SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CIVIL PART 3

- -X

JOSE MONTESDEOCA AND SONIA MONTESDEOCA,

Plaintiffs,

- against -

101-19 37TH AVENUE, LLC AND UNITED FOUNDERS, LTD,

Defendants.

INDEX NUMBER: 27647/11

TRIAL

- -X

Supreme Court
89-11 Sutphin Boulevard
Jamaica, New York 11435
June 21, 2018

B E F O R E :

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Justice of the Supreme Court

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CAROLINE MANDATO
SENIOR COURT REPORTER

(Whereupon, blow-ups of x-rays were marked as Plaintiff's Exhibits 1C, 1D, 1E, 2A & 2B in evidence by the Reporter.)

THE CLERK: All rise. Part three of the Supreme Court is now in session. The Honorable Joseph Risi presiding.

THE COURT: Good morning, counsel. How are you?

MR. GASTMAN: Good morning. With the help of everybody --

MR. FOWLER: Good morning.

MR. GASTMAN: -- we marked in another five films in evidence. I think I just have one more, number 11.

THE COURT: So, you're ready but not fully ready. But I'll sit here and wait for you to get ready, it's not a problem.

MR. GASTMAN: I apologize, there's just one more. One more, I apologize.

THE COURT: Take your time.

THE COURT OFFICER: You don't have to put the sticker on back. Where is it from?

MR. GASTMAN: It's Brisson so it will be a one.

MR. FOWLER: 1F.

THE COURT OFFICER: Yes, marked 1F.

Judge, I'm going to go get the jury.

THE COURT: Are we set to go?

MR. GASTMAN: Yes.

THE COURT: Anything we need to put on the record before we bring the jury in?

MR. GASTMAN: No.

THE COURT: All right. We'll continue with the testimony of Dr. Thomas Kolb.

MR. GASTMAN: Yes, your Honor, and this will be my last witness. I'll put in the rest of the paper records and I rest. Excuse me, your Honor, once the witness is in the witness chair and the jury is seated and we're safe, would it be okay if someone from my office helps set up the easel and just puts up the boards?

THE COURT: I don't think there's any objection to that.

MR. FOWLER: No objection.

MR. MAHER: No.

MR. GASTMAN: Thank you. I'll wait until everyone's seated and the aisle's clear.

MR. FOWLER: And again, Your Honor, depending on where the board is set up I would want to move so I can see the board.

THE COURT: Whatever makes you comfortable.

MR. FOWLER: Thank you, Judge.

THE COURT: I want you to have a view.

MR. FOWLER: I need a view.

THE COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the room.)

THE COURT: It seems like such a long time we've seen each other. So nice to see everybody back. Everybody's looking healthy and happy which is a good thing. So, have a seat and make yourself comfortable.

Mr. Gastman, whenever you're ready.

MR. GASTMAN: Thank you. Your Honor, this morning I'm going to recall the radiologist Dr. Thomas Kolb to the stand. His testimony was not completed on day one and, your Honor, this will be my last witness that I'll be calling in my case.

THE COURT: Thank you.

MR. GASTMAN: I would ask Dr. Thomas Kolb to please take the witness chair again.

(Whereupon, the witness took the witness stand.)

THE CLERK: Doctor, you're reminded you're still under oath.

THE WITNESS: Yes.

THE CLERK: You may be seated.

DIRECT EXAMINATION BY

MR. GASTMAN:

Q. Good morning again, Doctor.

A. Good morning.

Q. It's been some -- a handful of days, I'm going to try

to pick up just about where we left off.

Doctor, with regard to the cervical spine of the patient, in other words the neck, did you review, did you review a CAT scan taken at Middle Village Radiology on January 15, 2015?

A. Yes.

Q. Doctor, with regard to the cervical fusion surgery that had already been performed, did you see anything in this study with regard to the hardware? Any problems in the hardware?

A. Yes.

Q. Please tell this jury, what did you see?

A. The front plate that was put in to hold the spine in place broke at a certain level midway. And because it broke, instead of the spine being fused so that the spine couldn't be moved, now the spine could move a drop forward and back because the plate broke and you can actually see that on the pictures. And that creates a sort of pseudoarthrosis or moving where there shouldn't be. There shouldn't be a joint moving, it should be completely fused, it's not.

So, that was the finding on that. Among other findings, that was the major.

Q. Doctor, if I may, I'd like to refer you to the level of the neck at C3-C4 --

A. Yes.

Q. -- that level of the neck.

A. Yes.

Q. Doctor, were there any new findings or changes in findings at that level at this time?

A. Yes.

Q. Okay.

MR. FOWLER: I'm sorry, which film are we referring to?

MR. GASTMAN: Sure. We're looking at the film of the Middle Village Radiology dated January 15th.

MR. FOWLER: January 15th --

MR. GASTMAN: Yes.

MR. FOWLER: -- I apologize.

MR. GASTMAN: If you need a copy I can --

MR. FOWLER: No, no, I have it. I wrote it down as June.

MR. GASTMAN: I apologize.

Q. Doctor, with regard to level C3-4 was there anything new or different changed there?

A. Yeah.

Q. I'm looking at the second page of your report.

A. January 15, 2015 there was a herniation. Again we talked about it previously, with the tear in the ligament and the disk pushing it out, a disk herniation at C3-4 above the level of the fusion that was pushing on the sac and the spinal cord.

Q. And, Doctor, the phraseology interval appearance. Interval what is that referring to?

A. So that was on --

Q. This is the January 15, 2015 film.

A. Yes. Interval means that it happened in-between the prior examinations to the current examination of January 2015.

Q. So this is a new finding?

A. This is something totally new.

Q. And that's January 15, 2015; true?

A. That is correct.

Q. So, this is after the first surgery but before the other surgery to the neck?

A. Right. After the first surgery which started at C4-5 and now because the spine is fused and can't move there's a lot of pressure on the one level above called the adjacent segment, which is the segment right above the fusion, and because of that pressure a new herniation occurred. There's a new tear of the annulus ligament and the herniation pulled out to the point it was actually pushing on the spinal cord. So, that was caused by the fusion itself of the spine.

Q. Doctor, I want to move forward in time now. Did you review a film about nine months later, a CAT scan of the cervical spine dated October 14, 2015?

A. Yes.

Q. And, Doctor, did you compare what you saw in this film

to the film you just told us about?

