SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS: CIVIL PART 35

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JOSEPH MAZZILLI,

PLAINTIFF,

-against- Index No. 13276/07

CHARLES LOMBARDI and

ALICIA LAZZARA,

DEFENDANTS.

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Supreme Court

25-10 Court Square
Long Island City, New York 11101

April 4, 2013

* * * E X C E R P T O F J U R Y T R I A L * * *

B E F O R E :

HON. TIMOTHY J. DUFFICY, JUDGE

A P P E A R A N C E S :

THE FLOMENHAFT LAW FIRM, PLLC
Attorney for the Plaintiff

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BY: MICHAEL FLOMENHAFT, ESQ.

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BY: GLEN T. PEWARSKI, ESQ.

CAROL B DRUCKER
Senior Court Reporter

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THE CLERK: Case on trial continued; all parties present.

MR. FLOMENHAFT: Judge, one administrative thing

before we start.

THE COURT: Okay.

MR. FLOMENHAFT: I was -- I prepared these blow ups of images that are in evidence; admittedly, the blow ups are not as defined as the images in evidence. I was going to use them to facilitate the witness just drawing arrows to show what he is doing, but clearly these images that they are enlargements of are better resolution.

THE COURT: They are more defined.

MR. FLOMENHAFT: Yes.

The landmarks are all here to point out structures. I could do that, or I could have him mark up these exhibits.

MR. PEWARSKI: I am object using them because the blow up are -- the regular films were of inferior quality. He is blowing this up by a factor of ten, and it is just

not -- it is just not clear.

THE COURT: I think we have to use the ones that are in evidence.

MR. FLOMENHAFT: I will have him mark up these.

THE COURT: Yes.

We will have to use the clear ones, the small ones.

MR. FLOMENHAFT: Fine.

We will just show them.

THE COURT: We have a note from a juror that alternate number two, Daneen Locascio, can't serve on April 12. They have to be in Atlanta, Georgia.

How do you want me to handle it?

After we finish the trial, we will talk to the

juror or --

MR. PEWARSKI: You mean after today -- after we finish the witness I mean?

THE COURT: Yes.

MR. PEWARSKI: I would just tell them we will be done before the 12th.

MR. FLOMENHAFT: I would say we will probably be done.

THE COURT: If not, we will excuse her. We have four alternates.

MR. PEWARSKI: This is an alternate juror?

THE COURT: Alternate two.

That's why we kept all the alternates.

MR. FLOMENHAFT: We have time to see, judge.

THE COURT: Yeah.

MR. FLOMENHAFT: Today is the 4th, right?

THE CLERK: Yup.

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THE COURT: So we have to mark this as a Court Exhibit.

Do you know what one we are up to.

(Whereupon, the aforementioned Document referred to above was marked as Court Exhibit Number V by the Court Reporter.)

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

COURT OFFICER: Ready for the jury, judge?

THE COURT: Yes.

COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: All jurors are present and seated in the courtroom.

Do both sides waive the reading of the roll call?

MR. FLOMENHAFT: Yes.

MR. PEWARSKI: Yes.

THE COURT: Mr. Flomenhaft, do you have another witness, please?

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

G L E N N S C H W A R T Z, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Glenn, G-L-E-N-N; Schwartz,

S-C-H-W-A-R-T-Z.

MR. FLOMENHAFT: Judge, could I turn the volume up a little bit because his voice is kind of low?

THE COURT: Okay, turn it up.

MR. FLOMENHAFT: Testing.

THE WITNESS: Testing, testing, testing.

THE COURT: Seems good.

Okay.

MR. FLOMENHAFT: Judge, I want to give this to the witness.

Okay.

DIRECT EXAMINATION

BY MR. FLOMENHAFT:

Q. It is Dr. Schwartz, right?

A. Yes.

Q. Dr. Schwartz, what is your profession and specialty?

A. I am a physician. I am board certified in diagnostic radiology.

Q. What is diagnostic radiology, briefly?

A. It is the taking and interpretation of imaging studies of the body whether it is to do with radiation in terms of chest x-rays or radiographs or cross sectional imaging that you see in CT scans or MRI.

Q. Are you licensed in New York State?

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A. Yes.

Q. Can you tell us when you were licensed?

A. I was licensed in 1979.

Q. Okay.

Can you briefly tell us your -- just review with us your education, training and history.

