as Plaintiff's Exhibit 152. MR. SEPE: Your Honor, it's been served on counsel.

Q. Please tell me if you recognize that document?

A. Yes.

Q. What is that?

A. My curriculum vitae or my resume.

Q. Doctor, does that fairly depict your educational, teaching and training background as well as list the various lectures and publications that you've been involved in?

A. Yes, it does.

MR. SEPE: Your Honor, I would ask that 152 be moved into evidence.

MR. BEGOS: Objection, your Honor. He can testify to his background but I don't think we need his CV in evidence.

THE COURT: Yes, I don't think so. Sustained.

MR. SEPE: Your Honor, based upon Dr. Kolb's testimony I would offer him as an expert in the field of radiology.

MR. BEGOS: No objection to qualifying in the field of radiology.

THE COURT: Yes.

MR. SEPE: Thank you.

Q. Dr. Kolb, do you know the plaintiff in this case, Dr. Jonathan Korn?

A. Yes.

Q. How do you know him?

A. He's a referring physician.

Q. When did you first meet him?

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A. When did I first meet?

Q. Yes.

A. Approximately ten to -- somewhere between ten to fourteen years ago.

Q. When you say a referring physician, what do you mean by that?

A. He is an orthopedist who examines patients and send patients for various diagnostic radiology tests, and I would perform some of these tests on some of his patients.

Q. Did there come a time you reviewed MRIs of Dr. Korn himself?

A. Yes.

Q. Doctor, prior to that, in your career, have you had an opportunity to analyze MRIs of the cervical spine?

A. Yes.

Q. Approximately how many times?

A. Over the course of 15 years of reading, many thousands of times.

Q. And have you had prior opportunity to examine MRI images of the head?

A. Yes.

Q. Approximately how many times?

A. A similar number, maybe somewhat less but a similar number.

Q. And how about of the shoulder?

A. Again, similar.

Q. Doctor, did there come a time in March of 1994 that you analyzed MRI films of the head of Dr. Korn taken March 25th, 1994?

A. Yes.

Q. I'm showing you what's been received into evidence as Plaintiff's Exhibit 153. Do you recognize that document?

A. Yes.

Q. What do you recognize that document to be?

A. It's an MRI test of the head on a patient Dr. Jonathan Korn of March 25th, 1994.

Q. And was that report prepared by you?

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A. Yes.

Q. And was that report prepared after you examined the films of Dr. Korn's head taken March 25th, 1994?

A. Yes.

Q. What if any observations did you make from reviewing that film?

A. That there was no evidence of any abnormality in the brain.

Q. Thank you. Did there come a time when you were asked to review that same film from March 25, 1994 on a second occasion?

A. Yes.

Q. And how did that come about?

A. I was informed of additional clinical information that the patient suffered significant symptoms to the point of needing to be treated with a relatively powerful medication, and I was asked to look if there could be anything else within the brain or anything outside of the brain that could have been causing these symptoms to persist, to begin and to persist.

Q. Thank you. Showing you what's been received in evidence as Plaintiff's Exhibit 154, doctor, if you could please tell me if you recognize that document?

A. Yes, I do.

Q. What do you recognize that to be?

A. This is the supplemental report of the reading of the same MRI of the head that was dated March 25, 1994. It was prepared approximately one month after the initial reading.

Q. And upon the second review of that MRI image, what if any observations did you make?

A. There was actually an abnormality in the skull, not within the brain, within the skull that caused swelling between the outer bone and the inner bone of the skull, which was suspect for a fracture of the temporal bone which is a bone right here on the side of the head.

Q. Doctor, showing you what's been premarked as Plaintiff's Exhibit 154-A, please take a look at that.

A. Yes.

Q. What is that?

A. This is a series of MRI images of the head on the patient Jonathan Korn dated March 25th, 1994.

Q. And, doctor, is that the actual MRI image upon which the last two reports in evidence is based?

A. Yes, a portion of them, the actual images.

MR. SEPE: Your Honor, may I show that to Mr. Begos please.

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MR. BEGOS: No objection, your Honor.

MR. SEPE: We offer it in evidence.

THE COURT: It's received.

(Plaintiff's Exhibit 154-A for identification, document, received in evidence.)

Q. Doctor, did there come a time in February of the year 2000 that you reviewed additional MRI images of Dr. Korn's brain or head I should say?

A. Yes.

Q. I'm showing you what's been received into evidence as Plaintiff's Exhibit 155. I'll ask you to take a look at that and tell the jury if you recognize that document?

A. Yes.

Q. What do you recognize that document to be?

A. It's my report of the MRI of the brain in February 2000 on this patient Jonathan Korn.

Q. What observations did you make from reviewing that MRI image?

A. There were abnormal findings in the right temporal area, which is here and in the left area which is back here, but this time within the brain. There was swelling of the brain, there was abnormal areas that occupied areas that should have appeared differently on the films. And so the major findings here were brain contusions or swelling of the brain. Another word for that would be concussion with swelling of the brain. So there was swelling on both sides of the brain itself, both on the right and the left.

Q. Thank you. Doctor, if you could please explain to the jury what are gyri?

A. Gyri. The brain, as seen from the outside on models or pictures, there are foldings. It's not a smooth object but rather there are foldings in the side and those are called gyri, those infoldings are called gyri. In those infoldings are spinal fluid, the same final fluid that is in our back around the spinal cord and around the brain and so there's fluid surrounding these infoldings. There's fluid in the brain and outside the brain as well.

Q. For the benefit of the jury, what is it specifically about the appearance of the gyri in this case that lead you to the conclusion that Dr. Korn had brain contusions?

A. Their normal signal inside the gyri on the MRI that we did is black, that's normal signal, but you'll see that there are abnormal areas of whiteness in what should have been totally black. In any case, that means that there is abnormal water or abnormal swelling in those areas of the brain. Basically there are contusions or swelling within the brain, and those are the abnormal findings on the MRI.