A. Yes.

Q. And, Doctor, the damage to the hardware, the fracture that you mentioned earlier, is it still visible now?

A. Yes.

Q. And, Doctor, you mentioned something before about movement in the neck. Are there any further findings here on this film October 14, 2015 with regard to new movement in the neck due to that fracture of the plate?

A. Well, the herniation's there at C3-4 and the fracture of the plate causes a motion, an abnormal motion.

Q. And were you able to measure, Doctor, with any specificity the amount of displacement or movement? I'm looking at the October 14, 2015.

A. I'm looking for page two of my report on that. I'm sorry, here it is. Check my measurement.

Q. Middle of the page, Doctor.

A. Yeah, hold on one second. I'm looking at October 14, 2015. Yes, I did measure it as two to three millimeters anterior displacement of the distal fractured portion. So that means that exactly what I just said, instead of it being one plate that's completely straight there's a fracture right in the middle of it as you can see on the films.

And because of that fracture of the hardware, the surgical hardware, there is pushing out of the entire spine two

to three millimeters. It's not fused any more. In other words, it's slipped over from where it should be and that happened after the first surgery where this plate is broken.

Q. Doctor, in this film, the October 14, 2015 film, is that new herniation that you just told us about at C3-C4 is it still visible?

A. So, the herniation's still there. It hasn't changed from January through October 2015 and it's still pushing directly upon the spinal cord.

Q. Okay. Doctor, did you review some films, some x-ray films of the neck of this patient from November 6, 2017 taken at Dr. Brisson's office?

A. Yes.

Q. And, Doctor, we have blowups prepared of those x-ray films from November 6, 2017. Doctor, I want you to assume for a moment that these films dated November 6, 2017 were taken after the final cervical spine surgery because that occurred, as the jury heard, that last surgery was May 2, 2017. So, these are the films after the very last cervical spine surgery.

A. Yes.

Q. Are there things in that film that you'd like to demonstrate to the jury?

A. Sure. Absolutely.

MR. GASTMAN: Your Honor, may the doctor have permission to step down with the use of the easel and the

blowup demonstrate to the jury?

THE COURT: Yes. No objection to that, counsel?

MR. FOWLER: No objection.

MR. MAHER: No objection.

Q. And, Doctor, we have films 1D and 1E in evidence, they are from the same date, and, Doctor, you can begin anywhere you wish.

A. These two films are from November --

THE COURT: Just back it up so juror number one can see.

A. These are both from November 6, 2017 and they are labeled 1A and 1 -- I'm sorry, 1E and 1D.

THE COURT: Excuse me. Off the record.

(Whereupon, an off-the-record discussion was held.)

A. So, on the first picture which is labeled 1E there's an x-ray. This is an x-ray of the neck, we've seen this I think to understand that, and a few things to look at. This was the original fusion plate that was put in the front of the neck. You see there's a crack in here right now. If you come up and look you'll see now that the bottom of the plate is moved forward from the top of the plate.

So, there's a fracture right through there and that shouldn't happen. When you put a plate in somebody it should stay as a plate not fracture. Now, because of that the entire

bottom of the spine, right -- this is C3, 4, 5, 6 and 7. 7 here, 6 here, 3, 4, 5, 6 here. At C6 everything below C6 is forward, everything above C6 is back, that's what I mean by two to three millimeters of movement. So, that's abnormal.

The second thing we have here is that if you remember there was an interval herniation occurred above this anterior fusion, and that's this level right here. On the scans of January 2015 that we just talked about there was a new herniation at this level which was not fixed, it was not fused. And the reason why there's a herniation here is because this is now fused and fixed so that it doesn't move.

So the patient can't move their neck like that but when the patient does move the neck as much as they can in normal daily life the new focrum (sic) or the new kibbet (sic) of the only place where the patient can move their neck front or back is up here. So, with all that pressure that shouldn't be here if this wasn't fused this disk in here herniated out.

You can even look here how nicely -- how nice and tall this disk is. It's the same height as this disk. In other words, there's no loss of height, there's no degenerative change at this level here at all at C3-4 but rather the herniation occurred because the entire spine was fused.

So, the finding on this film though is that the surgeon went in and had to re-fix this patient not just from the front but from the back and had to fuse this level here. Instead of

taking this out they added another fusion device, this entire plate and metal screws that go into the spine so that now the patient is fixed to the front and the back all the way up to C3-4 and previously from C4-5, C5-6 and C6-7.

Q. So, excuse me, Doctor, I apologize. Looking on the left, the hardware to the left side of this film that's the back of the spine; yes?

A. Right. This is the front of the patient. This is the patient's mouth. So this is the back of the spine.

Q. And, Doctor, the top portion of the fusion that we see on the back that's a new portion that was done on the last surgery?

A. Right. This is the -- This was done because of that new herniation because of the surgery the patient had originally. This is what's called adjacent segment herniation. The segment that's right above the fusion, the fixation.

So, this patient had a posterior, a back, fusion that incorporated the new C3-4 herniation in addition to needing to fuse again the lower because there was a fracture of the front plate. All this had to happen in this patient.

Q. Doctor, I see we have another view from that same day. Does that give additional information?

A. So, we as radiologists look at patients from the front, the back, the sides. So, this is what it looks like from the front of the patient. This is the same patient on the same day.

Q. And that's the same hardware just a different view, Doctor?

A. That's right. So you can see what the surgeon did. Everything looks like it's flat but this one here that started at C4-5 and went down was the original plate that's cracked with the screws in it and then the surgeon went in and did two separate fusions. One to the right side of the patient, one to the left side of the patient and went up all the way up to C3-4. So the patient is now walking around like this.

Q. Thank you, Doctor.

Doctor, switching gears from the neck to a different portion of the patient's body. Did you review certain -- Did you review films with regard to the lumbar spine, in other words, the back of this patient?

A. Yes.

Q. Doctor, if you would, if you could show the jury a film taken before the lumbar spine surgery. I believe we have the film dated December 17, 2012 from Dr. Brisson's office, I believe it's 1F in evidence. 1F.

A. Correct.

Q. And if you have that one, Doctor, you may, you may explain your findings.

A. So, this is a side view of the lower back. We talked about there were five bones in the lower back, vertebra, five, four, three, two, one. And this is what a back looks like in

this patient before the patient had surgery. The intervertebral spaces are well-maintained which means there's no arthritic changes that are involved with the disks themselves. So, there's no degeneration.