A. I went to undergrad school at New York University. I went to medical school at New York University as well. I did four year diagnostic residency and internship at Kings County Downstate Medical Center.

Q. And then after that?

A. I spent two years there teaching as an assistant professor, and then I left to go into private practice.

Q. Professor of what?

A. Professor of Radiology.

Q. Have you been in private practice since then?

A. Yes.

Q. Where do you practice?

A. Private group, Long Island Radiology.

Q. What do you do there?

A. Diagnostic radiology, interpretation of imaging studies.

Q. Have you ever testified in a courtroom before?

A. Never.

Q. This is your first time?

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A. Yes.

Q. And did I initially subpoena you?

A. Yes.

Q. But then you subsequently agreed to be paid for your time this afternoon?

A. Yes.

Q. At what rate?

A. Four thousand dollars.

Q. Is this the first and only time you have ever testified --

A. Yes.

Q. -- in a courtroom?

A. Yes.

Q. Have you ever net Joseph Mazzilli?

A. No.

Q. But did there come a point in time when you were asked to participate in the evaluation of Joseph Mazzilli?

A. Yes.

My employment as a radiologist -- we have a contract with Empire Imaging to read their imaging studies.

Q. By the way, if you open up that envelope, I think your reports are there, so feel free to refer to them if you need to.

A. (Non-verbal response.)

Q. So, just briefly, how did it come about that you were asked to participate in evaluating Joseph Mazzilli?

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A. It was part one of the imaging studies that was performed at Empire Imagines as part of my day I interpreted the MRIs that were done at the facility. That was just one of them.

Q. Who was the referring physician?

A. Dr. Golzad.

Q. What is the date of -- of this study?

A. The date was June 20, 2006.

MR. PEWARSKI: When you say "the date," what date -- date of what?

THE COURT: You want to voir dire?

MR. PEWARSKI: I just wanted to get a clarification date of the study or the date that you read it.

THE WITNESS: The date of examination was -- I'm sorry.

MR. PEWARSKI: Thank you.

THE WITNESS: -- June 12, 2006.

Q. What date did you interpret it?

A. It says here June 20, 2006.

Q. And you generated reports?

A. Well, this was the report. The report was generated on June 20, 2006. At that time we did not use a computer generated system that immediately prints out the report, so this went to a transcriptionist, and the report was transcribed on June 20, 2006.

Q. By the way, was there more than one report?

A. Yes.

Q. What were the studies that were done?

A. There was an MRI of the right ankle, and I only have

one report and I --

Q. There isn't a lumbar report in there?

A. There one page from it.

MR. FLOMENHAFT: Okay. We have pages on other records of that, so --

A. And there was an MRI of the lumbar spine that was done on June 13, 2006.

MR. FLOMENHAFT: Judge, could I get the other page from the other records?

THE COURT: Yes.

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

MR. FLOMENHAFT: Excuse me one second, judge. The notes appear in a lot of the records. Excuse me one second.

(Whereupon, there was a pause in the

proceedings.)

MR. FLOMENHAFT: Judge, maybe I could have a five minute recess to find the first page that is missing?

THE COURT: We will take ten minutes.

Ten minute recess to find some records.

Same admonitions.

COURT OFFICER: Jurors, please rise and follow me out this way.

(Whereupon, the jury leaves the courtroom.)

COURT OFFICER: The jury has left the courtroom.

(Whereupon, a short recess was taken in the proceedings.)

* * *

THE CLERK: Case on trial continues; all parties present.

I remind you, doctor, that you are still under oath.

THE WITNESS: Okay.

THE COURT: You have all the papers necessary to proceed?

MR. FLOMENHAFT: Yes.

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

COURT OFFICER: Ready for the jury, judge?

THE COURT: Yes, bring them in.

COURT OFFICER: Jurors entering.

(Whereupon, the jury entered the courtroom.)

THE CLERK: All jurors are present and seated in the courtroom.

Both parties waive reading of the roll call?

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MR. FLOMENHAFT: Yes.

MR. PEWARSKI: Yes.

