2008 WL 7928466 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
Bronx County

DESSASORE,
v.
NEW YORK CITY HOUSING AUTHORITY.

No. 16097-2004.
June 2, 2008.

(Transcript of Dr. Thomas Kolb)

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

Plaintiff calls Dr. Thomas Kolb.

DR. T-H-O-M-A-S K-O-L-B, having been first duly sworn was examined and testified as follows:

THE COURT OFFICER: Thank you.

Have a seat.

In a loud and clear voice, please state your full name and professional address.

THE WITNESS: Dr. Thomas Kolb, K-O-L-B. 222 East 68th Street, New York, 10021.

DIRECT EXAMINATION

BY: MR. GERSHON:

THE COURT: Go ahead.

Q Good afternoon, Dr. Kolb.

A Good afternoon.

Q Dr. Kolb, can you tell us if you're a physician licensed to practice in the State of New York?

A Yes, I am.

Q Can you tell the members of jury what is your specialty?

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A Diagnostic radiology.

Q And can you tell the members of the jury your experience, education, training in the field of medicine?

A Yes. I went to college here at Queens College, City of New York, graduated in 1979, went to medical school in Brooklyn; Down State Medical Center, graduated 1983, as a physician.

I then did -- I became a pediatrician, actually. I did an internship and residency in pediatrics here in the Bronx at Albert Einstein College of Medicine and became board certified as a pediatrician in 1986.

I then went back -- that took three years. I then went back and did another four years in diagnostic radiology in Manhattan Columbia Presbyterian Medical Center from 1986 to 1990 and became board certified in radiology, as well in 1990 -- from 1990 to the present, about 18 years, I've been practicing diagnostic radiology.

Q And can you tell us, are you a member of any associations?

A Yes. I belong to the -- first of all, I'm a diplomate of the American Academy of Pediatrics, American Board of Radiology.

Q What does that mean, sir?

A That means that you become board certified. That means that you've taken a course of study, which in pediatrics is three yours, radiology four years. You pass a written examination and if you pass that examination, you have to take an oral examination. And if you pass that, you become a member of the board of whatever you're studying for. In my case, pediatrics and subsequently radiology.

So, I've been practicing radiology since that time.

Q Have you received any awards or honors, sir?

A Yeah. I've done research and written some papers. One of my more recent papers was in 2002, won the American Medical Association Science Writers Award for best publication of the year. And that dealt with diagnosing breast cancer, actually.

Q And, Doctor, could you tell us presently, in addition to being a diagnostic radiologist, do you treat patients?

A Well, I take their pictures or order pictures to be taken, I interpret their pictures. I also speak to and physically examine large numbers of woman. In my practice, my practice is divided into breast cancer diagnosis and diagnosis of musculoskeletal; the spine and so on, abnormalities.

So, for diagnosing breast cancer, I speak to every patient, I physically examine every woman before I do either mammography or ultrasound or MRI on their breast. And I do many biopsies because of the nature of my practice. I generally see young, high risk woman. And I do the biopsies myself. I personally do all the biopsies myself.

So, in that respect, to answer your question, I see patients.

The other part of my practice is doing musculoskeletal radiology. Let's say CAT scans, x-rays, MRI's and those kinds of procedures are performed by technologists who push the buttons to require that test, the MRI or CAT scan or so on. So, I'm responsible for those studies. I don't actually push the buttons, but I interpret the pictures; I look at them, interpret and read them.

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So, there's different facets to what I do.

So to answer the question the long way, yes, I see patients.

Q And can you tell us what degree -- when did you get your license?

A 1983.

Q And, Doctor, approximately how many of these MRI films do you read in terms of the musculoskeletal diagnosis?

A Musculoskeletal is including spine and brain and so on. It's just not limited to that.

Oh, in the past 18 years, many, many many thousands of studies.

Q Now, Doctor, you, prior to us ever speaking about this case, you were actually sent films to review by Dr. Hausknecht, correct?

A Sent films to review and actually performed examinations on a patient as directed by the physician, yes.

Q And there was a time that I contacted you with respect to testifying as to your findings, correct?

A Oh, yes, you did.

Q Now, Doctor, before we get into that, can you just tell the members of the jury what various types of diagnostic radiology there is as it relates to this type of case?

A Well, radiology is a study of looking into our -- into the body of a patient who's having a symptom, a problem and trying to diagnose what that problem is. And we use various tests: We use MRI scans, we use CAT scans, x-rays, mammograms, ultrasound. All these tests that we use to look inside the body to see if there's a problem or not.

In this particular case we relied on MRI -- I relied on MRI scans, which are magnetic resonance imaging scans, which are very common nowadays to look at the spine and other parts of the body.

Q Now, what is the difference between a MRI and a CAT scan and a x-ray? Why would you use a MRI as opposed to a CAT scan?

A CAT scan is a form of a x-ray, it's just a -- it's just using a computer to take x-rays and be able to take slices of the body. We're not actually cutting anyone, we're just looking at thin slices of the body as pictures. But, CAT scans are x-rays. X-rays look at the differences between substances that are hard or soft.

So, x-rays are very good to look at the bones. For example, to look at a fracture. Because the bone has skin around it and muscle around it and those are all soft tissues, but the bone is very hard. So, x-rays are excellent to look at these hard structures. But, they're not good to look at the soft tissues.

For example, in the spine there are bones. And in between the spine there are discs. They're also muscles, ligaments. There are nerves. All of these structures are not as hard as the bones. The x-rays don't see that.

So, if you take a x-ray of the spine, you'll see the bones of the spine and then you'll see empty spaces. But, there are a lot of structures really there but regular x-rays don't see it.

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CAT scans do a better job, but still the same principle, just looking at the difference between something hard or soft. MRI are totally different. MRI uses magnetic waives. Magnetic waves we put into the body in the MRI scanner and we get a picture of the body and we're able to tell the difference between all the different softer structures, whether it's a disc, a muscle, a tendon, a ligament, a nerve, spinal cord. Fluid around the spinal cord.

We can see all that on a MRI. We can't see that as well as on a regular x-ray. So, there are big differences between these tests.

Q And, Doctor, have you testified in the past?

A Oh, yes.

Q And how often would you say you testify in the course of a year?

A In the course of a year, probably five to six times a year for the past 15 years.

Q Okay.

And, Doctor, are you being compensated for your time away from your practice today?

A Absolutely.

Q How much is that?

A $6,000.

Q Now, Doctor, can you tell us before you get into Mr. Dessasore's films -- and by the way, in terms of Mr. Dessasore's case, you read films and interpreted them, but you never actually treated Mr. Dessasore, correct?

A That's correct.

Q Okay.

I understand doctor house connect made certain requests of you and you gave opinions and sent them back to Dr. Hausknecht, correct?

A Yes.

Q Okay. Now, can you just tell us before we get into the actual films, a little bit about the anatomy of the spine as it relates to this case?

A Sure.

Q And is there anything in the court that might assist you in explaining to the jury?

A There's a model there, so I can use it.

Q All right.

MR. GERSON: Judge, would it be okay if the doctor can step down?

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THE COURT: Sure.

MR. GERSON: Come on down, Doctor.

Q So, this is a model of the spine backwards. Let me turn the model around.

Okay, so?

A Okay, so, this is the spine. Up here is the head, the brain, which is not in this, and we see the bones of the spine.

Now, each one of these hard substances is bone. And there are really four parts to the spine: There's the neck, which is the cervical spine, there's the back which is the thoracic spine, there's a lower back, which is the lumbar spine, and then there's even lower than that. And what we're dealing here with on this particular picture, with two parts of the spine. There's the cervical part of the spine, the neck and the lumbar part of the lower part. All of us have the same number of bones in each part of the spine. So, the cervical spine is seven bones. And in the lumbar spine there are five bones in all of us.

Now, let's just focus, let's say, on the lower spine, the lumbar part. So, each one of these are bones here, is a bone in the spine. And you'll see that in between the bones there are --

Q Doctor, the bones, do they have a name?