Q. Thank you, Doctor.

This is an x-ray rather than a CAT scan and rather than an MRI, right?

A. Correct.

Q. And, Doctor, with regard to the bones, do you see anything that you would deem to be degenerative for a 36-year-old man there?

A. There's nothing --

MR. FOWLER: Objection. Asked and answered, your Honor.

THE COURT: Objection overruled.

A. There's nothing significantly degenerative. There is in the front of the spine here there are these tiny corners here but that's in the front of the spine which is the first thing to happen in anyone as we age. In the back of the spine, which is where herniations occur back here, there's no abnormalities. It's normal looking.

Q. Thank you, Doctor.

Is there a film now that we could show the jury that shows the patient's back after the lumbar spine surgery?

A. Yes.

Q. Do you have a film there, Doctor, dated June 17, 2013?

A. Yes.

Q. And is that an x-ray from Dr. Brisson's office?

A. Yes.

MR. GASTMAN: Your Honor, this is 1C in evidence.

Q. And, Doctor, if you would demonstrate on this x-ray the significant findings, please.

A. So, this is what happened after the patient herniated L4-5, which is this level right here. The surgeon again put in two screws in L4 and two screws in L5 with two plates, two plates that connect the screws and that's fixed or fused at this level. So the patient cannot move around at this level because that would just make the disk come out more.

The surgeon attempted to take out as much disk material as possible and put in these three little white lines here which is a disk stabilizer. In other words, just taking the disk out and not doing anything else the bones will start coming together and that's a very bad thing having bones come together, bone on bone.

So, the surgeon put in a disk stabilizer. Instead of the disks that we're born with this patient has a mechanical device that was put in here at the L4-L5 level. So, this is what happened to this patient because of the disk herniation at L4-5.

Q. Thank you, Doctor.

Is there -- I believe there's also an MRI taken of the lumbar spine after the spine surgery?

MR. GASTMAN: Your Honor, I believe we have an MRI dated November 10, 2015 from Lenox Hill Radiology, it should be 2B in evidence.

A. Correct.

MR. FOWLER: November 10 -- What's the date, I'm sorry?

MR. GASTMAN: Yes, that's November 10, 2015 Lenox Hill Radiology.

MR. FOWLER: Thank you.

A. So, this is an MRI on November 10, 2015 and you can see -- Here's the side of the spine, we're looking from the side now you can see all the disks and the metallic screws are here in black but the plate connecting them on one side of the patient and the other side of the patient the screws are on the other side with a metallic plate connecting them. And this is the disk stabilizer that's in here that's all black at the L4-5 level.

Q. Doctor, any interval change here or no?

A. I don't have my report in front of me.

Q. This is November 10, 2015 lumbar spine.

A. So, I have to look, November 10, 2015 lumbar. Give me one second.

Q. November 10, 2015.

A. Okay. So, you know, you can see -- We talked about disk herniations all along and you can see where the normal disks are. The disk is this white long structure between the two gray boxes which are the bones. And then when we come down to the one level above the fusion, the fusion was at L4-5, which is this level here, and this is the disk stabilizer.

If you look at L3-4 here you'll see disk material pushing into the sac and also narrowing the neural foramen. So, this is another adjacent segment disk herniation. This one is at L3-4 that you can see on this MRI. So, this will continue and progress because the patient is now fixed at this level. And instead of bending her entire back forward and backward, since they are fixed at this level, all of the bending pressure is now at 3-4 not at the lower levels 4-5 and 5-1.

So, this patient developed a herniation at the adjacent segment again just like in the spine. In the back there's a new herniation that occurred at L3-4.

Q. Okay. Thank you, Doctor.

If you could place those down please and perhaps you'd like to have a seat, we're going to switch gears two more times. And if you could place those films anywhere so you have access to your materials. We'll switch all those all out later.

MR. GASTMAN: Thank you, officer.

Q. So, Doctor, I want to go back to the cervical spine just for a moment. That's where most of the surgery was

performed.

Doctor, did you review, did you review -- Well, we know you reviewed the imaging studies from the hospital dated December 3, 2011. You already spoke to the jury about that. Doctor, did you also review imaging studies taken about a year later of the neck, the cervical spine, dated December 22, 2012?

A. Yes.

Q. Okay. Doctor, I want you to assume a couple things. I want you to assume that a radiologist will be called by the defendant who will give an opinion that on the date of the accident the films that this doctor looked at from the date of the accident he saw the herniations that we all saw but he described them as degenerative. But when that same doctor looked at the film that I just asked you about December 22, 2012 the doctor began to describe the degenerative changes as stable.

MR. MAHER: Objection, your Honor.

MR. FOWLER: I'm going object to the form.

MR. MAHER: Object to the form of the question.

THE COURT: I'm going to sustain that objection as to form.

MR. GASTMAN: I didn't finish the question but I'll rephrase.

THE COURT: I know you didn't.

MR. GASTMAN: I'll rephrase.

MR. MAHER: It's a characterization of someone

else rather than actually a question regarding an evaluation of the film.

THE COURT: I believe it's a hypothetical question.

Q. Doctor, let me give you a shorter hypothetical question. I want you to assume that a radiologist called by the defendant will say everything in the films on the date of the accident is all degenerative, all from before the accident, but I want you to also assume the same doctor looking at the film a year later December 22, 2012 finds that the degenerative changes to be stable. Do you have an opinion about that?

MR. MAHER: Objection.

MR. FOWLER: I'm going to object to the form, your Honor.

THE COURT: Objection's overruled. It's an opinion as to a hypothetical question. I'm going to allow him to answer that.

A. No, it doesn't make any medical sense. I mean, if someone is -- Assuming someone is saying that everything is due to degenerative changes and is saying the degenerative changes are occurring over time and keep occurring to the point where this patient has three herniations caused just by degeneration and nothing else and then all of a sudden the degeneration stops and there's no degeneration for a year after that, why would it stop? I mean, why would it occur only until the trauma and then

stop after the trauma? So, it doesn't make medical sense.

Q. Okay. Thank you, Doctor.

We're going to switch gears for the very last time. All right. Doctor, is it true that you reviewed a film of the patient's right shoulder taken at Lenox Hill Radiology on August 8, 2014?