Q. Doctor, did there come a time that a supplementary report was prepared for that same MRI image of February 23, 2000?

A. Yes.

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Q. Showing you what's been marked -- excuse me, what's been received in evidence as Plaintiff's Exhibit 156, I'll ask you to take a look at that.

A. Yes.

Q. Do you recognize that?

A. Yes.

Q. What is that?

A. It's a supplemental report to the MRI of the brain from February of 2000 prepared after comparing it with the earlier examination we talked about from 1994 by my partner Dr. Lichy.

Q. How long have you been partners with Dr. Lichy?

A. Since 1992.

Q. And have you used the same letterhead during that time period?

A. Yes.

Q. That report that is in evidence, is that maintained in the ordinary course of your business with Dr. Lichy?

A. Yes.

Q. Doctor, I understand this report is signed by Dr. Lichy. Did you review the same MRI images that are reflected in this report?

A. Yes, I have.

Q. And based upon your review of the films, what was your conclusion?

A. I agree, in that the comparison was made with the 2000 MRI to the 1994 MRI, and the 1994 MRI those areas that we talked about having the contusions in the brain were not present. We talked about the fracture at that time.

But in 2000, there are new areas of abnormality in the brain which are the contusions.

So, basically the report just states that these contusions are the swelling of the brain are new and seen first on the February 2000 MRI scan.

Q. Doctor, the areas of the brain that you're referring to from the 2000 MRI scan, where are those areas in relation to the areas that you discussed having viewed from the 1994 MRI?

A. The right side, which has the -- could I have the report back, the MRI of the brain, the original report that I wrote, February 2000. The area that had the appearance of a fracture in 1994 was in this left temporal area which is right about here. That was 1994.

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In 2000, the areas within the brain that were swollen or contused were -- that was on the left side of the brain. The bone that was damaged, that looked like it was damaged, was on the left side over here.

In 2000, the part of the brain that looked like it was swollen, that it definitely was swollen, was little bit further back here in this area on the left side, but also as well on the right side here, which was not the case in 1994. See these were different areas that, A, were different areas, but B in 2000 there was an injury to the brain itself that was seen on MRI at least, and in 1994 the finding was in the skull as a fracture.

Q. Doctor, did there come a time in or about June of 2000 that another MRI was taken of Dr. Korn's brain approximately June 20, 2000?

A. Yes.

Q. Showing you what's been received in evidence as plaintiff's 157, is that a report of that latest view of the brain that I just described?

A. Yes.

Q. What if any observations did you make as to that MRI image?

A. Four months later, the areas of contusion where the swelling had been had gone away and the MRI itself is normal in June of 2000.

Q. Doctor, for the benefit of the jury, can you explain the difference between traumatic injury and degenerative injury or injury caused by disease?

MR. BEGOS: Objection. As seen on an MRI in general?

MR. SEPE: No, your Honor, based upon his certification as a medical doctor.

MR. BEGOS: He's qualified as a radiologist. I ask it be confined to what he sees on an MRI or radiology.

THE COURT: No, I'll permit it. Overruled.

A. Traumatic injury occurs by a trauma, some type of trauma happens and some abnormality occurs because of that trauma.

Degenerative alone means an aging process. Things break down as we get older and we can feel pains, aches because of just getting a little bit older, so that's the difference between the two.

Q. Doctor, based upon your review of the MRI images of Dr. Korn's brain, were you able to determine whether or not the injuries you say you observed were due to trauma or degenerative condition or disease?

A. No, just by looking at these films they were certainly due to some trauma, absolutely.

Q. What's the basis for that opinion?

A. Well, the first MRI in 1994 was suspicion of a fracture of the bone. That can only happen from a trauma and not from aging or degeneration. And the second was swelling of the brain itself, a contusion to the brain, which subsequently wasn't there five months later, which meant that a trauma must have caused that initial contusion to the brain in February of 2000.

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So, both injuries must have been from some sort of trauma.

Q. Thank you. Doctor you had been discussing most recently the MRI reports with regard to February 23 of 2000. Showing you what's been marked as 155-A for identification, do you recognize that?

A. Yes.

Q. What do you recognize that to be?

A. It's the MRI of the brain on this patient February 23, 2000.

Q. And is that the MRI upon which you based your reports that you were discussing?

A. Yes, one of them.

MR. SEPE: Your Honor, I would ask that MRI be received into evidence.

MR. BEGOS: No objection.

THE COURT: Mark it in please, mark.

(Plaintiff's Exhibit 159-A for identification, document, received in evidence.)

Q. Doctor, did there come a time when you reviewed magnetic resonance images of Dr. Korn's cervical spine?

A. Yes.

Q. I'd like to show you what's already been marked in evidence as Plaintiff's Exhibit 147 and ask you to take a look at this. You can step down if you like.

Doctor, in order to give context to the jury for your subsequent testimony, can you please take a look at the exhibit and tell me if that's an accurate depiction of the cervical spine?

A. It's an accurate depiction of half of the cervical spine from the front.

Q. Understood, thank you. And what is the basic structure of vertebrae and what are commonly referred to as disks?

A. This here is what we are talking about as the cervical spine and that just means the bones in the neck. And to we have numbers here, C4, 5, 6, 7, T1. C stands for cervical which is the cervical spine, so that we know when I say C4-5, I'm talking about an area between the fourth bone and the fifth bone.

So the way the structures are, these are the bones and in between the bones there are these objects which we call discs and the function of the discs are to act as shock absorbers so when we walk around and move the bones don't crunch into each other.

So these bones are gelatinous, they're like toothpaste consistency, they're fluidy so there's a little springiness to them. But they are kept in place which you don't see here by these ligaments, or else if they weren't kept in place they would just spurt out and move into different directions.

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They are held in place by ligaments that run along the front of the spine, ligaments that run along the back of these bones. These are long ligaments called longitudinal ligaments and kept in place also by a tough covering that goes around the disc by what's called an annulus. Everything has a fancy medical name. But the point is these discs are held in place.