BY MR. FLOMENHAFT:

Q. Dr. Schwartz, there were two studies that were performed?

A. Yes; MRI of the lumbar spine and an MRI of the right ankle.

Q. What were the dates of those studies that were performed?

A. The ankle was done on June 12, 2006 and the lumbar spine was done on June 13, 2006.

Q. Okay.

And what was the procedure by which the images were

obtained and you would come in to interpret it?

A. The patient would come into the office on a scheduled time. The tech would show them into the MRI suite. He would be prepared for the MRI. The MRI would be performed. The films would be printed out. A copy would be archived digitally. I would have gotten the printed out images to read the next day.

Q. When would you generate your report?

A. That same day, but it would go to a transcriptist to type up and send it to the referring physician.

Q. If the images were obtained on June 12, your report would be generated on the 13th?

A. Usually, yes.

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Q. With respect to the first report generated with respect to Mazzilli's right ankle --

A. Yes.

Q. -- were you given any history in connection with this interpretation?

A. Yes, I was.

Q. What, if any, history were you given?

A. I have -- on the request it said the patient had recent right heel surgery on May 18, 2006 and with persistent right heel pain.

Q. And I want to put your report on the screen so you can explain to us what it says --

A. Okay.

Q. -- because it is in evidence?

MR. FLOMENHAFT: Judge, can I turn off the light?

THE COURT: Yes.

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

BY MR. FLOMENHAFT:

Q. So what I am going to do -- I am going to ask you to try to explain it to us in simple English. I will show you some imagines from that study.

A. Sure.

Q. Maybe you could translate this to us in English, in understandable English.

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MR. FLOMENHAFT: You know what, block it -- the first block up here.

Okay.

Q. That's the history, right?

A. Yes, that was what I just read. That was the history that I would have been given.

Q. Okay?

MR. FLOMENHAFT: And block this.

Just look -- block the next two paragraphs -- next three.

Q. What does that explain to us? What were you trying to explain by writing that?

A. Sure.

The first paragraph there explains that we did the examination in three different projections which is what we usually do on all muscular skeletal MRIs; sagittal, coronal and axial.

Q. Sagittal is sideways?

A. Sagittal is side ways, coronal is looking face on and axial is across.

Q. Cutting through?

A. Yes.

Q. Looking down?

A. Correct.

Q. So what does -- what did you report on that day?

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A. Okay.

The next sentence: The examination reveals loss of cortical margin which is the edge of the bone -- so on the MR it is usually a certain thickness; it gets thin; we say there is a loss of some cortical margin; there wasn't a normal thickness of the cortical margin -- involving the superior aspect of the posterior calcaneus probably postsurgical in origin.

Q. What are you saying in that sentence?

A. I am saying that there is an abnormality of the bone that we are seeing involving the calcaneus that looks like it was acute rather than chronic and was probably due to the

patient's surgery that he had one month previously.

Q. What do you mean by acute rather than chronic?

A. An acute injury is something that happens fairly recently, within a month or so, that we are able to see changes. Chronic means it has gone on for months or years; and usually when we see loss of cortical margin, it is more acute rather than chronic.

Q. Cortical margin is loss of bone?

A. Yes.

Q. Continue.

A. There is altered signal -- which means when we are looking at an MRI, the signal that the tissue gives out after they have been hit by an electronic pulse sitting in a magnetic field -- whether it is fat, water or bone, every tissue gives

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off their own signal; there is normal signal that we are expected to see; when we see signal that isn't normal, we call it altered signal; we saw signal that you wouldn't expect to see -- noted within the adjacent soft tissues within the pre-Achillies bursa probably representing edema -- which is that area of the tissue that is behind the ankle.

Q. Okay.

What were you seeing?

A. What we usually see when we see that on the images that we use are the pulse sequences is a very bright signal. It would be brighter than you would expect to see.

Q. What is the importance of that?

A. It means there was evidence of change in the soft tissue that caused fluid to accumulate. Whether it is fluid or scar tissue, it changes the imagine in that area.

Q. You attributed cortical change to the surgery. Why

did you do that?

A. Because usually acute loss of cortical margin is usually an acute thing and usually a chronic change of the bone usually causes a thinning. If it there is thinning, it is more of an acute problem.

Q. What does acute have to do with the surgery?

A. Depending on when the surgery was done, which is within a few weeks to a month, that is a proximate cause of why there has been bone loss.

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Q. Was the surgery that you were told about within the acute time frame?