A Yeah. In each part of the spine there are different numbers of bones. So, in the lumbar spine where there are five bones, we call them L for lumbar, one for the first bone, two for the second bone and so on. After we finish the five of the lumbar, starts the sacrum, which is the very -- even lower than the lumbar and we call the first bone of the sacrum S. The sacrum one, first bone. We number it this way so we're all on the same page here.

So, if I talk about something between L-4 and L-5, I'm talking about something between the fourth, this bone, and the fifth bone of the lumbar spine, not of the cervical.

I mean, the cervical spine up here there's seven bones. It all kind of is like the same thing, but they're seven bones and each one of those bones is called C for cervical. One, two, three, four, five, six, seven. Okay?

So, between these bones of these rubbery structures right here, those are the discs. And the purpose of the discs are to be like shock absorbers. Because we don't want the bones to come together and touch each other because that would be a painful situation and that would be predisposed to arthritis.

So, we're born with discs between the bones and the discs are gelatinous, like toothpaste almost. So, they're very watery, which is different than the bone, of course. At least harder than it is on the outside.

Now, this toothpaste substance or rubbery substance, something has to hold it into place, in place, or else when we move around it would just spurt out.

So, there are ligaments that cover the discs in the front of the spine and the back of the spine and around each level.

So, there is a ligament that runs down the front. They all have very fancy medical names, but we really don't have to learn those. There's a ligament that runs down the back and then there's an annulus which is a ligament that goes around the spine at each level so the discs are held in place.

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Now, on top here we talked about the brain, okay. All of the nerves that go to our neck, back, trunk, legs, everywhere in our body that go out to allow us to move come from the brain. The nerve that ends up in our pinky initially really started out in the brain. And it goes down the brain in a course called the spinal cord.

So, the spinal cord is just a collection of all these nerves that will eventually get out of the spine and go to where they're supposed to go so we can actually move, we can feel things. Okay. And so the spinal cord comes down and each level between the bones, for example, between C-3 and C-4, the third and fourth cervical bone, there's a hole, there's a hole that's on the left side of the patient and there's a hole on the right side of the patient. The hole is there because as the nerves come down the spinal cord, one nerve will come out the C3-4 hole. And the medical name for that is a foramen. So, the neural foramen is the foramen that holds the nerve. So, at every single one of these levels between every bone in this spine there's a bone.

If you look here you'll see there's a hole with a yellow thing sticking out. This gel thing is a nerve route and it's a nerve that goes to where it's supposed to go in the body. It originated up here in the brain, base of the brain, came down the spinal cord, and each level the nerve comes out to the left, nerve comes out to the right.

Let's say C3-4, one level down C4-5, a nerve goes out to the left, nerve goes out to the right. You'll see all these nerves coming out of the spine on the left and on the right.

Now, you have to remember that they're also bones in the back of the spine, so the entire spine is a circle of bones really because it's protecting the spinal cord. And if you look in here you'll see that the spinal cord takes up most of the space of the spinal canal inside in between these bones, these very little space -- millimeters of space between the spinal cord and the bones.

So, what keeps the spinal cord from hitting the bones? Well, this fluid, fluid around this spinal cord, in the thecal sac, which is an sac of fluid which surrounds the spinal cord, and that protects the spinal cord from hitting the bones. It also provides the spinal cord with oxygen, the nutrients that the spinal cord has to have, the cells, nerve cells having nutrients and oxygen.

So, around the spinal cord is a sac, but it's a very, very tight squeeze in there.

That's what you'll see on pictures, very small areas.

(Whereupon, continues on the next page. Take D.)

A (Continuing) So what happen then, for example, one of these discs, if there's a problem with one of these discs, what kind of problem can there be with discs?

There are things called “disc bulges” and “disc herniations,” where, let's say the covering of the spine in the back, of the spine or the annulus that goes around the spine is worn, if it's partially torn, then the disc can push out a little bit and you have what's called a “disc bulge.”

If it's completely torn -- sorry -- if it's completely torn, then the disc can push out completely. And that's called a “disc herniation.” That's a hole in the ligament or a pushing off of the ligament from the spine.

Now, how do you know when you're looking at the spine and how do you know when you're looking at a M.R.I., like you'll see, when there's a normal disc or a disc abnormality, a disc herniation?.

I told you that the discs go to the edge of the bone, are held there in place tightly by these ligaments. If I show you a picture of the disc going beyond the margin of the bone -- in other words, if this is the margin of the bone and you're looking at it from the side and you see no disc, looking at the edge of the bone, of course, there's disc in the middle here, but no bone on this side of the disc, that's a normal disc.

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If you see disc material pushing out on the other side of the bone, you know something's happened and that is abnormal. Okay? If it's pushed out in a certain shape, that's called a "disc herniation."

Why are herniations important? Why do we care about disc herniations? We just talked about the spinal cord. We just talked about nerve roots. We just talked about the thecal sac, which is the sac of fluid.

By the way, that sac of fluid, when we do a spinal tap and put a needle in the spine and draw fluid, that's the fluid we're taking out. That's the fluid around the spinal cord.

So the herniations are important because this is all a tight, closed space and if a disc is in an area that it shouldn't be in -- in other words, it's abnormal or herniated -- it can cause pressure on the nerves, be it in the spinal cord or where all the nerves are or be it nerves that are coming out of the spine. So it's possible for a patient to have symptoms, pain, other symptoms based on abnormalities caused by an abnormal disc, like a herniation.

It's possible that the patient will feel -- will have an abnormality. So patients are often sent -- for example, for pain -- for M.R.I.s, to look for ab-normalities. One common abnormality, as you now understand, can be a disc herniation. So I think that's really all the anatomy you need for this minute.

Q Okay, Doctor. I'm going to take that spine off before it lands in someone's lap.

(Whereupon, there is a short pause in the proceedings.)

Q Doctor Kolb, in conjunction with this, in conjunction with your treatment of Mr. Dessasore, did you read various lumbar M.R.I.s and cervical M.R.I.s and some of them you did?

A Yes.

Q I'd like you to come down and take a look at the first lumbar M.R.I. that was done of Mr. Dessasore on January 13, 2004, which has been marked into evidence as Plaintiff's Exhibit 12. There's a whole envelope of the films. Take out whatever films you want we'll mark them separately and put them up on a view box.

THE REPORTER: Starting with 12A, Judge?

THE COURT: Yeah.

(Whereupon, the item referred to is received and marked Plaintiff's Exhibit Number 12A, 12B and 12C in Evidence by the Reporter.)

Q Doctor, can you go over and would you ex-plain to the jury, how the M.R.I. is done in cuts?

A Because it's all computerized, we can look at the spine from any angle we want. We, generally, look at from two angles; the side view; and that's a view like we just had the spine, looking at it from the side.

From the side right here (indicating), you'll be able to see all these structures. See here actually on the picture? That's called "sagittal view."

There's another view. Instead of looking at it from the side -- okay? -- by the way, the side view, we don't just take one picture of the sides, like we do with a regular X-ray. We make many many many pictures going from the right to the left or from the

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left to the right. Each picture is just a few millimeters. You'll see a few pictures all the way on the right side,m for example, showing these nerve roots (indicating) and other pictures showing these nerve roots and some pictures straight in the middle showing the spinal cord (indicating) because there's no spinal cord on the side here and the side here (Indicating).

We have pictures from the side and we have pictures that we cut from top to bottom. Okay? For example, if you have a long loaf of bread, you can cut it the longways and open the whole loaf up and fill it that way or you can cut slices and have many slices. We do, we do the same thing when we look at these pictures.

This is a side view that we're gonna look at, but we will also look at the axial views, many slices from top to bottom.

Q Okay, Doctor. If you want to take a look at the films from January 13, 2004, and tell us if you see anything that's significant?

A This particular one that we're gonna start out with, 12A, you'll see that the next pictures we're gonna show are a lot clearer because there's some motion of the patient on this film because he had pain or a problem staying still or for whatever reason.

The important part is I want you to look at these white structures here. Each one of these white structures that look like little long lines, those are the discs. Those are the discs (Indicating). Okay? And the squares between each one of these white lines here, here and here (indicating) -- and you'll see them better in a second -- are the bones.