The point is when you look at an MRI looking for a disc abnormality, a normal disc goes to the edge of the bone and stops, and the reason it stops is because those coverings are attached to the bone and so the disc comes right to the edge of the covering and stops.

But if there was a tear in the covering, the disc would push through and if the disc pushes through, it's then beyond the margin of the bone.

In other words, if you see a disc that goes beyond the edge of the bone, you know that there's been some sort of tear to the covering and the disc has now pushed through, and that's called the disc herniation. Disc herniation is when the disc is pushed through.

And the importance of that is right behind these bones which you're not seeing is the spinal cord. Spinal cord comes from the back of the brain down our back. It goes in between, right behind these bones and that's where the discs are.

So when the discs move abnormally back through this tear of the ligament, it's very close and can involve the spinal cord which contains all the nerves that go to our body.

The nerves come out of the spinal cord through these holes in the side of the bones, and these holes, everything has a fancy name, are called foramina, neural foramina, holes that contain the nerves. Through each hole, there's one on the left and on the other side there's one on the right, the nerve comes out and goes down. In this case it goes down the shoulder and down the arm, in the back it goes down the legs. And so these are the holes and these holes here contain the nerves.

So disc herniations or abnormalities of the disc can involve the nerves either of the spinal cord itself or the sac that holds the spinal cord, the spinal fluid, or these nerve roots that come out.

So that's a very quick rundown on things you need to know about the cervical spine.

Q. Doctor, with regard to that diagram that's in evidence, is the anatomy for the right side identical?

A. Yes.

Q. With regard to what you described as the C5 or C6 nerve root area, with regard to the right side of the body, are there parallel nerves also running from those vertebrae to the opposite arm?

A. Yes. Everything you see -- this is a mirror image of the other side and vice versa. This is just half the body.

Q. Doctor, did there come a time that you observed an MRI image taken of Dr. Korn's cervical spine from April 8, 1996?

A. Yes.

Q. I'm showing you what's been marked as 158-A.

A. Yes.

Q. Do you recognize that?

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A. Yes.

Q. And what is that?

A. It's part of the images of the MRI of the cervical spine from that date.

Q. I'm showing you what has been received in evidence previously as Plaintiff's Exhibit 158. Please tell me if you recognize that?

A. Yes, it's my report of the MRI of the cervical spine.

MR. SEPE: Your Honor, I would ask that the MRI image be received into evidence.

MR. BEGOS: No objection.

THE COURT: Mark it in.

(Plaintiff's Exhibit 158 for identification, document, received in evidence.)

Q. Doctor, when you reviewed that MRI image of April 8, 1996 of Dr. Korn's cervical spine, what, if any, observations did you make?

A. That there was a disc herniation. In other words, a disc had pushed through a torn ligament at C5-6 between the 5th and 6th bones there and gone back and actually touched the thecal sac that sounds the spinal cord and the cord itself, the spinal cord itself.

Q. What is a thecal sac?

A. The spinal cord is surrounded by fluid, the spinal fluid, and the sac holds the fluid there around the spinal cord so it's the covering around the spinal cord that keeps the fluid in.

Q. Doctor, your report uses the term central posterior dislocation. Can you explain what that means?

A. It means the dislocation pushes straight back toward the spinal cord, not to the left side or right side but straight back to the spinal cord.

Q. Thank you. Doctor, based upon your review of the MRI image of Dr. Korn's spine, were you able to reach an opinion with a reasonable degree of medical certainty as to whether the herniation that you're describing from this MRI was caused by trauma?

A. You would need clinical information for that. There is evidence on the film to suggest it was caused by trauma, but to know it for sure you would need some clinical information.

Q. Hypothetically, assuming that there were no symptoms of nerve root compression or numbness or tingling in the extremities that are innervated by the nerves that go to the C5-C6 area until a point in time shortly before the MRI image is taken, and taking those hypothetical facts into account, what would your diagnosis be?

A. And there was a trauma that the patient had?

Q. Correct.

A. Prior to the cervical spine films being taken?

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Q. Correct.

A. And the symptoms started just after the trauma?

Q. That's correct.

A. Taking all those facts into account that there were no symptoms, there was a trauma, there were symptoms referral to C5-6, we have an MRI showing a herniation that pushes on the spinal cord at that level, yes, it would be caused by the trauma, the findings on the MRI.

Q. With regard to that report, plaintiff's 158, it reads that the marrow signal and cord signal is normal.

A. Yes.

Q. What does that mean?

A. Means no abnormality in the bone itself and the cord itself is not swollen to the degree that the MRI sees an abnormality.

Q. Does that rule out the possibility of symptomology?

A. Not at all.

Q. Doctor, did there come a point in time that you reviewed a subsequent MRI image of the same area of Dr. Korn's spine in April of 2001?

A. Yes.

Q. Showing you what's been marked as plaintiff's 159-A for identification.

A. Yes, it was reviewed in our office.

Q. Do you recognize that?

A. Yes.

Q. And is that the actual MRI image of Dr. Korn's spine from April of 2001?

A. Yes.

Q. Thank you. Was a report generated as a result of your review of that report?

A. Yes.

Q. Showing you what's been marked in evidence as plaintiff's 159. Do you recognize that?

A. Yes.

Q. What is that?

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A. It's a report of an MRI of the cervical spine on this patient dated 4/16/01, again dictated by my partner Dr. Lichy.

Q. And is the report signed by Dr. Lichy?

A. Yes.

Q. Doctor, have you yourself reviewed the same MRI prior to today that Dr. Lichy describes in this report?

A. Yes.

Q. And what is your opinion as to the accuracy of Dr. Lichy's report?

A. I agree with it.

Q. What if any observations did you make from your review of this MRI image of Dr. Korn's cervical spine from April of 2001?