A. It was four weeks.

Q. Continue.

A. I just describe it as increased on STIR and T2 weighted sequences and decreased on T1 weighted sequences which is a way that we show on different pulse sequences the differences in tissue magnetic susceptibility.

Q. For what purpose?

MR. PEWARSKI: Objection to the form of the question: For what purpose.

THE COURT: Sustained.

Q. For what purpose would you be using these sequences to try and access weight?

A. They give us different -- depending on the pulse sequences, they give us different characteristics that we look for which will tell us what type of tissue we are looking at.

Q. Anything else you want to say about this paragraph?

A. No. It just says the same thing, that there was altered signal, that there was abnormal tissue in the area that

was posterior to the ankle.

MR. FLOMENHAFT: Let's blow up the rest -- actually can we blow up the rest and put it in the corner. I want to show some images -- actually, just blow this up and then we will go to the impression.

Q. What does that say to us?

A. That is not the impression, but it just says that the structures that I was able to see that were normal -- those were them -- that the Achilles tendon that were posterior from the ankle looked normal. There were no abnormal fluid collections noted, an organized fluid collection that would you see with an abscess or hematoma.

Q. What do you mean by "hematoma"?

A. Blood collection.

Q. And when you stay "abscess," what do you mean?

A. Infected collection.

And the ligaments and tendons that were around the ankle were normal.

Q. Okay.

Which tendons would that be?

A. On the medial side of the ankle would be the posterior tibial tendon or flexor digitorum longus and flexor hallucis longus tendon.

MR. FLOMENHAFT: So let's just enlarge the impression.

Q. Is that your entire impression, or is there more on the second page?

A. There is more on the second page.

Q. Why don't you explain this portion of your impression?

A. There is some bony change in the calcaneus that looked

acute. Probably secondary to the surgery if it was not there previously, that there was(sic) also changes in the soft tissue behind the ankle. Which were -- also looked like they were post-surgical in origin.

Q. What do you mean, If they were not there previously?

A. It goes back to whether they were acute or chronic, and they looked acute when I looked at them. This looked like acute changes, but sometimes you can get fooled, and sometimes there are changes that look like that that can be chronic; but if they were not there on a previous MRI, then this was probably be secondary to the surgery.

Q. Let's go to the next -- the impression -- the next page.

A. And it just mentions that there was soft tissue

swelling on the lateral aspect of the ankle.

Q. I want to show you an exhibit that has been marked into evidence as 7D?

MR. FLOMENHAFT: Judge, can I approach with the one that is in evidence?

THE COURT: Yes.

MR. FLOMENHAFT: I want to --

Actually, can I ask the witness to step up to point out certain --

THE COURT: Okay.

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

Q. Doctor, I want to show you what has been admitted into

evidence as 7D and this represents one of the imagines that you interpreted?

A. Yes.

Q. And to what extent, if any, does(sic) the post-surgical changes that you reported -- to what extent are they reflected in this enlargement, 7D?

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

THE COURT: Overruled.

A. Again, as I was saying when I was explaining that, there was an altered signal as you can see here.

Q. Can you describe it for the record.

A. These very bright areas -- this is the ankle. This is basically the talus and the calcaneus, the end of the fibula.

MR. FLOMENHAFT: We need a pointer. May we have one of those metal poles?

THE COURT: The metal rod?

MR. FLOMENHAFT: Metal rod.

THE COURT: We can give you this pole.

A. This area in here that I said had altered signal, like bright and white. This is what we are seeing here. This is what normal tissue looks like as compared to this bright area that we see here.

Q. By the way, what type of image is this?

A. This is an axial cross sectional as if we cut the ankle in half.

Q. Up and down?

A. Actually, we look up.

Q. Can we see the flexor hallucis longus tendon?

A. This here is the structure. Here is the flexor

hallucis longus tendon.

Q. Are you talking about the black structure?

A. Yes.

Q. What is the white? With a reasonable degree of medical certainty, what is that bright white area which is on each of the flexor hallucis longus tendons?

MR. PEWARSKI: Objection to the form the question.

THE COURT: Sustained.

Q. Where is this bright signal with respect to the flexor hallucis longus tendon?

A. The bright signal is here, on the lateral aspect of the hallucis longus tendon. It comes across here, posterior to it, and then comes medial, so it is on this side of the tendon.