We said the disc should come to the edge of the bone and stop. These are the five bones. This is five. This is four. This is three. This is two. This is one. And you'll look at these discs here (indicating) between one-two and it's unclear, two-three and three-four, it looks like they come to the edge of the bone and stop. But you'll see -- and you'll come up and look because these are small -- that this disc actually comes all the way out here beyond the margin of the bone and there's a piece of this disc also that comes out beyond the margin of the bone.

If I show it to you another way -- for example, on 12C, where the discs were white before, the discs are now gray and you can see the squares much better, the squares of the bone. The discs are between them and you can see a round piece of the disc. When you come up, you'll see it's very obvious, a round piece of the disc here that's coming out. It's pinched off and coming out beyond the margin of the bone and that's the pinched off part.

The disc is the same thickness. Then it goes through that hole in the ligament, narrows down by the ligament and going around is tight and it punches through and expands a little bit. When you come up or whenever you look at this picture, you'll see a disc here (indicating) that is different.

Q Since we have the films up now, would you like the jury to see it?

A Sure. Let me explain one more thing and everyone can come and look at it.

Q We said that we can look at the spine two different ways. This is the side view. So let's put that axial view cuts up and see what things look like.

I Want to point out just a couple things before we put this down; and that is, behind the bones is the spinal cord fluid. That's where the spinal cord in the lumbar spine -- the spinal cord actually goes down to about T-12. We're not even talking about that. That's the middle of the back at L-1, top level of the lumbar spine. Below that are just nerves.

The spinal cord actually stops. It doesn't go all the way down to the end of the spine. It stops at the top of the lumbar spine. On these pictures, which are very different than the neck pictures, you're not going to see it. You'll see it on the cervical spine. These gray strands coming down are the nerves.

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Let me point out one other thing; and that is, when we go all the way to the side of the spine, whether it's the right side of the patient or the left side of the patient, you'll see these white structures with a dot in it. You'll come up and see structures with a dot. These structures are the holes or foramina. They're brighter because there's fat in it and the dot is the which actual nerve coming out.

It you take a picture all the way to the side like this (indicating), you'll see a hole filled with fat and a nerve coming out. So you'll see here that this is what a normal neural foramen looks like. And as you go down, you'll see you're losing it. When you come up, you'll see less white in it and the white is being pushed back. That's because the disc herniations are pushing out and into these neural foramina. Okay? That's something to keep in mind.

I Want to show you one other thing and then we can go over everything at once. And that is those axial cuts, cutting straight down. This is 12B.

Now, the bones and the discs are not long and square. They're round because we're cutting it this way (indicating), instead of from the side.

Now, what's this round gray thing behind the bone and the disc? This is the spinal canal or the thecal sac. That's the canal that runs up and down the body, behind the bone that contains the nerves or the spinal cord. So here (indicating) we see it round, instead of just straight up and down because we cut the patient that way.

This is a normal disc, between L-1 and -2. It's numbered here. These little pictures tie in. The little pictures, when you look, are the exact same pictures you just looked at and it orients you to what level you're looking at.

You see a white line going across here (indicating), between L-1 and L-2. It tells you this big picture here is between L-1 and L-2. This is normal. And the disc comes to the end and stops.

Now, what happens lower down, at five-one? At five-one, there's actually a point here, instead of it being like on the picture before, being round and stopping, it comes to a point. And here (indicating) you can actually see a point coming down. That's the disc herniation that I showed you before that changed in configuration.

At four-five, instead of it being flat in the back here, you'll see there's a piece of the disc pushing down here, but which you don't see at any other level right here (indicating) that's also a disc herniation.

So there are two disc herniations; at four-five and five-one. The neural foramina, the holes where the nerves come out are right here (Indicating). Here is the sac, this round thing, and these two dots on the side are the nerves that are coming out. Okay?

So the findings on this film from January are disc herniations at those two levels; four-five and five-one, that are pushing on the fat. Fat is in front of the sac and it narrows the neural foramina, or the holes that contain the nerves, on both sides, the left and the right. Those are the major findings.

Q What is the significance of that? What does that mean?

A Well, it could cause the patient problems.

Q Such as?

A Pain. All functions of the nerves are pain, sensitivity. In other words, being able to feel some-thing, have feeling in whatever area of the body we're talking about. Inability to move, paralysis or a weak-ness of muscles. Those are the major parts. Reflex

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problems. Not being able to differentiate hot and cold. Those are all the functions of nerves. So any of those could be problematic to the patient.

Q Did you -- Doctor, by the way, on those films, was it your impression that in January of 2004 this man had degenerative findings in his spine?

A No. There were just those herniations. The discs that we showed kept the water. We talked about discs having water and you can see on the M.R.I. the white discs that I showed you before, they're white because there's water in it and they're all the same likeness. There's no degenerative change.

Q What is the significance of that?

A Arthritic changes can cause problems, but they usually take a while to form; in the order of months and years to form. There's no evidence of that on these films.

Q So based on these films, is it your opinion, within a reasonable degree of medical certainty, as of January, this man didn't have any problem with arthritis in his spine?

A Right.

Q Doctor, you said that there's LS-S1 and L4-L5 herniations?

A Yes.

Q And no arthritis?

A Yes.

Q I'm gonna show you a copy of the report, which is part of the record which has been marked as Plaintiff's Exhibit 18 from Market Surgical, which is, basically, the report of Doctor Mark Armstrong from Diagnostic Imaging and Neuroradiology, who also examined these very films and read these very films and, if you could, take a look at that, Doctor?

A (Whereupon, the witness complies.)

Q Can you tell us, first off, do your findings and his findings meet?

A By and large, they do.

Q Did he find any herniations?

A Yes, he did. At L4-5 and L5-S1.

Q Doctor, was what is spondylolisthesis?

A Slippage of bones in the spine.

Q Is there anything in the doctor's report, Doctor Armstrong's report, that addresses either the presence or lack of degeneration in this man's spine or arthritis in these films?

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A No.

Q No, he doesn't address it or --

A (Interrupting) Well, he doesn't use “degeneration” or “arthritis.” He talks about not being any evidence of degeneration or arthritis. In other words, he talks about the signal changes, which is the white to the black of the disc, the loss of height of the discs, which we haven't talked about, yet. The report is saying there's no arthritis in the spine.

Q And with respect to other than herniations, is there any variations between your opinion and his?

A By and large, not. I think that the herniations go out, as I showed you, to the foramina, and he doesn't mention that. But he agrees -- this was written four years ago, at the time of the scan. He agrees with the herniation as four-five and five-one, with no evidence of arthritis.

Q Okay. Did you want to show the jury? Have them come and take a look at the films?

A Whatever you think.

Q Okay. I just want to make sure the people on the end can see.

JUROR NUMBER TWO: I can see from here.

A The finding is here on these films. 12C, L5-S1 herniation. Neural foramina are these white, long-shaped ropes with the dot in the middle, which is the nerve. You'll see this is normal (indicating) between two and three. Normal, both the same.

What happens between four and five? It's gone. The white is just a tiny sliver. Between five and one, tiny sliver. They all should be identical.

The same on the other side. Here (indicating), it's normal. Normal. Two-three normal. White keyhole shape with dot in the middle. Normal. You can see very nicely it's pushed back. And five-one, it's pushed even further back.

So that's why I believe the disc herniation pushes on the foramina which contain the nerve roots.

Q Any other films you want to put up before the jury sits down, Doctor?

A This is the picture that has a lot of motion on it. That's 12A. Normal one-two. Normal or may be pushing a little bit, two-three. Normal, three-four and pushing out, you can see here at four-five it's pushing out. This is the area we saw before, that round piece of herniation. You can see this white piece right here (Indicating).

The reason we take all these difficult angles and make things white or black, based on how he we put the magnetic waves in is to see how we can use all these pictures to make a diagnosis.

THE COURT: All right. Why don't we take five minutes, folks?

COURT OFFICER: All rise. Jury exiting.

(Whereupon, there is a recess taken.)

(Whereupon, the following takes place on the record in open court in the presence of Mr. Titowsky, Mr. Gershon and the Court:)

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(Whereupon, twelve items are received and premarked Plaintiff's Exhibits Numbers 12A, 12B and 12C, 13A, 13A1 and 13A2, 14A and 14A1, 14B and 14C, 15A and 15A1 in Evidence by the Reporter.)