A. In comparison to the one from 1996, the herniation at C5-6 that was there has gotten a little bit larger and there was a new herniation at a different level at C4-5, so now there are two herniations and the one that was there in 1996 has enlarged.

Q. Doctor, I'd like to display this particular report to you which is 159 in evidence doctor, can you make that out?

A. Yes. MR. SEPE: Can everyone see?

Q. With regard to the third line of paragraph 1, doctor, could you explain what effacement of a central aspect of the thecal canal means?

A. Effacement of the central aspect of the thecal canal means it is pushing on the thecal sac which we just talked about. But what's changed, and if you look on the second line it says, there is now further extension of the disc which is at C5-6, meaning there's a larger herniation with compression of the spinal cord which we talked about, effacement of the ventral aspect of the thecal canal which is pushing back on the sac which we talked about, but now there's marked narrowing of the neural foramina bilaterally.

Q. What does that mean?

A. Narrowing of the neural foramina bilaterally means the holes where the nerves come out are now narrowed or pushed in by this herniation, which wasn't the case previously in 1996.

Q. Now with regard to the section of your report marked impression, can you please explain what you mean by right nerve root compression at C5-C6?

A. We talked about that the nerves go through the holes there and in the impression we are just reiterating that space is now being pushed on by the herniation and compressing the nerve.

Q. And what is the basis for the portion of the report that reads that that compression was not present previously?

A. There was a comparison made. Obviously a typographical error in the first sentence. Says comparison was made without previous examination. It should say comparison was made with previous examination of 4/11/96 and repeats that again in the impression when it says in the second line of the impression. As compared to previous examination of 1996, there has been

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an increase in the ventral compression at C5-6 and appearance of right nerve root compression at C5-6 which was not present previously. This was obviously compared with the previous examination and there are now new findings.

Q. Doctor, with regard to what you described as nerve root compression at the C5-6 level, what if any nerve roots are present at C5-6?

A. Between 5 and 6 the C6 nerves comes out as you can see on that chart.

Q. And where does that nerve go to?

A. I believe there are dermatome charts that actually show that. I believe it goes down the arm to the outer part, the thumb part and the second finger of the hand, eventually goes down that far.

Q. Thank you. And is that also true with regard to the nerve roots on the left side of C5-6?

A. Yes, it would be the same. Everything is symmetrical.

MR. SEPE: Your Honor, I don't believe I offered this into evidence, 159-A, I do so at this time.

MR. BEGOS: No objection.

THE COURT: Mark it in.

(Plaintiff's Exhibit 159-A for identification, document, received in evidence.)

Q. Dr. Kolb, based upon your review of the MRI images of Dr. Korn's cervical spine from April of 2001, were you able to reach an opinion with a reasonable degree of medical certainty as to whether or not that further herniation was related to trauma as opposed to disease?

A. The further herniation was related to trauma -- can you repeat the question again please?

Q. Sure. With regard to that further herniation and based upon your review of the images both in 2001 as well as 1996, were you able to form an opinion as to whether or not what you described as the further herniation was a result of trauma?

A. Well we have a second new herniation which wasn't there before, so something happened in the interim to cause that new herniation. Then we have a herniation that began in 1996 and has gotten larger, so it certainly is possible that something could have happened to have caused that to get larger as well on the second MRI.

Q. Hypothetically speaking, assuming that prior to 2000 the subject of the MRI had no symptoms that would be associated with right nerve root compression but such symptoms did appear in the year 2000 slightly before the 2001 MRI, how would that affect your diagnosis, if at all?

A. Was there any event that occurred before that MRI?

Q. Assuming there was.

A. Assuming there was an event, so it would be directly related to. If he had no symptoms, again, had no symptoms, had a trauma occur, an event occur, something occur that would cause a trauma to the neck, we do an MRI and find an extension of

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the disc herniation which is now causing compression on the nerve root to which you're speaking of, that would be then causally related to the trauma that occurred just before the MRI.

Q. Are you familiar with the term traumatic arthritis?

A. Yes.

Q. What does that mean?

A. It means that at first a trauma occurred and then after the trauma occurred, because of the damage from the trauma, there was premature arthritis that developed or degeneration that develops, initially because of the trauma, which now becomes arthritic in time.

Q. And based upon your review of cervical disc MRIs over the years as well as your medical training, is that an injury or a condition that heals?

A. No. Arthritis or degeneration is a continual process that progresses on. Both the disc herniation doesn't heal, nor does arthritis that's caused by a herniation, doesn't heal as well. It's individual within patients but in general, no, it does not heal. It can get progressively worse.

Q. Doctor, did there come a time you reviewed MRI images of the right shoulder of Dr. Jonathan Korn?

A. Yes.

Q. And did there also come a time prior to those MRI images that you reviewed what I'll refer to as x-rays or plain films of that same right shoulder?

A. Yes.

Q. Showing you what's been previously marked as plaintiff's 160B for identification --

MR. BEGOS: 168?

MR. SEPE: 160B.

Q. Do you recognize that?

A. I know what it is, yes.

Q. Have you previously seen it before today?

A. Yes.

Q. What is that?

A. This is a single picture, x-ray picture of the right shoulder, done at an unusual angle, and it's dated 2/18/2000.

Q. And if you can explain for the benefit of the jury, Dr. Kolb, what is the difference between what is commonly known as an x-ray or plain film and an MRI?

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A. Two very different tests. X-rays have been used for a hundred years. X-rays are relatively crude. They look at the differences between structures that are soft or hard. So if you look at a shoulder, what you see on an x-ray are the bones in the shoulder. You see the bones and everything else is kind of dark in the shoulder.

But there are a lot of other structures in the shoulder that you can't see on an x-ray because they are softer. That's rotator cuff you may have heard about and other structures, tendons, ligaments, muscles, you can't see any of that an on MRI.

But an MRI can actually distinguish all of those different structures from each other, so we can see the tendons and the ligaments and the bone and the bone marrow and the muscles, all of that can be seen on an MRI.