Q. What does that bright signal represent?

A. This bright signal represents early scar tissue.

Q. Both the lateral and the medial side of the flexor hallucis longus tendon?

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A. Yes.

Q. Why do you say that?

A. Because you can see the difference in tissue brightness. You can see the brightness of the tissue. Here you can see it coming around the tendon, and you could see it coming this way around the tendon also on the medial side.

Q. Okay.

And to what extent are you able to see the posterior --

Withdrawn.

What is the posterior tibial neurovascular bundle?

A. That's the structure here that contains the posterior

tibial artery, vein and nerve.

Q. To what extent, if any -- Are the post-surgical changes that you referred to in your report also referring to changes in the posterior --

MR. PEWARSKI: Objection.

Q. -- tibial neurovascular bundle?

MR. PEWARSKI: Objection.

THE COURT: Sustained.

Q. What does this imagine show?

A. If you look this is mildly enlarged and you can see -- also see within the bundle -- areas of the white that we can see here which also reflects that there is some increased fluid within the bundle whether that is probably scar tissue or edema

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surrounding the nerves and vessels.

Q. Okay.

And is that a normal looking posterior tibial neurovascular bundle?

A. No, it is larger than you would expect to see in a normal ankle.

Q. And the changes that you are describing for us in that posterior tibial neurovascular bundle -- are they in the category of chronic or acute?

A. I would say given that they we see the changes in the rest of the ankle, they would be acute. If they were not there on a prior exam, then I would almost say they were acute.

Q. To what extent did you relate those changes to surgery?

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

THE COURT: Overruled.

A. I would expect that they are changes secondary to the surgery.

Q. Okay.

MR. FLOMENHAFT: Before we go to 7D -- 7E, I just want to -- I thought we had the --

THE COURT: Does he need to testify from there?

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

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Q. I want to show you 7E that is in evidence.

What is the difference between 7E and 7D that we just saw?

A. This is an image that is taken a little further down than we saw on the previous image. It is further toward the

foot from the ankle.

Q. Okay.

What, if anything, is it -- did you think it was showing?

A. Again, we are seeing the bright signal which is the scar tissue forming around the posterior aspect of the ankle. This is the flexor hallucis longus tendon, and you can see that there is bright signal which looks like scar tissue coming around the tendon.

Q. On the medial side?

A. On the medial side, and you can see the posterior tibial neurovascular bundle. Look again; it has bright areas in it that you usually don't expect to see.

Q. Were these appearances -- what do these signify to you?

A. That there was trauma to that area, and there is scar

tissue forming.

Q. Where?

A. Medial to the flexor hallucis longus tendon and involving the posterior tibial neurovascular bundle.

Q. Did you opine at that time the reason for the source of that trauma?

MR. PEWARSKI: What time is that? Could we have a time frame on this opine?

MR. FLOMENHAFT: Sure.

Q. At the time you interpreted these imagines on June 13, 2006, what was your opinion?

A. I thought this was all surgical in origin.

Q. By the way, is there -- there anything about this image or the imagine we just saw before, Plaintiff's Exhibit 7D

which offered you an opportunity to track the course of the surgery?

A. You mean the instrumentation from which direction?

Q. And how far it went?

A. Well, it looks like the instrumentation started here at the posterior lateral aspect and went across posteriorly to the medial aspect. This is the flexor --

MR. PEWARSKI: Excuse me.

I am going to note an objection to this about instrumentation from this witness. There is no foundation.

MR. FLOMENHAFT: He opined that it was from surgery, judge.

THE COURT: I will allow it.

Q. Continue.

How -- how far did it go?

A. At least it went to this area which is medial to the flexor hallucis longus that we are seeing scar tissue forming.

MR. PEWARSKI: Pointing to a line.

Q. How far above where -- with respect to the flexor hallucis longus tendon did it go?

A. It is hard to say on this imagine, but probably within the range of five millimeters or so.

Q. Where with respect to the right -- to the flexor hallucis longus tendon -- with respect to this imagine -- does this imagine give you a viewpoint of approximately where with respect to the -- how far with respect to the flexor hallucis longus tendon and the posterior tibial neurovascular bundle the surgery went?

A. It went at least this far.

Q. Okay.

You can take a seat.