CONTINUED ON NEXT PAGE.

THOMAS M. KOLB, having been previously called as a witness by and on behalf of the Plaintiff in this case, having been previously sworn, resumed and testified as follows:

COURT OFFICER: All rise. Jury entering,

THE COURT: Please be seated.

MR. GERSHON: May I?

THE COURT: Yes. Go ahead, Mr. Gershon.

MR. GERSHON: Okay.

CONTINUED DIRECT EXAMINATION

BY MR. GERSHON:

Q Doctor, we talked about the lumbar M.R.I.

of 1-13-04. I'm going to ask you to take a look at the lumbar film of July 12, '04, about six, seven months later.

And can you come down and just explain to the jury what your findings are with respect to that M.R.I.?

Doctor, just to try to move things along, we have marked as Plaintiff's Exhibit 13A the actual films and there are posters marked 13A1 and 13A2, the identical film.

A This film has been labeled A2, a lumbar spine. The date is July, 2004, right here (Indicating), 7-12-2004.

Okay. Here we have our squares, our bones. I'm going to label them here. They're blown up so we can all see it. I'm going to number all the bones. This is L-5, -4, -3, -2 -1. These are the five bones. They're all “L” for lumbar.

These are the discs. Now, you can nicely see -- a little motion as I showed you -- that this looks a lot clearer than the pictures you came up and saw before. This is the July '04. Here's the edge of the bone right here (Indicating). Edge, edge (indicating) and, and then it stops. That's between one and two.

Between two and three, it doesn't look as nice as one and two. Something's happened here. Edge of the bone. Edge of the bone (Indicating). There's a piece of black sticking out.

Between three and four, looks pretty good. Goes right to the edge of the bone, stops.

What about four-five? Here's the bone, this black piece coming out here (Indicating). Five and one, black piece coming out. The herniation that you saw that you was pinched out on the other films is here at five-one and you can see it pushing out. At four-five it's also pushing out.

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And, now, with better films, you can now see another. Two-three, it's also pushing out. Herniation. Remember that behind these bones is this white stripe which is the spinal canal, the fluids, the thecal sac that holds the fluid and these dark lines coming down at the end of the spinal cord -- this is the end of the spinal cord here (indicating) and you'll see it better on the neck -- are these lines, these dark lines that come right down. Very nicely, here's a line, here's a line (indicating). Nerve roots go down and out; one to the left, one to the right.

Here you see very nicely. You see four-five, five-one pushing on the sac right here (Indicating). In order to push on the foramina, you have to look at those cuts all the way out to the sides as we looked at before. This is more central, in the middle, so you can see the herniations in the middle.

In the other picture, right next to this picture, again, you'll see very nicely here (indicating) this piece of herniation coming out -- let's stay in the center of the spine here, where you get most of the signal. This is what's herniated here. This is what's herniated here (indicating) and this here, between two and three (indicating) looks like that's herniated, as well.

Now, notice in the center of the spine which is where we look at these things what are the colors of the discs? We saw before that all the discs were white. The one that had motion, that's a T-2 image. This is the same T-2 image. We can make fluid look dark or white, depending on what we tell the machine.

The one you came up and looked at all were white. Some were pushed out, but they were all the same color. Here, you have white disc.Here you have white disc, very white, dark and then these two discs are darker than the discs above it.

That's because it's starting losing water. When a disc starts losing water, it turns, turns dark on this type of M.R.I. sequence. This is a sign of arthritic change of the discs. This two discs, four and five, that were herniated six months before are now degenerating. These are the findings.

Q What is the significance of degeneration?

A Well, the sequence is as follows: You start losing water from the disc because the disc has lost sponginess. It becomes more brittle and loses its height. When it loses its height, the bones get closer together. When the bones get closer together, you form bone spurs.

That's the progression of arthritis in the spine. What's happened here in a relatively short time is that these discs have lost their water.

Q Doctor, if you could put the other film up just for a second?

A (Whereupon, the witness complies.)

Q I believe you showed what is going on there in that area. Is that some type of impinging -- with-drawn.

What is shown where you circled?

A This is a cut over to the side a little bit and it's just showing that the four-five disc -- this is the picture that correlates with the image that best showed it in January, 2004, a herniation at five-one.

Q Okay. And the herniation is this pressing on anything?

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A Herniations can press on the fat in front of the sac. They can press on the sac and along the sac, as I showed. They can also press on the holes that hold the nerve roots. They can cause pressure on the nerve roots. They can actually displace nerve roots. These are the various things that herniations can do.

CONTINUED ON NEXT PAGE.

Q And what -- were you finding on these particular films what was going on?

A Yes, the herniations were -- sorry...

Q You have to dance around that now.

A The herniations were --

THE COURT: They are going keep changing reporters. It's not that they are lazy, it's just they are typing up a transcript of the -- of the stenographic notes when they go downstairs, so they are typing a transcript of the trial. They type it up for the end of the trial.

Q What were your findings on this particular MRI?

A Well, we talked about those three disk herniations, we talked about the loss of signal. The herniations are pushing on the thecal sac, which is this right here (indicating), pushing on the neural foramen, which is what we showed before on the other pictures here, which I will not put up right now, and we talked about also, you know, this disk, 5-1, and one is at 4-5 is starting to lose height, which are early stages of arthritis. Those are the findings.

Q Doctor, just one last question with respect to this impingement on the thecal sac that you are indicating is on the neural foramen: Tell the members of the jury what can some of the symptoms be as a result of that?

A Commonly it would be pain and you would have -- you could, if the nerve is affected enough, have problems using -- for the nerve to tell the muscle to move, so you can have weakness, pain, numbness, and inability to differentiate hot, cold, reflex problems, so...

Q By the way, Doctor, you indicated that there was -- you saw now on this film in July of '04 evidence of degeneration that wasn't present on the earlier films.

I'm going to show you, Doctor, what's been marked as part of the record from Market Street Surgical, and could you take a look at the lumbar spine as read by another radiologist, James McCleevey, and tell the members of the jury if Dr. McCleevey also found at this time in July that there was disk degeneration and arthritic changes now present?

A He says that there is desiccation at 2-3 and 4-5. And he doesn't say that this one has lost water. He says this one and these two are desiccated; whereas, I think this one -- these two are desiccated, and this one doesn't impress me as being (indicating). That's where we agree and disagree.

Q Okay, any other findings where you are in agreement or disagreement?

A Well, he says 2-3, there is no bulge or herniation.

I think 2-3 are abnormal here (indicating). I think it could have been abnormal on the January films, but a lot of motion was going on. But I think -- I still believe there is an abnormality here at 2-3. This is normal level and this is normal; it's supposed to look like that (indicating). When you see this pushing out, the disk here is abnormal, so I would add on this level being abnormal.

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Q What level did he say is herniated?

A He says 5-1 there is a herniation, and he says 4-5 there is a disk bulge, creating a broad based extradural defect.

Q What is that?

A Pushing on the sac.

Q Okay.

A The defect means it is pushing on the thecal sac, which contains nerves.

Q Okay, Doctor, anything else on these films?

A No.

Q Okay.

Doctor, in addition, did you also review films from -- the cervical films from July 13, 2004?

A Yes.

Q Okay, do you want to put those up.

Just to back up a second, and forgive me for repeating, would it be safe to say that you and the other radiologist that read the initial films in January of '04 didn't find any degenerative changes?

A Yes.

Q Is it also safe to say that you and the radiologist who read the films in July of '04 now found degenerative changes happened?

A Yes, I agree.

Q Let me get rid of some of these for you. Close quarters.

Doctor, I'm going to show you what's been marked as Plaintiff's Exhibit 14A-1, and which is just a copy of Plaintiff's Exhibit 14A, which is the actual films; and in addition, there is 14B and 14C, and these are films of the cervical spine MRI done in July 2004.

I'll give you the board and you can tell us what your study or observation showed and what is significant.