Q. Doctor, I'm showing you what's been received in evidence previously as plaintiff's 160.

A. Yes.

Q. Do you recognize that?

A. Yes.

Q. What do you recognize that to be?

A. It's a report from South Hampton Radiology on patient Jonathan Korn, and it is a limited study obtained to rule out foreign body of the neck and right shoulder and right hand, to see whether there is or isn't a foreign body in the neck, right shoulder and right hand.

Q. And what is reported in that document?

A. That there's no foreign body. In other words, from whatever trauma was suffered, sometimes the skin is broken and objects can go into the body and they were looking whether it is glass or concrete or some piece, they were looking for pieces from the trauma that may be within the patient's body and they didn't find any pieces.

Q. Are you familiar with the term notching of the right tuberosity?

A. Yes.

Q. What does that mean?

A. It's another way of saying a fracture.

Q. And what, if anything, does this report say in layman's terms as to a fracture?

A. It says -- to read?

Q. To explain please.

A. To explain, it says that there is notching of the right tuberosity. Tuberosities is part of the shoulder there. It's actually, I'll show you, this part, right here in this area; it's part of the shoulder joint, that bone. And the report says there's notching of that bone compatible with subluxation, which means that this bone, the joint has come out. The bone, the head of the humerus which is this bone has come out of the joint.

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See it's all held in one joint here. This is one bone, there's another bone and here is the third bone. When this bone pops out that's a subluxation of the shoulder.

There are ligaments and tendons and muscles that hold it in place. But if you suffer a trauma severe enough you can actually dislocate the shoulder, or if it's not completely popped out you can sublux or partially pop out the shoulder.

So what they're saying in the report here is that there is notching of the right tuberosity compatible with subluxation, which means the shoulder joint coming out which may or may not be present at this time. So they are hedging in this report as to whether it is present at this time.

Only one view was obtained. They only took one picture because they were looking for foreign bodies, they weren't actually looking for fractures or dislocations on this film and therefore subluxation or dislocation is not entirely excluded.

In other words, the radiologist wasn't sure whether there was or wasn't a subluxation or dislocation in the shoulder.

When they conclude no foreign body and then they say there's a deformity of the humeral tuberosity, they use the term notching in the body as discussed above with chronic changes, which they never discussed in the body of the report so I'm not sure where they are even getting that from. It's not on the film. I'm not sure where they are getting that, but that's what it says in their report from South Hampton Hospital in February 2000.

Q. And have you had a chance to review the report with regard to their examination of the cervical spine?

A. Yes.

Q. And could you please explain in layman's terms what those findings were from the x-ray?

A. That there was no foreign body, again cervical spine being neck. They said that there's narrowing of the C5-6 space. In other words, the two bones C5 and C6 are very close to each other, closer to each other than they should be of undetermined age, probably old, due to moderate spurring seen posterior at this level.

So they said that there are arthritic changes caused by a disc abnormality, discogenic arthritic changes at C5-6.

Q. Doctor, how did the MRI image from 2001 of that same area of Dr. Korn's body differ from the x-ray image from South Hampton Radiology reported in February of 2000?

A. Well on the MRI you can't see the -- on the x-rays you can't see the disc, only on the MRI you can see the disc. There was an earlier MRI of the cervical spine in 1996 where there was a herniation at 5-6 but the space was normal in height. Then there was an x-ray showing that the space had diminished in height.

That means that from the time of the first MRI in 1996, when the trauma occurred and there was a herniation of the disc, to four years later, that disc space has now narrowed. As you were talking about traumatic arthritic changes.

Q. Thank you. Showing you what's been received in evidence as Plaintiff's Exhibit 161, please take a look at that and tell me if you recognize that document?

A. Yes.

Q. What do you recognize that document to be?

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A. This is an MRI of the right shoulder from September 2005.

Q. And showing you what has been marked but not received in evidence as plaintiff's 161-A and B for identification, please take a look at those two exhibits.

A. Yes.

Q. With regard to 161-A and B, what are those?

A. They are MRI of the right shoulder done September 15, 2005.

Q. Of whose right shoulder?

A. Dr. Korn.

Q. And are those the MRI images upon which the report you just referred to was based?

A. Yes.

Q. And have you reviewed those MRI images prior to today?

A. Yes.

MR. SEPE: Your Honor, I would ask that 161-A and B be received into evidence.

MR. BEGOS: No objection.

(Plaintiff's Exhibit 161-A for identification, document, received in evidence.)

(Plaintiff's Exhibit 161-B for identification, document, received in evidence.)

Q. What if any observations did you make from your review of the MRI of Dr. Korn's right shoulder from September of 2005?

A. There are a number of findings on the MRI. First of all, there is that fracture we talked about that they noticed on the original plain film which is called a Hil-Sach's fracture, that's the name given to the fracture and that was a fracture of the head of the humerus there. So that was seen on the MRI of the right shoulder.

There's also a tear of the tendon, of the rotator cuff tendon, the major rotator cuff tendon in the shoulder and that goes over the head of the humerus there in the shoulder; that was also a finding there.

There's also a tear of other cartilage in the shoulder, that is called the labra and the labra between this bone here and that bone, again just like the spine where we have these cushiony discs between the bones so that the bones don't hit.

There's also some cartilage between these two bones and that was also torn.

So, there were tears of the rotator cuff, there were tears of the cartilage in the shoulder as well, and also there are evidence of small fragments, bony fragments within the soft tissues, not in the joint but within the soft tissues around the joint, as well as fluid in the joint. So there were a lot of findings, lot of abnormal findings on this examination.

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Q. What exactly is the glenoid labrum?

A. The cartilage between two of the bones, again the glenoid bone and the humerus. It's a joint when we move our arm around, so that we can move it around and bone doesn't touch bone. Inside the shoulder joint there is cartilage, just like there's cartilage in our knee, just like there's discs in our back. They just make sure the two bones don't come together because that would be very bad and painful when two bones come together. That's what can happen when cartilage tears. But the cartilage is there to try to keep the bones apart.