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

Q. Before you --

MR. FLOMENHAFT: Judge, could I approach?

THE COURT: Yes.

Q. Before we move off this topic, I am showing you two markers. I am giving you a black and a silver one. I am wondering on 7D if you can mark with an F and an arrow where the flexor hallucis longus tendon is.

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A. Just with an arrow, point to it?

Q. Arrow, yeah.

Just mark an "F."

MR. PEWARSKI: Could I hear what the question is, your Honor?

THE COURT: Do you want the question read back?

MR. PEWARSKI: I would like to know.

THE COURT: Read back the question, reporter, please.

(Whereupon, the requested portion of the record was read.)

BY MR. FLOMENHAFT:

Q. In addition to marking with an F where the flexor hallucis longus tendon is on 7D, if you can, mark with a "P" an arrow that shows where the posterior tibia neurovascular bundle is.

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

Q. And extend it into the black so we can see where you

are pointing to.

A. With a "P."

Q. Yeah a "P"?

If you can do the same thing on seven -- what was it -- 7D?

A. 7E.

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Q. 7E?

A. 7E.

Q. Yeah; same on 7E.

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

Q. Which is the better imagine to help us for you to see the tracking of the surgery?

A. Probably E.

Q. On 7E can you mark with an arrow approximately where -- with respect to the flexor hallucis longus tendon and the posterior tibial neurovascular bundle according to your view -- where it extended?

MR. PEWARSKI: There is no foundation for this witness marking the surgery.

THE COURT: We went through this before, so I am going to overrule that.

A. How do you want me to mark it?

Q. With an arrow mark it "S."

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

Q. Thanks.

By the way, how far is the flexor hallucis longus tendon to the posterior tibial neurovascular?

A. It is variable, but it is usually within five or six

millimeters.

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Q. Would that be less than and a quarter of an inch?

A. Quarter to half an inch depending on the ankle.

Q. Okay.

Now you did another report?

A. Yes.

Q. We are going to put that report on the board.

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

Q. What was the nature of this report?

A. This was a report of an MRI of the lumbar spine --

Q. Okay.

A. -- of the back.

Q. Okay.

And you found various abnormalities in Mr. Mazzilli's spine?

A. Yes.

Q. Can you just summarize for us the abnormalities that you found?

MR. FLOMENHAFT: This, by the way, will facilitate testimony.

Judge, I have a model.

Q. Will this help?

A. Sure.

MR. PEWARSKI: I am going to note an objection to that. This is a radiologist that looked at films. He interpreted films.

THE COURT: It is an anatomical model of the spine, and I think he is going to be testifying as to the different parts, so if it will help the doctor or the jury or the Court, I will allow it.

MR. FLOMENHAFT: Thank you, judge.

BY MR. FLOMENHAFT:

Q. So, Dr. Schwartz --

A. Yes.

Q. -- to the extent that it would be helpful to you, basically, tell -- first summarize what was going on according to you in Mr. Mazzilli's spine on June 13, 2006.

A. From what I saw, I saw a lot of chronic changes in the spine that has to do with the degenerative disk disease.

Q. What significance did it have for you?

A. This was a long-standing process going on in his back.

Q. Did that signify anything to you in terms of pain?

A. It is variable in different patients. Some people can have a spine that looks like this and be pain free. It depends on how long it took to develop, and this looks like it was very chronic in nature.

Q. Was there anything about your -- you refer to disk herniations and disk protrusions.

A. Yes.

Q. What do you mean by that?

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A. Desk herniation being a process by which a portion of the intervertebral disk -- which is the brown part -- comes out beyond the margin, and it impacts on the nerve and the spinal canal.

Q. And you found a herniation in Mr. Mazzilli?

A. Yes.

Q. Where did you find the herniation?

A. That was at L-1, 2 which is the highest level up here.

Q. Okay.

Would that herniation have any significance to a tibial nerve problem in the foot?

A. No.

Q. Why is that?

A. Because the tibial nerve develops from the sciatic nerve which is from the lower lumbar spine.

Q. Did you find any abnormalities in the lumbar spine?

A. There was bulge of the disk which is what you see when the disk degenerates. It spreads out and narrows the canal.

Q. Anything involving the nerves?

A. It just narrows. The canals and the nerves react in different ways from it, but there was nothing compressing a nerve other than the narrowing that we see because of the

chronic changes of the spine.