A Now we are looking at the neck. You see squares here, which I'm going to number, is the bones of the neck. This is the second bone, cervical, 3, 4, 5, 6, 7. This is cervical, “C” (indicating).

Now here we have a brain up here (indicating). We have this gray structure, a line coming down; this is a spinal cord (indicating). Okay, the dark around it is the sac of fluid. We can make that white or dark, depending on how we want to take pictures. I will show you pictures where it is white, but the cord is gray. One thing to see on this particular picture is this piece of disk coming out right here at 5-6 (indicating). You will see when you come up and look that each disk, 6-7, for example, comes

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to a point and stops; doesn't go beyond the bone. Here is actually a piece of disk that's pushing out and coming closer to the spinal cord (indicating), and you can see the distance between the bone and spinal cord here and see the distance between the disk and spinal cord. And you see that it's narrowed, significantly pushing in. You could see this a little better on a picture that's not blown up, which is 14B.

Now I will just get this boxed for you. One second here.

Here we have our bones here, the squares here (indicating). Here we have the gray spinal cord here, but around the gray is white, instead of being dark there. We can tell the machine to make water white or water dark. The fluid around the spinal cord is watery. So here we told the machine to make it white. You can see certainly if you come up.

I will number the bones here again: 2, 3, 4, 5, 6, 7.

You can see that 3-4, 4-5 and 5-6, and that one is 5-6, that we lose a white stripe. You see a white stripe coming down, which is a fluid in front of the spinal cord, and 3-4 we lose it, 4-5 doesn't have it, 5-6 doesn't have it, and 6-7 it's reemerging, gets it done again, and that's because the disk pushes into the thecal sac and occupies the space, and they shouldn't. There's three herniations here on the cervical spine (indicating).

Now, the last thing we will see on the cervical spine here is those axial cuts. The reason I'm showing the axial cuts is to show the nerves as they come out to the left and right. So the axial cuts that were on 14C look very different; everything is round. This -- this is the way they took them, you know, the place who did the films in 2004.

This -- if I can get my pencil...

This tiny little circle here, which each one of these pictures is straight, this tiny circle is the spinal cord going like this (indicating). The patient is lying on his back like this; the patient, his neck is like this, and they take the picture to put up on the board to look at. This little gray thing is the spinal cord. The white around it is spinal fluid. We see a structure that comes off to the right (indicating), right side of the patient, and one comes out to the left, but it's not symmetric. We are all born symmetric. Our right nerves, right, should look like our left. If it doesn't, something is wrong.

So, for example, at this level, and I will tell you which level, this is the left side of the patient and this is C3-4 (indicating), that's because this piece of disk, this dark piece, is coming down pinching it off. Normal (indicating); abnormal (indicating). I will put an arrow by it. You can look at it by your leisure. Abnormal (indicating)

Then if we do go down a level to the second herniation, at 4-5, you will see that we hardly see neural foramen. We don't see it start coming back here on a cut below, but in the cut above we don't see either side, so the herniation at 4-5 is pushing on both of these and is involving the existing nerve roots on 4-5. I will put little arrows here (indicating). You can look at it at your leisure. Here as well (indicating).

And then if we go down one more level, see here that the left side at 5-6, again, both sides are involved, but the level is smaller than the right, so 3-4, 4-5 and 5-6.

So these herniations, to sum everything up, are pushing to back on the spinal canal on the sac, and they are going out to the sides and involving the neural foramina that are the holes that carry nerve roots, some more on the left than the right, some both on the left and right, some worse on one side than the other.

Q Clinically what does that mean?

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A Well, the patient again could have pressure on his nerves and could have, again, pain, numbness, inability to move, weakness of the muscle groups that the nerves go to. Same scenario as the lumbar spine. Again, the patient could have a variety of symptoms.

Q Doctor, if you had a herniation, for example, at C4, C5, is it automatic that you are going to have symptoms at the C4, C5 nerve root, or can they be other places?

A All the nerves are contained in the spinal cord, so 4-5 -- hang on one second.

At C4-5, the C4, the left nerve comes out; C4, the right nerve comes out. But C5, 6, 7, where are they? Still coming down in the spine cord. So anything that causes pressure on the spinal cord at a certain level can cause pressure on all the nerves that come down, even if they are below that level.

So the answer to your question is yes, you can have a herniation on one level and still have a symptom at a different level. It has to be clinically correlated and so on, but the answer is yes.

Q Doctor, with respect to those films, do you see any degenerative changes or degeneration now?

A No.

Q By the way, I want you to take a look at the radiological report from Dr. Glenn Schwartz -- first off, tell us -- they found a herniation at C3, C4, also, correct?

A Yes.

Q Okay, and was there any other type of findings -- what is that? There is some writing about a spur?

A Yes.

Q What's a spur?

A A spur is a piece of bone that's enlarged.

Q Would it be fair to say one level where you were reading herniation he was reading as enlarged bone?

A Yes.

Q What would that be a sign of, Doctor?

A Could be an arthritic change.

Q Doctor, what is the significance of the fact that these films, as opposed to the first lumbar films, were in January, just about a month after the accident, where these films were in July, approximately six to seven months after the accident?

A Well, it's possible, in fact, if he had a spur it could have formed over the six to seven months, just like the arthritic change in the lumbar spine occurred, so...

Q Okay.

Now, Doctor, when you were given all these -- by -- by the way, you reviewed all these things, films.

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Do you know why Dr. Hausknecht sent you earlier films?

A Because I did the actual films of 2008 of the cervical spine, and he wanted me to compare the earlier to the latter.

Q Do you want to go into this film anymore, or would you like to go onto the cervical?

A No, go on.

Q Okay, sir, the 2008 cervical film was the one that you had taken, correct?

A Yes.

Q Okay, Doctor, I'm going to give you the board which is marked as 15A-1, as well as the film, which is 15A, from your MRI.

And you can tell the members of the jury what your findings were with respect to that.

A I'm just numbering the bones.

Now you see very nicely spinal cord, the sac, both sides around the cord, the white fluid around it. You see the bones very nicely and the disk. Normal, 2-3. Nice stripe in front of the spinal cord. Okay? The disk comes to the edge of the bone and stops here. We can see very nicely there is no, what the radiologist called, extradural defect. There is a nice white stripe.

What happens here (indicating)? Something is pushing in here. Now it's thinner. What's here (indicating)? You can see that nicely also, pushing in. And finally a herniation.

I can show you other pictures that someone didn't blow up where these herniations are found as well. You see it is pushing in here (indicating), and 6-7 again becomes normal again. And see the white stripe again is thick like it is supposed to be here? This area here and this area here (indicating), that white stripe is thick and normal. Here it is pushed in, pushed in, pushed in (indicating). So there are herniations at C3-4, C4-5, C5-6, and other films show an aspect of it better, but we are going to move through with these blowups.

Q Doctor, you want the films up, the film that's been marked?

A No, I think that's good.

Q Doctor, tell the members of the jury on these films as opposed to the films from 2004, do you see the degenerative change going on in this man's spine?

A You see the whiteness of the disk that you see down here maybe a little here have darkened up more, so the disks have maintained their height, but lost color. In other words, lost the whiteness part, so over the course of a number of years it dries up.

Q You did a report on all these things?

A Yes.

Q I believe it was your opinion with respect to his cervical as well as his lumbar that the man had a progressive degenerative change?

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MR. TITOWSKY: Objection, leading.

THE COURT: Doctor, what is your conclusion?

Q What was your conclusion with respect to degeneration in terms of this man's cervical spine?

A Progressive degenerative change is my actual writeup.

Q Basically, Doctor, to sum it up, would that be the same type of thing that you are seeing also in this man's lumbar, that things are just deteriorating?

A Similar, yes.

Q Doctor, can you tell us -- I want you to assume -- by the way, did you also do a brain MRI?

A Yes.

Q Okay, you know what the reason was for the brain MRI was?

A Dr. Hausknecht wanted to rule out, as I understand it, other areas of the body that could be affected that account for the patient's problems.

Q Doctor, did you, after reviewing the MRI -- after doing an MRI of the brain and seeing the MRI, did you render a report?

A Yes.

Q And is that report part of your business record?

A Yes.