Q. Doctor, based upon your training and review of these images, to a reasonable degree of medical certainty, do you have an opinion as to whether or not the injuries you're describing in the right shoulder are consistent with dislocation?

A. Usually a Hil-Sach's fracture is caused by dislocating the shoulder, coming out, and then there's a grinding of the humeral head which causes the fracture and the notching that we talked about.

So usually there's some form of popping out or subluxing of the shoulder joint. And that fracture that we've been talking about is by this grinding or smashing of the bone by the other bone.

So usually, of course, that is a traumatic event.

Q. Are you familiar with the term crepitus?

A. Yes.

Q. And what is that?

A. That is air within the joint that makes noise as you move the joint.

Q. Thank you.

MR. SEPE: Your Honor, I have no further questions.

CROSS EXAMINATION

BY MR. BEGOS:

Q. Dr. Kolb, you testified that you knew Dr. Korn as a source of referrals; is that right?

A. Yes.

Q. So Dr. Korn referred patients of his to you for x-rays and MRIs and so forth?

A. Yes.

Q. And then you would charge those patients and earn income off the people that Dr. Korn referred to you, correct?

A. Yes.

Q. And you also testified as an expert in cases where Dr. Korn was testifying as an expert; is that right?

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A. Yes, I think so.

Q. You've also testified in cases as an expert, in cases where Dr. Kaplan, who became Dr. Korn's partner, testified as an expert?

A. Yes, that's true.

Q. And when you testify as an expert, you ordinarily charge a fee, correct?

A. Yes.

Q. What's your ordinary and customary fee for testifying as an expert?

A. $5500.

Q. So if Dr. Korn or Dr. Kaplan gets a lawyer's client referred to them and they refer that person to you for x-rays and then everybody testifies in court, you might make $5500 or more from that referral, correct?

A. Considering your scenario alone. B Q. Are you charging for your time today?

A. Yes.

Q. And how much are you charging for your time?

A. It's $5500 for being here.

Q. Now are you charging for your time or are you charging to come in and offer a particular opinion?

A. I'm charging for my time to read the films as they appear.

Q. And is that because -- are you charging that amount because you could make a similar amount if you were in the office reading films instead of being here in court?

A. Yes, that was initially how the figure was arrived at.

Q. So it's not just picking a number that says, hey, I want $5500, it's actually related to what you would be earning if you were back in the office reading films, correct?

A. Yes.

Q. If your assumption is you could earn $5500 today reading films, would it be in your view appropriate to charge, say, $15,000 to come in and testify?

MR. SEPE: Objection.

THE COURT: Overruled.

A. I'm not sure what you're asking.

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Q. Well let's say your time in the office this morning would actually be worth approximately $5500. Would it be appropriate, in your view, for you to charge $15,000 to come in here and testify?

A. I've never thought about --

MR. SEPE: Objection, your Honor.

THE COURT: Overruled.

A. I've never thought about what is appropriate or not. I charge whatever is commensurate with me coming in based on my time, and I don't have an opinion whether I should charge less or more.

Q. So you can't answer whether it would be appropriate or not for you to charge $15,000 to come in and offer an opinion as an expert?

A. As a moral judgment, no, I can't.

Q. The reports, the radiology reports that -- actually let me ask you this. Do you know approximately how often Dr. Korn or Dr. Kaplan refers patients to you?

A. How often?

Q. Yes.

A. No.

Q. Now ordinarily, as a radiologist, you get patients through referrals from other doctors, correct?

A. Yes.

Q. People don't walk in off the street and say I want an MRI, right?

A. That's correct.

Q. They're going to need a prescription of some kind to get the MRI or the x-ray taken?

A. That's correct.

Q. Do you get a lot of referrals from lawyers?

A. None.

MR. SEPE: Objection.

Q. None?

THE COURT: Overruled.

Q. Looking at -- do you still have the exhibits, the reports that were used on direct exam?

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MR. BEGOS: Are they right here?

MR. SEPE: Yes.

COURT OFFICER: He has the copies.

Q. You have the copies, okay. Looking at, let's take exhibit 152, this is a March 29, 1994 report, right?

A. Yes.

Q. This is addressed to somebody, correct?

A. Yes, it is.

Q. And is it the practice as a radiologist to address your report to the person who referred the patient to you?

A. To the person who referred the patient to me, yes.

Q. And this report is addressed to Dr. Korn, correct?

A. Yes, that's correct.

Q. So Dr. Korn referred himself to you for this MRI, correct?

A. I don't know that to be the fact. All I know is that the report was addressed to him. Possibly he wanted to see the report and then send it out to his referring physician. I don't know that to be the case.

Q. It's not cc'd to another doctor other than Dr. Korn, correct?

A. This paper is not cc'd to another doctor. What happened with it after Dr. Korn got it, I don't know.

Q. Just for comparison purposes, if you look at exhibit 155, that's an MRI report that's addressed to a Dr. Finkel, correct?

A. Yes.

Q. And you cc'd that to Lenox Hill Radiology, correct?

A. Yes.

Q. So your interpretation of this would be that Dr. Finkel asked for this MRI, correct?

A. Yes.

Q. And he's a neurologist; is that right?

A. I don't know.

Q. Now, your job when you look at an MRI film is to note whatever is unusual, correct?

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A. Yes.

Q. And you don't note things that are normal, right?

A. Usually not.

Q. And when you read the MRI, this is the March 29, 1994 MRI, exhibit 152, you didn't note anything abnormal in the reading, correct?

A. That's correct.

Q. And it's your job, if you see something abnormal, to note it?

A. Absolutely.

Q. Whether you are looking for it or not, correct?

A. Absolutely.

Q. I mean if someone comes to you and they're referred to you for an MRI of the brain because they think there's a fracture and you see a tumor, you would report the tumor even though you're not asked to look for a tumor, right?