MR. FLOMENHAFT: Thank you.

Nothing further.

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THE COURT: Okay.

Cross?

MR. PEWARSKI: I am going to leave this up.

CROSS EXAMINATION

BY MR. PEWARSKI:

Q. Dr. Schwartz, counsel said that he had served you with a subpoena?

A. Yes.

Q. Do you have that subpoena?

A. No.

Q. Can you tell the jury when you received the subpoena?

A. I think it was two weeks ago.

Q. After --

A. I think it was March 20.

Q. March 20?

A. Yes.

Q. So today is what, the fourth?

THE COURT: Fourth; April 4.

Q. So March 20 -- so we are already on trial for three weeks before you were subpoenaed --

A. I don't --

Q. -- is that true?

A. I have no knowledge of when this trial --

Q. The trial -- we have been taking testimony, I believe, since May(sic) -- since March 5th or 6th, and you have just been

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contacted for the first time on March 20?

A. That's when one of my people who works for me brought me an envelope which had the subpoena in it.

Q. You were first contacted for this case after this trial had already been going on two weeks?

A. If that's what you are telling me.

Q. I am saying: If you are telling me you were first contacted on March 20 --

Who contacted you?

You said at some point you got a phone call.

A. No, I got the subpoena.

Q. Okay.

A. And phoned Mr. Flomenhaft to find out what was going on.

Q. Did you eventually agree to be paid for your time in

court?

A. Yes.

Q. How -- Can you tell us how that came about?

A. He asked me if I would come to court and discuss this case, take time off from my day of work and come here and discuss this case, and I said I would.

Q. For money?

A. Yes.

Q. How much did you agree to? How much did you agree to get paid?

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A. Four thousand dollars.

Q. For -- if you are done in two hours? Is it an hourly thing or a set fee?

A. A set fee.

Q. And did you discuss your testimony ahead of time?

You never met me before today; would you agree?

A. Yes.

Q. You have never met me?

A. I have not met you before.

Q. We have never spoken about the case?

A. Correct.

Q. Did you spend any time with Mr. Flomenhaft discussing your testimony?

A. Yes.

Q. How much time -- Where did you guys meet?

A. At my office on Long Island.

Q. So he came to your office. What day was it that he came to your office for the first time?

A. Think it was the Sunday following -- that I got the subpoena.

Q. So if you got the subpoena on the 20th, and he came to you on the twenty-fourth?

A. Correct.

Q. About ten days ago?

A. Yes.

Q. How much time did you two spend together?

A. I would say a half hour to forty-five minutes.

Q. Did you go over the films?

A. Yes.

Q. Did he tell you what the case was about?

A. Yes.

Q. And what did he tell you the case was about?

A. He explained to me that Mr. Mazzilli had ankle pain.

He went to -- I think it was -- Hospital for Special Surgery who evaluated him; felt he didn't need surgery; he went to a different physician, a podiatrist who looked at his x-rays, felt he had a fracture of the Os Trigonum.

Q. Who told him -- who told Mr. Mazzilli he didn't need surgery?

A. I am just relating to you what was told to me.

Q. So the first doctor told him he didn't need surgery, and Dr. Lombardi told him he did need surgery?

A. Yes.

Q. Did Mr. Flomenhaft tell you that nerves were cut?

A. Yes.

Q. Did he tell you that before you looked at the films?

A. I don't know the sequence that it was in.

Q. Okay.

But --

All right.
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So he told you that nerves were cut, and then at some
1
point you two looked at the films together?
2
A. Yes.
3
Q. Did he point any things out to you when you went over
4
the films; what nerves, for example?
5
A. Actually, no, he didn't.
6
Q. Okay.
7
So did he give you any other studies to review?
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A. I saw the MRI of the lumbar spine, and I saw the MRI
9
that was performed before this one.
10
Q. You did?
11
A. (Non-verbal response.)
12
Q. So he showed you the prior one?
13

A. Yes.

Q. Okay.

Was there -- On the prior examine you said on this report --

MR. PEWARSKI: Could you bring up the report?

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

MR. PEWARSKI: We will start with the first page.

Q. By the way, do you know what kind of surgery Dr. Lombardi did?

A. No.

Q. Do you know what tools he used?

cd

A. No.

Q. Do you know whether -- you mentioned about those white

areas on there. Could those -- you said early scar tissue. Could that be consistent with fluid?