Q And is it part of your business practice to keep such a report?

A Yes.

MR. GERSHON: I would like to offer the results of the MRI of the brain as Plaintiff's Exhibit 21.

MR. TITOWSKY: No objection, Your Honor.

THE COURT: Okay.

(MRI of the brain was received and marked as Plaintiff's Exhibit 21 in evidence.)

Q Doctor, I want you to assume that prior to the accident of 12/11/03, Mr. Dessasore had no complaints of pain in his neck and back for a period of at least nine, nine and a half years; I want you to further assume that on December 11, '03, he tripped over a bannister and fell head-first down a flight of stairs about twelve to thirteen steps and was taken on a backboard and stretcher to Jacobi Hospital; I want you to further assume that he was complaining at that point of back pain; he had the MRIs done that were shown to you; he had EMGs that tested positive at both the cervical level and lumbar level; and, in addition, had a provocative discogram done by the surgeon that tested positive at L4, L5.

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Do you have an opinion with a reasonable degree of medical certainty whether or not the disk herniations in this man's back were caused by his accident of December 11, '03?

A Yes. To clarify, he was asymptomatic for nine years at least, then had this trauma and started complaining of varied complaints, including pain?

Q Yes.

A So these findings related to the trauma itself, the answer is yes.

Q Doctor, do you have an opinion with a reasonable degree of medical certainty whether the disk herniations in this man's neck are related to the trauma of December 11, 2003?

A Assuming he had no neck complaints for nine years and then he fell down and has neck complaints and problems related to the nerves from the neck and has these findings, the answer is, yes, of course it was due to the trauma.

Q Once again, Doctor, would it be safe to say that there were no degenerative changes noted in this man's earlier films, lumbar films, in January '04?

A Yes, by myself and others. “Other.”

MR. GERSHON: Thank you. Nothing further.

THE COURT: Okay.

MR. TITOWSKY: May I take these down, please.

They are just going to get in my way.

THE COURT: If you don't need them.

MR. TITOWSKY: I don't think I will.

CROSS-EXAMINATION BY

MR. TITOWSKY:

Q Good afternoon, Doctor.

A Good afternoon.

MR. TITOWSKY: 4:15 on a Friday afternoon, thank you very much, Mr. Gershon.

MR. GERSHON: Sorry. It wasn't my intention, Mr. Titowsky.

Q Doctor, when you prepare reports regarding your reviews of MRIs, it would be important for you as a radiologist to include any significant findings, correct, sir?

A Yes.

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Q All right.

A significant finding would include things like herniated disks?

A Yes.

Q Bulging disks?

A Yes.

Q Narrowing of the neural foramen?

A Yes.

Q And nerve root impingement?

A Yes.

Q And can we then assume, Doctor, that when you review an MRI and you do not note any particular findings at a particular level, can we then assume, Doctor, that your reading of the film at that level would be normal?

A Yeah, within reason. I mean, let's go over a specifics, but within reason, yes.

Q Okay, it stands to reason if you didn't write -- you are not going to write “normal,” “normal,” “normal,” “normal, “ “normal”?

A Yes.

Q You are going to write down what's wrong, sir?

A In general, yes.

Q Okay, good.

Now, in preparation for your testimony in your review of this case, did you review any records? I know you reviewed a lot of films, but did you review medical records?

A Just one of the radiologist's earlier films.

Q Okay, other that though, did you review any medical records?

A No.

Q The MRIs that were done in 2008 at the request of Dr. Hausknecht, were the actual studies themselves done in your office?

A Yes.

Q Okay.

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Did you meet Mr. Dessasore there that day?

A No.

Q Have you ever met Mr. Dessasore before today?

A Never.

Q Okay.

Is -- did you meet him at all when you first got to court here?

A No.

Q Never examined him?

A That's correct.

Q Okay.

And do you have any knowledge, sir, of the particular symptoms and conditions that he is claiming in this case?

A No.

Q Okay.

So your testimony here is basically just -- I don't mean to say “just,” but it is essentially -- you're telling us what you see in these films, correct, sir?

A Yes.

Q Okay, good.

Now, I believe you told us that the lumbar studies that you saw in July, from July of 2004, showed three herniated disks; is that correct, sir?

A Yes.

Q That was L2, L3, L4, L5 and S1?

A Yes.

Q Can we assume then, sir, all of the other levels seen in the July films were normal in your opinion, sir?

A Disks, yes.

Q Okay.

Now, was there anything abnormal at any of those other levels, other than the disks?

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A No.

Q Now, each of those -- withdrawn, sorry.

You mentioned how you labeled the bones L4, L5 and so on. The nerve roots that come out of each level, they are also labeled, correct, sir?

A Yes.

Q And can you tell me, sir, with respect to the lumbar spine, what nerve roots exist at, say, the L4, L5 level?

A Generally, you can look at it anatomically and find it. It is the lower root, like 4-5 would be 5.

Q So the L5 nerve root comes out between the L4 and L5 vertebra --

A Yes.

Q -- correct, sir?

A Yes.

Q Okay.

And the nerve root goes to the left and to the right, correct, sir?

A Yes.

Q Okay.

Now, I think that you said before, and I tried to write it down, that the nerve roots go to particular muscle groups; is that right, sir?

A Or particular areas of the body.

Q Okay, what's the term in medicine, “innervate”?

A Yes.

Q Does that mean the nerve root goes to a particular muscle group and allows that muscle group to work right?

A Yes, yes.

Q And the nerve roots, say L5, that L5 nerve root, what muscle groups does that L5 nerve root innervate?

A You would have to get the book to see what it is. I can't tell you off the top of my head.

Q Just a general idea?

A I cannot. I can refer to the chart.

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Q Can you give an extremity?

A Extremity?

Q Yes.

A I would rather not take an educated guess since we know there is a medical fact and we can look it and up and see what it is. But in general, the nerve that goes to the left goes to the left, the back, and to the left leg.

Q We can agree, sir, that a lumbar nerve root, any one of them would go more toward the lower part of the body as opposed to the upper part of the body?

A Yes, of course.

Q That much, so the same thing -- let's talk about the cervical nerve roots then; okay?

The cervical nerve roots would tend to go out toward the upper part of the body, arms as opposed to legs, correct?

A Yes. Neck, shoulders, arms.

Q Okay.

Now, can you tell me, sir, if I ask you any of the nerve roots in the spine, could you tell me what muscle groups any of them innervate? Can you tell us that, sir, for any of them?

A No. I would take the chart out and look it up. Yes, that's the answer.

Q Okay.

Can you tell me -- what's dermatome?

A That's the area that the nerve root goes to of the region that you are particularly interested in.

Q The dermatome -- withdrawn.

What is the significance of the dermatome? What does it tell us?

A It tells us you can trace back the nerve root that's involved to the area where the patient is complaining of the symptom.

Q The symptom we are talking about is the ability to feel, correct?

A Or move. Or the ones that I talked about between hot and cold, motion, vibration, movement, pain; all of those.

Q Well, the dermatomes refer to particular areas of the body that are connected or innervated by nerve roots, right?

A Yes.

Q They are very specific, are they, Doctor?

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A Yes.

Q Again, would you be able to tell us what areas of the body are innervated by any of those particular nerve roots? Would you be able to tell us that, sir?

A No.

MR. TITOWSKY: All right.

May I show this to the witness?

THE COURT: Yes.

Q What is that, Doctor?

A The dermatomes.

Q Okay, take a look at it for a minute, please --

A Uh-huh.

Q -- and tell me if you feel that it is a fair and accurate depiction of the dermatomes in the human anatomy.

A Yes, it is.

Q Okay, and would that assist you in explaining some aspect of your testimony here concerning dermatome?

A Not a condition, but I can answer you by reading this, yes.

MR. TITOWSKY: I would ask that it be introduced into evidence, Your Honor.

MR. GERSHON: May I see it?

THE COURT: Yes.

MR. GERSHON: No objection.

MR. GERSHON: No objection.

(Whereupon, above mentioned exhibit is duly marked A in evidence.).