A. Yes.

Q. And, Doctor, I believe we have a blowup of that here in evidence as 2A in evidence, and if you would, Doctor, if you could please describe your findings on the film please.

And, Doctor, while you set that up, I want you to assume this jury heard from the shoulder surgeon Dr. Kaplan that Dr. Kaplan performed a repair to the rotator cuff of this patient. Doctor, what were your findings on this film, please?

A. So, in the shoulder -- I don't know how much you've heard -- there are tendons that keep the muscles, as you can feel your muscles in the shoulder, they keep everything in place. These tendons by definition mean there are muscles that connect to the bone and tendon is what it's called and that's the connection from the muscle to the bone. And those are called the rotator cuff tendons and there are four of them.

The most common ones to tear are the supraspinatus and infraspinatus tendons, that's a fancy way of saying it, but the point is that these tendons should be completely black. If we go to the back these are sixteen pictures starting from the

front of the patient and they are taken going to the back of the patient. So, looking as if you're looking at my shoulder right here.

And in the shoulder you can feel -- A shoulder is like the humorous is this long bone and it's shaped like a ball, the humorous is round and you can feel it as you move your shoulder, and the humorous connects up this to this other bone, this gray bone. This is the humorous here, this top round bone. You can see that it goes all the way down the arm. We're only looking at the shoulder and the picture stops here but the bone goes all the way down as you can see here.

So, the tendons connect these muscles here right here to the bone and they connect them with these tendons that are supposed to be completely black. Anything that's in the tendon that's white is fluid, that's there because there's a tear of the tendon. So, there are two tendons that come very close together that connect the two muscles to the top of the shoulder here that make up a portion of the rotator cuff and one tendon is called the supraspinatus and one tendon is called the infraspinatus tendon.

So, in front of the patient here you can see that there's a long white area right there and it continues right there and a lot of fluid right next to it. This shouldn't be there. It's completely abnormal. That's because this tendon here, which is the supraspinatus tendon, as it attaches to the

bone is partially torn. So, there's a partial rotator cuff tear involving the supraspinatus tendon with a -- with fluid in the deltoid muscle, right. This is our deltoid muscle right here. Fluid right underneath the deltoid muscle.

There's a smaller tear of the infraspinatus tendon as we come from the front to the back of the patient. So, the infraspinatus tendon is partially torn and the supraspinatus tendon is partially torn even more. This is a classic partial rotator cuff tear on this patient.

There's also a tear of this tendon, the biceps tendon, with all this fluid surrounding it's very abnormal. So, those are the major findings on this MRI of the right shoulder here.

Q. Thank you, Doctor. Have a seat if you will, please.

Doctor, do you have an opinion that you can express with a degree of reasonable medical certainty as to whether the injuries you have described to this jury are permanent?

A. Oh --

MR. FOWLER: Objection, your Honor.

THE COURT: What's the grounds for the objection?

MR. FOWLER: Well, again he's not a surgeon. He is a radiologist. He's going to make a determination based on the films whether the injuries are permanent.

THE COURT: I sustain that objection.

Q. Doctor, the injuries you've described to the jury do you have an opinion that you could express --

MR. GASTMAN: Withdrawn.

Q. Doctor, I want you to assume the following. I want you to assume that before the date of the accident Mr. Montesdeoca was relatively healthy, he was a truck driver, he had a family, he worked full-time, he had minor back complaints a day here a day there in the years before the accident and after the accident he had the injuries we've heard about and the surgeries we've heard about.

Now, doctor, do you have an opinion that you can express with a degree of reasonable medical certainty as to whether the injuries you've described to the jury are related, are causally related to the accident?

MR. FOWLER: I'm going to object again, your Honor. I mean, he's reviewing the films --

THE COURT: Objection sustained.

Q. Doctor, are you getting paid for your time?

A. Yes.

Q. Okay. Can you tell the jury, please, approximately how are you or how is your office being compensated for the work that you've done?

A. My fee?

Q. Yes.

A. Yes, they are being paid $8,500.

Q. And, Doctor, you have issued reports in this case that contain your findings?

A. Yes.
Q. And were -- Is there a cost involved in that?
A. Yes.
Q. How much is that?
A. They're are a lot of reports. I can't give you exact amount but there definitely was an invoice sent out, yes.
Q. Okay. And but, Doctor, your time in court, the time away from your practice, are you being compensated for your time in court?
A. Well, that's what I meant before. That's the $8,500.
Q. Okay. And, Doctor, is it true that you have read films on behalf of some of the surgeons that this jury's heard from in other cases?
A. Yes.
Q. And is it true that you have been called by the law firm of Gorayeb & Associates to describe your radiological findings to a jury?
A. Right. Either on cases that are sent to me done elsewhere or most often cases that I do myself as a radiologist, as a treating radiologist. Yes, both ways.
MR. GASTMAN: Thank you, Doctor. I don't have any other questions. Thank you.
THE COURT: Mr. Fowler.
MR. FOWLER: Your Honor, may I request a brief recess? I want to get some of the records together.

THE COURT: How brief is brief?

MR. FOWLER: Fifteen minutes if that's possible.

THE COURT: Fifteen minutes at this time.

MR. FOWLER: If that's all.

THE COURT: Does everyone want a fifteen minute break?

MR. FOWLER: Probably not.

THE COURT: All right. Fifteen minutes tops. Be back here in fifteen minutes.

MR. FOWLER: Thank you. I appreciate it.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the room.)

THE COURT: Okay. We're off the record.

(Whereupon, the witness stepped down from the witness stand.)

(Whereupon a recess was taken.)

(Whereupon, the witness stepped up to the witness stand.)

THE COURT: Mr. Fowler, are you ready for cross-examination of the witness?

MR. FOWLER: Yes, I am.

THE COURT: We'll bring the jury in.

THE COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the room.)

THE COURT: Have a seat whenever you're ready.

Make yourself comfortable.

Mr. Fowler, would you like to take the opportunity for cross-examination?

MR. FOWLER: Thank you, your Honor, I will. Thank you very much.

CROSS-EXAMINATION BY

MR. FOWLER:

Q. Hello, Doctor. How are you?

A. Good morning, sir.

Q. Now, Doctor, you were retained by plaintiffs counsel's office sometime in May of this year to review these various films?