A. Yes.

Q. But when you read this MRI you didn't see anything?

A. That's correct.

Q. And then you were asked to look at it again, and that's exhibit 154, correct?

A. Yes.

Q. And you had been given some information, you said, and you were asked to look at it again?

A. Yes.

Q. And again, this is addressed to Dr. Korn, right?

A. Yes, it is.

Q. So based on your practice, would it be your understanding that it was Dr. Korn who asked you to look at it again?

A. No.

Q. Do you know who asked you to look at it again?

A. I don't remember the name of the clinician. It was after being told that the patient had trauma and subsequent steroid administration, that I was asked to look again at the brain. Again, I found nothing in the brain.

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Q. So a doctor asked you to look at it again?

A. Yes, I would think so. This is now eleven years ago.

Q. Could have been Dr. Korn who asked you to look at it again?

A. Well, after -- it's unlikely.

Q. Why is that?

A. Because I already had my results and I don't think that he would -- well, I don't know for a fact what the name of the doctor is who asked me, let me say that, who asked me to look at it again. All I know is I was given information that's highly unusual based on the findings of the MRI.

Q. So based on your recollection, it could have been Dr. Korn who reported to you some symptoms or findings, and it could have been Dr. Korn who said can you take a look at this MRI again and see if you see something in light of what I told you?

A. I don't know the name of the person who asked me to look at the MRI again, in light of the fact that there was more information available based after the first reading.

Q. That wasn't my question. My question was based on your recollection, it could have been Dr. Korn who gave you the additional information and who asked you to look at it again, correct?

A. My answer is, I don't know.

Q. Ordinarily as a radiologist you don't treat patients, correct?

A. That's correct.

Q. So you write a report and send it typically to a treating physician who does with it whatever he thinks is appropriate?

A. That's correct.

Q. And with respect to the 2000 reading, this is exhibit 155 which you sent to Dr. Finkel, you don't know what Dr. Finkel did or didn't do with the information you gave him, right?

A. That's correct.

Q. Only Dr. Finkel would know that?

A. I don't know what happened with that report after Dr. Finkel received it.

Q. When you relooked at the MRI in 1994, whatever you saw presumably was small enough that you missed it the first time, right?

A. Small enough that it wasn't picked up the first time, that's correct.

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Q. And when we looked at the 2000 brain MRI, again 155, that whatever you saw in the second look in 1994 wasn't there any more, right?

A. That's correct.

Q. And you don't know if there was actually a fracture in 1994, you're just reporting that there was some I think you said intensity of image?

A. No. I think we should go back to the actual words.

Q. Let's get the words here. A focus of be a normal signal?

A. Which, which may be due to marrow edema from a nondisplaced temporal bone fracture or bruise.

Q. May be but you don't know?

A. Suggestive of a fracture or bone bruise.

Q. And if it was a fracture or bone bruise, by 2000 that was gone, right?

A. Right, on the MRI it was not seen. Not visible.

Q. And that would be -- would that be consistent with your understanding of a lot of traumas, you get hurt and it gets better?

A. Some traumas you get hurt, you get better; some traumas you get hurt and you don't get better.

Q. When you looked at the brain MRI, this is exhibit 156, March 15, 2000, you saw the focal areas of gyral edema bilaterally, right?

A. Yes.

Q. And then you took another MRI a couple of months later in June of 2000 and those, whatever you saw in February -- in March, sorry, was gone, right?

A. Yes.

Q. So again if it was trauma, the trauma happened and whatever you saw in March had healed by June, correct?

A. I wouldn't use the word healed, I would say that the finding was not there any more.

Q. So you wouldn't use the word healed. So there was a finding in March and the finding was gone in June?

A. Right.

Q. That's all you can say about your readings of the reports, right?

A. That's right.

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Q. You were asked about images of Dr. Korn's cervical spine, and you saw a herniation at one point in time, this is the first reading you had, and you testified that without what Mr. Sepe told you were symptoms, clinical symptoms reported and a statement that a trauma had occurred, you couldn't say from reading the films whether the herniation was a result of trauma, correct?

A. I couldn't -- no, I didn't say that. I said I can't date it to exactly when it happened. Without having any arthritic changes at that site and having a herniation, given statistically speaking how herniations occur, you could very well say that it was due to a trauma.

Q. Herniations do occur as a result of natural degenerative processes, correct?

A. But there wasn't any degenerative process on that MRI in 1996.

Q. That wasn't my question. My question was discs do herniate for reasons other than trauma, correct?

A. Absolutely.

Q. And if you look at the spine of a 50 year old, you would expect to see degeneration that you wouldn't see in the spine of a 20 year old; is that correct?

A. Most commonly, that's correct.

Q. And that's one of the reasons why, without knowing more, just looking at -- withdrawn.

There are herniations that don't cause symptoms as well, correct?

A. That's correct.

Q. You can have a herniated disc and not know it?

A. That's correct.

Q. So from just looking at an MRI film, you can't say whether somebody is experiencing any kind of symptoms from a herniation; is that correct?

A. That's correct.

Q. With respect to the shoulder, if I'm not mistaken what we have is the x-ray that was taken in February 2000, that's exhibit 160.

A. Yes.

Q. Which you saw presumably sometime recently?

A. Yes.

Q. Do you recall when you first saw it?

A. Within the last week.

Q. And then we have exhibit 161 which is a report by your partner from September 19, 2005, correct?

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A. Yes.

Q. And that's addressed to Dr. Korn, right?

A. Yes, it is.

Q. And based on your practice, your typical practice is to address the report to the referring doctor, right?

A. That's correct.

Q. At the time this report was written -- withdrawn. Let me ask this. When did you first learn that Dr. Korn was involved in litigation?

A. I think probably in the last month.

Q. When you've testified -- when you've gotten patients referred from Dr. -- withdrawn. Let me ask it this way. Do you have contact with Dr. Korn outside of reading radiology films for him?