Q Now, Doctor, before we get to that, Doctor, that was just entered in -- the document that was just entered into evidence. Your review of the cervical films in this case, both the 2004 and the 2008 studies, if I recall correctly, in your opinion, they show herniated discs at three levels, is that correct, sir?

A Yes.

Q All right. And that was, what was it C-3/C-4 -- C-3/C-4, C-4/C-5, C-5/C-6. Correct, sir?

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A Correct.

Q Could you tell the jury, please, what nerve routes exit from the neuro foramina at each of those levels?

A C-3, C-4, C-5.

Q C-3, C-4, C-5. Okay.

Now, I believe you told this jury that you felt that the nerve routes at those three levels, C-3, C-4 and C-5 are being impinged, is that correct, sir?

A Let's go along with it, the exact wording is in my report. But, okay, there is impingement on the neural foramina, correct.

Q Okay. Which is not necessarily impingement on the nerve route, sir?

A Right, cause pressure on the nerve route.

Q It could?

A Sure.

Q But, it may not?

A Well, everything may or may not, but it could.

Q Okay. But, we can agree then, sir, that since you didn't note any other findings in any other cervical levels besides those three?

A Right.

Q About the nerve routes at -- all of the other cervical levels are okay, correct, sir?

A They may or may not be.

Q Well, did you see anything when you looked at the films that told you that they weren't?

A Well, you have the spinal cord which contains six -- C-6. This also has pressure from C3-4, C4-5,6.

So, the answer to the question is there maybe an abnormality of those nerve routes, but there's no herniation other than those ones that I just discussed.

Q Doctor, I'll try to make the question more clear.

I'm asking you not whether there may or may not be, did you see it?

A No.

Q So, when you reviewed these MRI studies from both 2004 and 2008, with respect to the cervical spine of the plaintiff, you did not see anything at the levels other than the C-3, C-4 and C-5 nerve routes, correct, sir?

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A Yes, correct.

Q And you are a board certified radiologist whose job it is to see these things in films. Right, sir?

A Correct.

Q Okay. Now, based on that, sir, you did not see anything wrong with the C-6, C-7 and C-8 nerve routes, correct, sir?

A Correct.

Q Now, can you tell the jury what areas of the body are innervated by those nerve routes that I just mentioned; C-6, C-7, C-8?

A C-6 is the outside of the arm, C-7 is the front and back of an arm, and C-8 is the inner part of the arm.

Q Okay. And when you say all those parts of the arm, the back and the front, we're talking about the dermatomes that you're looking at in that diagram in evidence, right, sir?

A Yes.

Q All right.

So, based on what you saw in the films and also what you didn't see, there's nothing wrong with the C-6, C-7 and C-8 nerve routes, correct, sir?

A Correct.

Q And the C-6 and C-7 and C-8 nerve routes go to all of those areas of the arm that you just mentioned, right, sir?

A Yes, sir.

Q So, there is nothing in those films, those cervical films that would in anyway explain any symptoms to those areas of the arm, correct, sir?

A No, that's incorrect.

Q What is in the films that explains symptoms to those areas of the arm?

A You have herniations that are causing pressure on the spinal cord at 3, 4 and 5. In the spinal cord, C-6, C-7 and C-8 are still coming down. So, while I can't see those nerves, and so my answer to my question to you was before was, no, I don't see it on the film. I disagree with you saying that there's no explanation on the films for any abnormalities for C-6, C-7 and C-8. There is an explanation on the film.

Q Could you point out?

A The herniations at 3/4, 4/5 and 5/6 are causing abnormal pressure on the thecal sac in which the cord runs, which are C-6, C-7 and C-8.

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So, you're asking me is it possible to have an explanation as to how C-6, C-7 and C-8 are involved? I've given you one. That's my best explanation.

Q That's your final answer?

A Yes.

Q With all due respect, that wasn't exactly my question, was it?

MR. GERSHON: Objection.

Q I'm asking you --

MR. GERSHON: It was totally responsive.

A I thought I have.

MR. GERSHON: Was that the question? Was that his final answer?

A I thought that was your question as to how could there be an abnormality.

THE COURT: Ask the next question.

MR. TITOWSKY: I'll try to ask the next' question, Doctor.

Q What I want to know is, could you put up any one of these films that we've seen here today and point to the actual pathology, the actual defect, the actual lesion that is causing problems at the nerve route levels that you say are unaffected? Can you do that for us, Doctor?

A I did.

MR. GERSHON: You want him to do it again?

Q By you saying to this jury that by what's causing all of the problems at the C-6, C-7 and C-8 levels are herniations at other levels?

A Levels above, yeah.

Q And they're pressing on the spinal cord?

A I'm not saying they are.

Q Is that what you're saying?

A I'm not saying they are. I'm saying how could it be if I don't see anything on the films, how could there be an abnormality? I'm giving you a very cogent, logical, explanation.

Q Are you saying they're pressing on the spinal cord?

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A No.

Q Well, it's consistent with your report where it says the cord signal is normal, right?

A I'm agreeing with what you just said, yeah.

Q So, Doctor, I'm still trying to wrap my brain around this.

If you have herniated discs at three levels, but none at all of the other levels, you're telling this jury that even in the absence of herniations at all those other levels, the nerve routes at all those other levels are still affected in some way?

A I'm telling you it's a possible explanation.

Q It's a possible explanation, right?

A I've said that many times.

Q Doctor, when you testify in court, what's the standard, to a reasonable degree of medical certainty, right, Doctor?

MR. GERSHON: Objection.

THE COURT: You're asking him could he state that to a reasonable degree of medicine?

Could you state that last.

THE WITNESS: To a reasonable -- if you could just ask me the question again?

MR. TITOWSKY: I'll rephrase the question. I apologize. I'm going to try to wrap things up now.

Q Would you agree with me, sir, that there's a difference between something to a reasonable degree of certainty and a possibility? There's a difference, isn't there, Doctor?

A Yeah.

Q So, you said that there is a possibility that those herniated discs are causing problems at the upper levels, right, sir?

A Yes.

Q But, that is not any type of certainty, is it, Doctor?

A So, let me clarify.

You have asked me how is it possible -- if I get this wrong, correct me -- how it is possible that nerve routes that this patient is having problems with are affected if I don't see them on the film at the level that they're being affected. And I'm answering you that those nerve routes are traveling down the levels at which there are nerve routes affected.

Now, is that the reason why these nerve routes at C-6, C-7 and C-8 are abnormal? It's a reasonable possibility.

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If you want to ask me semantics, as I understand it, certainty versus possibility, I don't know. You're asking me a question, I'm giving you the most logical, cogent answer I can. I can't go any further than that.

Q Okay. Fair enough, Doctor.

Let's talk about the lumbar level then.

A Sure.

Q You said, as I understand it, that there are herniations at L-4/L-5 and L-5/S-1, is that correct, sir?

A Yes.

Q And you've also said, I believe that you can now see one at L-2/L-3, correct, sir?

A Yes.

Q Same thing, that we can assume that you did not see any other significant findings in any other levels, right, sir?

A Yes.

Q Okay. Now, can you tell us the nerve routes that come out of the areas that you say are -- withdrawn. I'm sorry.

Can you tell us the nerve routes that come out at the levels where you say there are herniations in the lumbar spine?

A L-3, L-5, S-1.

Q Okay. And can you tell us what areas of the body are innervated by those nerve routes.

A L-3 goes to the front of the thigh and down the inside of the thigh and leg. L-5 is the outside of the leg, and S-1 is down the buttocks and down the back of the leg.

Q All right.

Doctor, can we also agree then that there were no findings of any consequence with respect to any other lumbar nerve routes, as far as your review of these films is concerned?

A Yes.

Q L-l is okay?

A Yeah.

Q L-2?

A No abnormality on the film.

Q L-4?

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A Yes.

Q Now, there's also the sacral nerve routes, S-1, you said you did see something there, correct, sir?

A Yes.

Q What about S-2, do you see anything there?

A No.

Q Okay.

MR. TITOWSKY: With the Court's permission, I'd like to use a blowup of the document that the doctor has that I just put in evidence, your Honor?

THE COURT: For purposes of demonstrating to the jury, you can show it.

Q Okay.