A. Correct.

Q. And obviously at that time you were given access to defense radiologist's report?

A. I don't recall whether I had the reports or not. I usually get sent the films. Sometimes there are reports and sometimes there aren't.

Q. You don't recall, you made no note as to whether or not you received the films -- the reports and the films together?

A. Correct.

Q. Okay. Do you have any independent recollection?

A. No, a month ago. Sometimes they send films -- reports and sometimes reports are not available.

Q. When you say not available, did you ask for any reports

that were already read on those films?

A. No. My job is to report what I see on the films and that's what I view as my job to be and that's what I did.

Q. Okay. So, again, Doctor, you're a radiologist. You've had many occurrences I'm sure in which you disagreed with colleagues as to what a film shows, correct?

A. Within reason. I mean, most people agree. I mean, there are minor differences but I would say that there are always some disagreements in some cases.

Q. Well, again, Doctor, now in this particular case you reviewed the Elmhurst Hospital records from the day of the occurrence, correct, the hospital films?

A. I review the Elmhurst Hospital films from the time of the accident, yes.

Q. Okay. And you found disk herniations, correct?

A. Correct.

Q. In the cervical spine on the CT scan from December 3, 2011?

A. Correct.

Q. And, again, Doctor, are you aware that the radiologist who read those films that day stated no obvious disk bulge or herniation is seen?

A. I think it -- I may have been told that last week but I accept that you're reading from it and that's what he said, yes.

Q. Okay. So, again, Doctor, that's an example certainly

of there can be a disagreement among radiologists as to what a film shows in a particular view?

A. Right. I think we have to take it in context. This was a patient that was hurt, they were looking for fractures and not herniations, but I'm agreeing with you that my report in that way disagrees with the original report, yes.

Q. Okay. And again they also noted in that CT scan in Elmhurst Hospital degenerative joint disease in the cervical spine at that time, correct?

A. I'd have to read that but I'll accept that they said it if that's what it says.

Q. I believe the Elmhurst records are in evidence. Do you need to review it, Doctor?

A. Yes.

Q. Okay. Actually I have a copy, if that's all right, I can hand you.

MR. GASTMAN: I have no objection.

MR. FOWLER: Thank you. May I approach, your Honor?

THE COURT: Yes.

MR. FOWLER: Thank you.

Q. I'll direct your attention to the third finding, Doctor. Does that indicate degenerative joint disease?

A. Well, it --

Q. Yes or no.

THE COURT: I don't think that calls for a yes or no answer. I'm going to let the doctor answer the question.

A. That's only part of what it says. It says uncovertebral degenerative joint disease. Uncovertebral, the facette joint in the back, is not near a herniation. It does say that here, yes.

Q. Well again, the facettes are part of the spinous process, correct?

A. Well, there's lots of the part of the spine and there are some parts that are close to herniations and some parts that are far away.

Q. What do you mean by far away, Doctor? Couple millimeters?

A. Well, I'm sorry?

Q. What do you mean by far away? A couple millimeters?

A. No. I'm talking about no where near.

Q. Well, what's no where near, Doctor?

A. No where near means if I were to take out one of the cervical spines, if you want me to show it I'll show it otherwise I'll just tell you that -- or maybe we'll show it later. Where there's a disk herniation that comes out these are the squares, the vertebral bodies.

Then there's bones around the back of the spine, the other side of the spinal cord, right, when a herniation gets in

front of the spinal cord. There are also bones in the back of the spinal cord that you can feel and the uncovertebral joint is in the back no where near the herniations.

Q. Okay. But that same report again indicates no obvious disk bulge or herniations seen, correct?

A. That is correct.

Q. All right. Thank you, Doctor.

And you deny then that there's any degenerative changes shown on those films at all, the Elmhurst films from December 3, 2011?

A. Yeah, I disagree with both that there are no herniations and that there's no degeneration.

Q. Okay. Now, Doctor, the cord in the December 3, 2011 CT scan it would be normal in caliber and signal, correct?

A. Yes.

Q. Okay. So again, no indication of cord compression at that point from that film?

MR. GASTMAN: Just note my objection. You mean the read from the hospital as opposed to the film?

MR. FOWLER: No, no, I'm talking about the film.

MR. GASTMAN: You're asking about the -- Just note my objection. It's unclear whether he's asking about the doctor's read of the film versus the hospital's read of the film.

THE COURT: Rephrase the question so that the

witness is clear what you're asking.

Q. Doctor, would you disagree as to whether or not the cord is normal in caliber and signal characteristics from the December 3, 2011 Elmhurst film?

A. Well, the question is not a correct question because there is no signal on the cord on the CT scan. But to answer your question the best I can, the cord is normal in caliber and that's as much as I can say to answer your question.

Q. Okay. Now, Doctor, you talked about seeing a fracture of the anterior fixation plate at the C6 level I believe you said in the January 15, 2015 films.

A. Yes.

MR. FOWLER: May I have exhibit -- Oh, I have Exhibit 1; is that right? Thank you.

THE COURT OFFICER: Um-hum.

Q. Now, Doctor, you yourself didn't read any of these films originally, correct?

A. Correct.

Q. You were retained by plaintiffs counsel's office for reviewing films knowing you're coming in for an expert opinion during a trial, correct?

A. Well, not knowing that I'd come in for trial but knowing that it was a possibility, yes.

Q. Okay. And again, Doctor, I think you said to me earlier you're not sure whether or not you reviewed the reports

of the radiologist who actually read the films initially at any time?

A. That's correct. Yes, that's correct.

Q. All right. Doctor, I'm going to show you a portion, with the Court's permission, of what is in evidence as Plaintiff's Exhibit 1 which is Dr. Brisson, the treating orthopaedic surgeon's records. I'm going to refer you specifically to the CT scan and cervical spine of Middle Village Radiology exam date 1/15/15. All right. Thank you. Again, Doctor, if you could just review that and let me know when you're done.

A. You want me to read the entire report?

Q. Well, again, whatever you're comfortable with. The findings, whatever.

A. Yeah. Yeah. Just point me to a place and I'll read it otherwise I'll read the whole report.

Q. Well, again, Doctor, is it fair to say that that report doesn't show any fracture of the anterior fixation plate at the C6 level?