A. No.

Q. Were you told or can you tell from this or anything else in your records why Dr. Korn asked for an MRI of his right shoulder in September 2005?

A. I don't know that he asked for it. All I know is that it was addressed to him. Maybe it was just to facilitate getting the reports out to the doctors that he would do it because he's a physician. I don't know that he asked for it.

Q. It's your practice to address a report to the physician who requests it, correct?

A. Clearly, Dr. Korn being a physician, clearly Dr. Korn being a referring physician, another physician may have asked Dr. Korn to get an MRI of his shoulder. Dr. Korn may have asked the report to get out quickly to him and he would distribute the report and that request would be honored as long as the referring physician does get the report.

I can't tell from this report whether there was a referring physician other than Dr. Korn or not. There very well may have been.

Q. So it's possible that Dr. Korn, knowing that there was a trial coming up, asked you or your partner to take an MRI of his shoulder to come up with evidence for this trial, right?

MR. SEPE: Objection, calling for speculation on the state of mind of other people, your Honor.

THE COURT: Sustained.

Q. With respect to your background, your specialty is breast cancer, correct?

A. I would say that's a primary specialty, yes.

Q. And you were asked about articles you wrote and those were all about diagnosing breast cancer, correct?

A. And one article on MRI, early MRI techniques, that's correct.

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MR. BEGOS: Nothing further. Thank you, doctor.

REDIRECT EXAMINATION

BY MR. SEPE:

Q. Dr. Kolb, do you recall a moment ago Mr. Begos asked you about your comparisons of MRIs of February 23rd, 2000 and June 20th of 2000?

A. Yes.

Q. And you testified a moment ago, it's fair to say, that the edema that you spotted in February of 2000 had resolved by June of 2000?

A. That's correct.

Q. For the benefit of the jury, what is edema?

A. Swelling.

Q. And what is the presence of edema significant for on an MRI?

A. Swelling of the brain can cause increased pressure. And of course the brain is the nerve center, and so it can cause symptoms. By having swelling on the brain, it can cause symptoms.

Q. And, doctor, once swelling resolves or in layman's terms goes away, would any injury underlying that swelling be picked up or not be picked up by the MRI? In other words, what I'm asking you is, would the MRI be able to detect any damage underlying that swelling?

A. Not necessarily.

Q. What types of instances would an MRI not pick up the damage of the brain underlying the swelling that may have been present at one point but it resolved sometime after?

A. Once the swelling goes away it can form a scar, some residua of the trauma and since it is not swollen any more and there's no edema and there's no whiteness on the MRI you may not see it. In other words, you can have symptoms even though the swelling has cleared up.

Q. And what if any effect does steroid administration have? What I mean is, what if any effect is there of the patient who is being viewed through the MRI if they are taking steroids at that time?

A. The reason for steroids is often to reduce the pressure of the brain. Ask me again.

Q. When you say pressure of the brain, what do you mean by that?

A. The brain has a certain pressure. The spinal fluid has a certain pressure in the brain. If there were to be something that occupied a space, such as swelling in the brain that shouldn't be there, that would cause an increased pressure in other parts of the brain and can cause symptoms.

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So the steroids can be given. One reason steroids are given is to reduce that pressure in the brain.

Q. Is it fair to say if that pressure existed but the patient was subsequently treated with steroids, that that pressure might not show up on the MRI?

MR. BEGOS: Objection, your Honor, is it fair to say? Improper question.

THE COURT: Sustained as to the form of the question.

Q. Doctor, assuming that the subject of the MRI was on steroids at the time the MRI image was actually taken, could that affect the MRI result itself?

MR. BEGOS: Objection, no basis in evidence for that assumption.

THE COURT: Overruled.

A. Being on steroids can affect, of course, the appearance of the brain on MRI.

Q. In what way?

A. It could reduce the amount of swelling that's there. That's one of the things it does. It's a treatment. In other words, the patient suffered a trauma, has an abnormality in the brain, you've started treating the brain. Now do an MRI under treatment you're going to see something different than if you would have done the MRI without the treatment. You're going to see less, of course, than prior to the treatment.

Q. And a moment ago you said that after an area of edema or swelling resolved, it's possible there could be scar tissue in the area the edema was observed; is that correct?

A. You can form scar tissue from damage to the brain that may not be visible on an MRI. In other words, you can have symptoms that persist even though the findings on the MRI go away.

Q. And other than scar tissue in that area that we're discussing hypothetically, are there other types of damage to brain tissue that would not be shown in the MRI?

A. There can be symptoms that patients have, and I'm not talking about this patient, but they can be headaches, they can be seizures, there can be pain that patients have where you do an MRI, and this is clearly where the patient has significant symptoms, and you just don't find anything on the MRI.

So the answer to your question is, you can have symptoms without there being an MRI finding. And just because something was there and went away doesn't speak to the patient's symptoms.

Q. Does an MRI detect damage of the brain at the cellular level?

A. Cellular level is microscopic and on MRIs we look at the tissue.

Q. Thank you.

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RECROSS EXAMINATION

BY MR. BEGOS:

Q. The reality is, doctor, if you don't see something abnormal on an MRI all you can say is there's nothing abnormal on the MRI, right?

A. That's correct.

Q. You don't write in your reports gee there might be scar tissue that we don't see here or there might be a hundred other problems that we don't see here, you just write it's a normal MRI, right?

A. Sure.

Q. And anything else on your part is just guessing as to whether it's there or not?

A. I'm not guessing. You would have to ask the clinician or patient if there's symptoms. It is not guessing.

Q. We're asking you as a radiologist if you see a normal MRI of the brain and you were to write hey there could be scar tissue that I can't see, that would just be a guess, correct?

A. Yes. You only read the MRI as is. But the questions that I answered before are not guessing.

Q. Thank you.

MR. QUADRINO: Nothing further.

MR. SEPE: Nothing further.

THE COURT: Thank you, doctor.

End of Document

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