Doctor, can you tell us, please, what areas of the body are innervated by the S-2 nerve route?

A Back of the buttock and calf.

Q And it goes all the way down the back of the thigh and the back of the calf, correct, sir?

A Yes.

Q And as far as you know, from what you saw on the films, there's nothing wrong with the S-2 nerve route, correct, sir?

A As with almost all MRI's, that's correct.

Q And the same is true for the L-1 nerve route, L-2 nerve route and the L-4 nerve route, correct, sir?

A Yes.

Q What areas of the body are innervated by the L-3 and L-4 -- I'm sorry, the L-4 nerve route?

A L-4 is the middle of the knee and down the leg towards the inside of the leg.

Q And again, you see no pathology at any of those levels, any of those lumbar or sacral levels, correct, sir?

A That's correct.

Q So, there would be nothing in your review of the lumbar films that could possibly explain the plaintiffs complaints of complete numbness in his left leg from his hip down to all five toes, is that right, sir?

A Same thing that I told you before. I see what I see. And anything other than that is not seen on the MRI. There maybe reasons for it, but I agree, but I'm seeing the herniations at the level we agreed at. I don't see anything at the other levels.

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Q When you say there maybe reasons for them, you don't know what they are, do you, Doctor?

A Well, let's be very clear. You pointed out S-2. How often is there a herniation between S-1 and S-2 that affects the S-2 nerve route that you asked me about?

Q You're asking me?

A Infinitesimally never.

Does a patient never complain about an S-2 nerve route? Of course they do. Do you see it on a MRI? Almost never. Even smaller than what I said.

So, to ask me a question as to whether the MRI sees all of the nerve routes that causes the pain? It's for the clinician to put together. The MRI is not going to see every single nerve route. It's the best test that we have available today. No clinician can --

Q What I'm trying to find out, Doctor, is whether you can offer us an explanation for the patient's clinical symptoms based on your review of films?

A I have. And that's as far as I can, from what I've done already.

Q Thank you, doctor.

THE COURT: Mr. Gershon?

MR. GERSHON: Just a few redirect.

REDIRECT EXAMINATION

BY MR. GERSHON:

Q Dr. Kolb, you indicated there's herniations in his neck at three different levels. Could you one more time just explain to the jury how in your opinion, logically, that could -- those herniations that you mentioned that he had can affect areas that deal with different levels?

MR. TITOWSKY: Objection to the form of the question.

THE COURT: I'll allow it. It's getting late. Let's move on.

A In the spinal cord are all the nerves that come down, the ones that come out, they're next to each other: C-2, C-3, C-4 are next to each other. C-2 is not next to C-8. So, if you have a herniation that is at C-5/6, okay, that's pushing on the cord. Anything that's close to that can be affected by pressure as well, C-6, C-7, C-8. It's possible. Is there a herniation at C7-T1? Is there one at C7-7? No, I don't see one.

If you have a patient that tests objectively, I don't know exactly what the patient had. I'm not the treating physician that tested with the EMG's and so on, objective tests that showed there were certain groups involved.

Does the imaging explain everything? Well, it explains the vast majority of everything, but not to the enth degree. Just like S-2. Do you ever see an abnormality of a disc herniation of -- that involves the S-2 nerve? Almost, almost never. You can win the

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lottery before you will see that on a MRI, but yet people complain of S-2 dermatome pain. Can I explain that? No. But, a MRI is the best test we have to explain the reasons why patients have pain. It's as logical as that.

Q Does the MRI show everything known to man or you have to take a big picture?

MR. TITOWSKY: Objection.

THE COURT: Sustained.

Q Withdrawn.

Does everything show in the MRI?

A No, of course not.

Q Doctor, with respect to the lumbar spine, counsel mentioned something about L-3. You indicated that's the inside of the leg, correct?

A Yes.

Q The L-3 nerve route?

A Yes.

Q You mentioned something about L-5. That's around down in the outside of the leg, correct?

A Yes.

Q And by the way, isn't S-1 also down in the back of the leg?

A Yes.

Q Okay. And by the way, do you know, as far as you know, these dermatome charts, they're also -- these dermatome charts that are used also as a scientific aid to doctors, do you know if it's an exact science that every time they -- there's always a direct correlation between the nerve route and the specific area of the body?

MR. TITOWSKY: Objection.

THE COURT: That's kind of a long question.

Q Let me ask you this.

Are you -- do you know if this is an exact science that every time there's a nerve route damage it always corresponds to exactly the dermatome that's on this chart?

A Well, it's the other way around. If you're complaining of pain in a certain area, you'll try to find the nerve that it relates to. Like, if you're complaining of pain at S-1, you'll see if there's an S-1 problem in the back. But, yeah, that's pretty scientific, the dermatome.

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Q Are you saying there's always a correlation or?

A Sometimes you don't find the correlation. But, when S-1 goes to the area it goes to, that is scientific. But, will you find the correlation? The answer to your question is no, sometimes you won't, you have to treat the patient for their pain or whatever the symptom is, you can't treat the MRI, you're treating the patient.

Q By the way, once again, you don't treat a patient in a vacuum, it's not just the MRI --

MR. TITOWSKY: Objection.

MR. GERSHON: Withdrawn.

Q Doctor, just one last time can you explain -- you indicated your logical explanation for the cervical level. Can you just one more time explain to the jury how you can have the L-4, the herniations that you found in the lumbar spine and have the symptoms that would be at other dermatomes?

A Again, let's go back to S-2. S-2 there are no herniations between S-1 and S-2 to give you an S-2 problem. Something is happening higher up that affects S-2. If S-2 goes all the way up and down from the brain, down the spinal cord into the nerve routes before it comes out at the left S-2 and the right S-2.

So, something has happened somewhere, either in the nerve routes as they go down or if it's on both sides, it has to happen before the exiting or else it would be on one side rather than the other.

So, at some point, S-2 is being involved. Can you have a problem with 5-1 that affects a nerve route at S-2? Yeah, you can. Do you see it in MRI? No, there are no S-1/S-2 nerve routes, herniations that are read on MRI's. Almost ever.

So, that just shows you the logic of how you can have a part of your body be abnormal, hurt, symptoms, but yet not see on the MRI the nerve route to be abnormal.

You can -- I mean, that's just, that's science. But yet, something is wrong with S-2 if the patient complains of it or if there are other objective tests that show it, like EMG's. So, there's a logic behind it. We don't see everything. We see a lot.

That's my explanation.

MR. GERSHON: Thank you, nothing further.

THE COURT: Any recross?

MR. TITOWSKY: Just briefly.

RECROSS EXAMINATION

BY MR. TITOWSKY:

Q Doctor, you said that the findings on the MRI's can cause certain symptoms. Would that include problems with reflexes?

A It can.

Q And when one has herniated discs with nerve route impingements, the reflexes would be decreased, is that right, sir?

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A They can be.

Q Well, that's what you would expect to see if there were a problem with the reflexes, right? So, you would expect the reflexes to be decreased?

A I would ask a clinician that. I think I would expect the answer yes, but I would ask a clinician that examines patients and gets reflexes.

Q But, you wouldn't expect the reflexes to be increased, would you, sir?

A Same thing. I would ask the clinician that.

Q You don't know?

A Some things I don't know.

MR. TITOWSKY: Nothing else.

THE COURT: Okay.

You're excused, doctor.

THE WITNESS: Thank you.

THE COURT: Monday is my motion day. We're going to start at -- I'm going to be here, but you're going to start at 12 because before that I'll be doing other cases. Okay?

So, 12 o'clock Monday. Doesn't mean you have to go to work, we still give you the day's credit for jury service. But, you don't have to come ‘til 12. Okay?

So, I'll see you at 12 o'clock.

Enjoy the weekend.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exits the courtroom.)

(TIME NOTED: 4:50 p.m.)

THE COURT: So, if you want to come in earlier, we won't start the case ‘til 12 o'clock. We're not starting. I don't expect anybody to be here until 12:00, okay?

MR. GERSHON: Judge, I'll need five minutes, because I want to make sure everything is all right.

(Whereupon, Court is adjourned to Monday 6/2/08.)

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