A. You'll have to give me a minute to read it.

Q. Whatever time you need, Doctor.

A. January 15, no. Whoever read it didn't see it, didn't put it in their report and missed it.

Q. Missed it, okay.

And, Doctor, were you advised when Dr. Brisson was on

the stand he testified that the first time he considered the fracture -- the possibility of the anterior plate was fractured was in February of 2015?

A. Maybe he said that, if you say so, but x-rays taken today January 14, 2015 shows a fracture of the cervical plate at C6-7.

Q. I'm sorry, what is this?

A. Fracture is there on January 14 on x-rays.

Q. January 14 on x-ray?

A. Yeah.

Q. Whose record is that?

A. Dr. Brisson. So it was there.

Q. Again not according to the one who read the film that day though?

A. Well, I can't account for anybody else who reads the film.

Q. You disagree with it?

A. There's definitely a fracture there so I definitely disagree.

Q. Okay. Do you have that --

MR. FOWLER: May I just approach the witness I have one more on that, I'm not sure.

THE COURT: You may.

Q. And again, Doctor, even in your reading of the films, you reviewed plain films of the cervical spine dated October

10th of 2015?

A. Yes, October 10, 2015.

Q. All right. And you noted that that showed the anterior posterior fusions with no interval change, correct?

A. No interval change from one month earlier, September 23, 2015, correct.

Q. Okay. And, Doctor, we also -- You also reviewed some of the lumbar films, correct?

A. Correct.

Q. And the hospital record from Elmhurst December 3, 2011?

A. I don't know about the hospital record.

Q. Okay. Okay. I'm going to show a portion of the hospital record in evidence which is the film review that day December 3, 2007 of the lumbar spine. Thank you.

A. December 3, 2007.

Q. 2011. I apologize if I said seven. I thought I said eleven.

MR. GASTMAN: I apologize, this is what in evidence?

THE COURT: I have no idea --

MR. FOWLER: I'm sorry, this is the --

THE COURT: -- what the question is. I believe it's Elmhurst Hospital records.

MR. FOWLER: Yes.

THE COURT: A portion of it.

MR. FOWLER: Yes, number three.

MR. MAHER: Number three.

MR. FOWLER: I apologize, your Honor.

MR. GASTMAN: And I apologize, the date of the film or the body part?

MR. FOWLER: December 3, 2011 lumbar.

MR. GASTMAN: Thank you.

MR. FOWLER: I'm sorry.

THE COURT: I didn't hear a question being posed to the witness.

MR. FOWLER: I just wanted the doctor to review the film -- the report.

Q. And again, Doctor, fair to say the radiologist that read the film at the hospital that day said no disk space narrowing, a mild bulge at L4-L5, correct?

A. Among other things, yes.

Q. Okay. Thank you, Doctor.

And again, Doctor, you believe in that film you saw a traumatic disk herniation, correct?

A. I saw a disk herniation, yes.

Q. Okay. Well, a traumatic disk herniation, nothing degenerative? You said there's no degeneration.

A. Correct. I said two things. I said there's a disk herniation and there's no degeneration there.

Q. Okay. So again, you found a traumatic disk herniation

in that film that was read by the hospital as showing a mild bulge, correct?

A. Can you repeat that.

Q. Sure.

MR. FOWLER: Your Honor, may I ask the reporter please read that back, I'm sorry.

THE COURT: Okay.

(Whereupon, the last question was read back by the Court Reporter.)

A. Correct. Knowing that the patient had a trauma that day as I'm told that, yes.

Q. Okay. And again you found no preexisting condition of the lumbar spine in your reading of those films, correct?

A. What do you mean by preexisting condition?

Q. Preexisting degenerative conditions.

A. Oh, degenerative, no. No. There are no --

Q. I'm sorry, are you finished with that?

A. Yes.

Q. Yes, you're right.

A. Neither did the original report say there was any degenerative changes by the other radiologist.

Q. And again, Doctor, none of these films were ever read by you originally, correct?

A. Correct.

MR. FOWLER: Okay. Thank you, Doctor, I have

nothing further.

THE COURT: Thank you, Mr. Fowler.

Mr. Maher.

MR. MAHER: Yes, briefly.

CROSS-EXAMINATION BY

MR. MAHER:

Q. Doctor, just relating to the same lumbar CT scan from the date of the incident. In reviewing that report would it be fair to say that the reading radiologist made a finding of mild spinal stenosis?

A. Not really. I mean, I'm not sure. Because in the findings it says no bony spinal stenosis is seen and in the impression it says with mild spinal stenosis at L4-5. So, there's a contradiction in this report. So, I don't know how anyone can understand this report from the hospital of a lumbar spine.

Q. Which portion are you talking? I'm looking at it and it says --

A. Under findings in the --

Q. -- it says with mild spinal stenosis, right?

A. In the fourth line it says no bony spinal stenosis is seen and then it says mild annular disk bulge without spinal stenosis.

Q. Mild spinal stenosis and there's no nerve root impingement?

A. So I'm not sure what the -- Right, it says there's no nerve root impingement. So I'm not sure what spinal stenosis means because he says above there's no bony spinal stenosis but --

Q. Let me ask you -- Are you done?

A. Yes.

Q. Is spinal stenosis something that would develop over a matter of hours?

A. Spinal stenosis can occur from a herniation, yes, sure. So, it can occur traumatically, yes.

Q. Okay but in this instance there's no indication in this report of a herniated disk, correct?

A. No. Same answer. You can have spinal stenosis from a bulge as well.

Q. And is it also true that spinal stenosis can be congenital? That you could be -- you can have that condition as a result of a condition that you were born with?

A. You can. I mean, the radiologist says this patient doesn't have it but anything's possible.

Q. Well, he also says that he does have it.

A. Right. So, I mean, this radiologist is a little black and white, I don't know, plus minus. I'm not sure.

Q. It may be a typo in one portion of the report?

A. Well, I'm not sure where the typo is. It's impossible for me to comment on this report. I mean, it's a very

straightforward opinion that I made but this report has a typo somewhere.

Q. Okay. But there's no indication anywhere in this report of a finding of a nerve root impingement of the lumbar spine in the immediate aftermath of this incident?

A. That's correct. The report does say at L4-L5 there was no nerve root impingement, that is correct.

Q. Right.

And similarly with respect to the examination or the findings with respect to the CT scan that was done of the cervical spine there was no herniations noted by the reporting radiologist on the date of the incident?

A. That's correct. This reporting radiologist found no herniations at all on December 3, 2011 according to his report that is correct.

MR. MAHER: Okay. All right. Thank you. I have no further questions.

THE COURT: Mr. Gastman, redirect.

MR. GASTMAN: Yes, very brief, thank you.

REDIRECT EXAMINATION BY

MR. GASTMAN:

Q. Doctor, as a board certified radiologist in order for you to do your job and report on a film do you typically read somebody's else's report first before you come up with your own findings?

A. No. No. I always -- Whether I have the reports or not, I always read the films myself first so there's no bias. I read what I read, I dictate and I put out my report. If I have prior reports, fine. If I don't, I don't.

Q. And it has no effect, as you just explained, has no effect on how you do your work?

A. Absolutely not. Absolutely not.

Q. Now, Doctor, you were asked a few questions about some of the films taken in the emergency room setting at the hospital when the patient came in from trauma. You said something about the context of the study.

MR. MAHER: Object to the form, your Honor.

MR. FOWLER: Objection.

THE COURT: Objection is sustained.

Q. You were asked questions about findings at the hospital level and I thought I heard you say that was -- those were the findings under the context. What did you mean by that?

MR. MAHER: Objection. That was on his direct.

THE COURT: Objection is sustained.

Q. Okay. Doctor, you said that the hospital was looking for fractures. Is that what you said?

MR. MAHER: Objection.

MR. FOWLER: Objection, your Honor.

MR. MAHER: Again, same objection.

THE COURT: Objection is sustained.

Q. You were asked about herniations in the cervical spine films; true?

A. Yes.

Q. And we can agree, can we not, that the hospital radiologist he missed all of them, he missed all three of them?

MR. MAHER: Objection.

MR. FOWLER: I'm going to object to the form of the question, your Honor.

THE COURT: Objection's overruled.

Q. He missed all three, didn't he?

A. Yes, he did.

Q. You saw them?

A. Yes.

Q. Doctor, I want to ask you if defendant's radiologist read that exact same film and issued a report, and I have a copy of it here, and it says he found the three herniations that you found would you agree with defendant's radiologist?

A. Yes, there are three herniations there.

Q. Thank you.

Now, Doctor, you were asked a question on cross-examination about facettes and a cervical spine and herniations you were saying something to the effect no where near.

A. Correct.

Q. Doctor, is there a film here in the courtroom that you

could better explain what you were talking about?

A. Yeah.

Q. Could you show us. And I would ask that the films marked in evidence be provided to the doctor in case there are -- and we have some -- If you don't find it, Doctor, we have more films in evidence.

A. Well, I'll try on this one and if you think we need others we'll get them.

MR. FOWLER: I'm sorry, which exhibit, Doctor? I'm sorry.

A. 1E.

MR. FOWLER: Thank you.

A. So, one minute of anatomy. These are the vertebral bodies, the bones. The disks are in-between. Herniation goes beyond the margin of the bone here. Okay. So, if you were to have a herniation it goes this way. The facette joints are back here. So, the facette joints here are not near where the herniation occurs here. This is the facette joint. It's covered now because this patient had surgery and I can pull out more films but I don't really want to take your time. This is a normal facette joint. It's one bone here, one bone here, okay.

If this were to narrow or form some spurring this is the uncovertebral joint which is what's mentioned on the CT scan. This is where the facette is. This is where the herniation is. It's actually even further away from the

herniation in real life but if we pull the CAT scan out of the spine you would see things laid out more. But the general point is that there's no spurring or loss of height of the disk itself, there's no degenerative disk disease and it's the disk that herniates.

This facette is normal and the others were but for someone who says that there's uncovertebral joint disease it's back here and not here. That's pretty much as far away as you can get from a herniation in the cervical spine.

Q. Doctor, did you say a CAT scan would show that even more so?

A. If we had the right pictures, yes.

MR. GASTMAN: May the doctor please be provided with 4A, B and C in evidence. These are CAT scans from Elmhurst Hospital day of the accident.

A. Oh, perfect.

Q. If these views are no better than the x-rays you just showed us you can tell us.

A. No, all these are all good. So, this is a nice. So, if you look at 4B -- We're learning a lot of anatomy today. Here's one more minute of anatomy.

4B CAT scan cervical spine 12/3/2011. Now, I told you there are bones in front of the spine which are these vertebra, the squares, but now we're cutting it like a loaf of bread, we pull it out. This is the herniation that we talked about here

but there are also bones in the back. These ridges on the back of your spine are these bones right here.

So, there's bones in front of the spine, there's bones in the back of the spine. This is the front, this is the back and in the middle you have the spinal cord. The herniation is from the front of the spine going back pushing on the thecal sac and eventually on the spinal cord here. Uncovertebral joint's all the way out here. This bone and that bone are the same bones I showed you on an x-ray on 1E, here this bone and this bone, except we're taking one picture here pulling it out and blowing it up.

So, this is the facette joint here and here and it's as far away as you can get and it's in the back part of this backbone here as far away as you can get from the disk herniation which is a tear of the ligament and annulus here as you can. So, there's no --

So anyone who would say there's facette joint degeneration or uncovertebral joint degeneration that does not relate in any way to whether there is or isn't a disk herniation. They are worlds apart in the spine and this spine.

Q. Thank you.

MR. GASTMAN: Your Honor, may the witness please be provided once again, he was provided with a report on cross-examination from Middle Village Radiology, it's the cervical spine dated January 15, 2015. I believe defense

counsel handed it up.

THE COURT OFFICER: Yeah, he still has it, counsel.

Q. Okay. Middle Village Radiology.

MR. FOWLER: I think that would be Dr. Brisson's records. I think that's in.

MR. GASTMAN: That's fine.

MR. FOWLER: Yes, I think it's --

THE COURT OFFICER: Exhibit 1.

MR. FOWLER: -- Exhibit 1.

THE COURT OFFICER: Okay. Here's Exhibit 1.

Q. Should be the second tab, Doctor, if I'm correct.

THE COURT OFFICER: No, no, no, no, this.

A. Thank you.

Q. Thank you. Did you locate that report, Doctor?

A. Yes.

Q. Defense counsel was asking questions about whether or not --

MR. GASTMAN: Withdrawn.

Q. Did the radiologist that day did he see the broken plate in this film?

A. No.

Q. All right. Doctor, I'm going to have you take a look at the second full paragraph of this report. Is there some finding that the radiologist has in this report with regard to

missing that?

A. You mean the last line of the second paragraph that says metallic artifacts somewhat degrades the axial images in this region.

Q. For those who are not a radiologist, what does that mean?

A. That means that the radiologist was uncertain about reading it because of artifacts which are not part of this film but it's pretty clear. I mean, I can show it to you and you would certainly agree with me that it's fractured, that same plain film. So, I just plain out disagree with this report but the radiologist is trying to cover by saying I can't really see it.

Q. Is there a film, Doctor, that's in evidence that you could show the fractured plate?

A. Yeah. I just showed it this morning and I'll show you again here.

Q. And if you would simply read that evidence number sticker into the record, please.

A. Well, it's 1E.

Q. Thank you.

A. Now, it's on multiple films, I'm just showing you one. It's on multiple CAT scans and multiple x-rays.

Q. And Doctor --

MR. FOWLER: I'm sorry.

Q. This is November 6th --

THE COURT: Excuse me.

MR. FOWLER: I have an objection. He's talking about something on the January 10, 2015 film showing the jury a November 17th film.

MR. GASTMAN: Your Honor, I --

THE COURT: Clarify that.

MR. GASTMAN: Yes. Thank you.

Q. Doctor, what's on display now this is 1E in evidence, correct?

A. Correct.

Q. So this is Dr. Brisson's film dated November 6, 2017; true?

A. Yes.

Q. So this is after all, all of the surgeries were performed?

A. Yes.

Q. Please continue, Doctor.

A. Well, we may have an earlier one but --

Q. I'd like you to demonstrate on this one. This is after all the surgeries are done?

A. Right.

Q. There's no more surgeries?

A. Right.

Q. Is there still a fractured plate?

A. Yes.

MR. FOWLER: I'm going to object, your Honor.

THE COURT: What's the grounds for your objection?

MR. FOWLER: Well, again, (a) I think it assumes facts not in evidence. I forget the date of the final surgery but quite frankly --

MR. GASTMAN: It was May 2, 2017 as this jury heard.

MR. FOWLER: Right.

THE COURT: This is in fact evidence; isn't it?

MR. FOWLER: Yes, it is.

THE COURT: Objection is overruled.

MR. FOWLER: Objection withdrawn.

A. Yes, on this film 1E there's a fracture of the anterior plate and you can see it that the front of the plate is here and then the top of the plate is there. So, there's a fracture line going right through here.

Q. Okay. Now, Doctor, you already told this jury today that you also saw that fractured plate on the October 14, 2015 CT scan. Doctor, if the defendant's radiologist also saw the fractured plate on that same film would you agree?

A. Yes, I agree it's definitely there.

MR. GASTMAN: Thank you.

THE COURT: All right. Mr. Fowler, I'll afford you an opportunity to recross if you like. You don't have

to do it, I'm just affording you an opportunity.

MR. FOWLER: Based on the cross-examination, nothing, your Honor -- I mean, redirect, sorry, your Honor.

THE COURT: Anything, Mr. Maher?

MR. MAHER: No.

THE COURT: Doctor, you can step down. Thank you very much.

A. Thank you.

(Whereupon, the witness stepped down from the witness stand.)

THE COURT: Mr. Gastman, do you have another witness you'd like to call?

MR. GASTMAN: Your Honor, I do not. Plaintiff has no more witnesses in this case in chief. I have medical records to put into evidence after which I shall rest.

THE COURT: Okay. Come up.

(Whereupon, the following took place at the side bar on the record in the presence of the Court and counsel.)

THE COURT: We're at that point in the trial the plaintiff has rested. So, now we're going to afford the defendants an opportunity to put on their witnesses and present their case before we do summations.

We have a scheduling issue with the doctors so I am going to give you a heads up on where we're planning on

going with this trial. This afternoon we have no testimony scheduled so you'll be able to leave in a few minutes. On Friday we have no testimony scheduled so you will not have to report back on Friday. We're scheduled to have the doctors for the defendants testify Monday probably in the morning and in the afternoon.

I believe Tuesday we have a calendar here in the morning and I have something on in the afternoon and to squeeze summations, charging you and sending you out to deliberate with a half hour to go doesn't seem worth the while for you to come in on Tuesday. We do plan on finishing the trial having summations on Wednesday morning, charging you on Wednesday morning and having you deliberate right after that. So, but I want to give you the schedule so you can plan your lives accordingly.

So, for now I'm going to dismiss you only to the extent of directing you to reappear here Monday morning at 9:30. You'll probably be all day Monday, nothing on Tuesday, and Wednesday the case is going to go to you. Okay. And I can't thank you enough for the cooperation that you've shown. I wish every jury was like this. Thank you. Okay. For now we can ask the jury to be excused.

THE COURT OFFICER: Yes, Judge.

THE COURT: Have a good weekend.

THE COURT OFFICER: All rise, jury exiting.

(Whereupon, the jury exited the room.)

THE COURT: All right. Counsels, anything we need to put on the record before we --

MR. MAHER: No, we were going to work amongst ourselves.

MR. GASTMAN: No, your Honor. I simply wish to place my limited objection on the record with regard to the medical doctor not being permitted to answer hypothetical questions with regard to permanency and causality. I received the same restriction on their doctors -- on their radiologist doctor.

THE COURT: We haven't got to that point yet.

MR. GASTMAN: Yes.

THE COURT: Your objection's noted. Thank you.

MR. GASTMAN: Thank you, your Honor.

THE COURT: We're off the record.

(Whereupon, an off-the-record discussion was held.)

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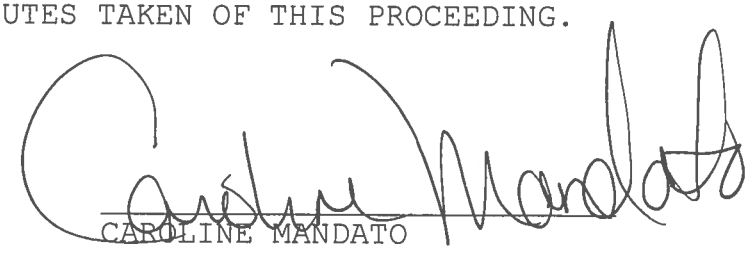

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Senior Court Reporter

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