A. Not just fluid a month after surgery. That would be unusual.

Q. Well, you will agree with me, this MRI that you have read was less than four weeks after surgery?

A. Yes.

Q. You expect to see fluid and swelling less than four weeks after surgery, correct?

A. Yes.

Q. So that could be fluid; do you agree?

A. Not all of it.

Q. Some of it?

A. Yes.

Q. Were any fluids used in the course of the surgery?

A. I don't know.

Q. Like saline liquid?

A. I wasn't there.

Q. Do you know what type of surgery was performed?

A. No.

Q. What part of the heel surgery was performed on?

A. No.

Q. Now, could you first --

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MR. PEWARSKI: Could you bring up the two views that the attorney questioned on?

What was it, 7E?

I'm sorry.

7D. 7D.

Q. Now, you indicated here -- this white here -- this

could be edema, couldn't it?

A. Partly, yes.

Q. And edema means fluid?

A. Partly, yes.

Q. And what about up here? Could this be edema?

A. Yes.

Q. What cutting was done up here?

A. I don't know. I wasn't there.

Q. Well, would you take my word for it --

Strike that.

Over here, would that be edema as well?

A. Yes.

Q. This white area?

A. Yes.

Q. Swelling?

A. Yes.

Q. Fluid?

A. Yes.

Q. And I would like you to assume that there were(sic) no cutting of any kind done during the surgery that was performed in these areas over here.

Okay?

I would like you to assume that.

Okay?

A. Okay.

Q. Yet there is fluid there.

A. Yes.

Q. So you can have fluid without any cutting; would you agree?

A. Yes.

Q. The fact that there is white in certain areas doesn't mean that a knife went in; would you agree?

A. Yes, I agree.

Q. Okay.

That's good.

You mentioned about some abnormalities being in this area here of the neurovascular bundle?

A. Yes.

Q. Would you agree that there is white speckles all through this tissue here, white speckles all through here?

A. White dots, yes.

Q. Yes, whiteness all over through here?

A. No, not the same type of whiteness.

Q. Some whiteness, right?

cd

A. Some, yes.

Q. Would you agree with me that the signal is identical to the signal here?

A. No.

Q. You wouldn't?

They are the same color, aren't they? Isn't this here and this here and this here all the same color?

A. No, they are not.

Q. They are not?

Okay.

The fluid you said was around the flexor hallucis longus tendon --

MR. FLOMENHAFT: Objection.

He didn't say it was fluid.

THE COURT: Sustained.

Q. The white area around the flexor hallucis longus

tendon -- was it cut? Injured? Damaged?

A. I can't tell from this whether it was damaged.

Q. What did you write in your report?

A. That there were post-operative changes.

Q. Nothing was cut; nothing was damaged?

A. Nothing was transected.

Q. What do you write in your report? Did you ever mention any --

MR. PEWARSKI: Let's go up to the report. We will go back.

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

MR. PEWARSKI: Can you go to page two?

Q. You said that the impression continued onto the second page, correct?

A. Yes.

MR. PEWARSKI: Can you go to the imagine on the second page?

Q. Is that what you wrote in the impression that there was soft tissue swelling on the lateral aspect of the ankle?

A. That was the area you pointed out.

Q. Well, the lateral aspect of the ankle is on the outside of the ankle, correct?

A. Yes.

Q. That is on the opposite side of the ankle from the neurovascular bundle, correct?

A. Yes.

Q. So you made a point of mentioning in the impression that there was soft tissue swelling on the lateral aspect of the

ankle, correct?

A. Yes.

Q. But you never mention in your report anywhere any soft tissue swelling on the medial side of the ankle, correct?

A. Correct.

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Q. You never mention anything in the report that you have dictated at the time of this film that there was any swelling or any abnormalities of the -- in the area of the neurovascular bundle; is that correct?

A. That's correct.

Q. Do you think it is important, doctor, when you make a report that it should be accurate?

A. The report is accurate usually.

Q. I am not asking about the report.

MR. FLOMENHAFT: Judge.

THE COURT: It is argumentative.

Let's stop it.

MR. FLOMENHAFT: Can he answer finish the answer?

THE COURT: He will finish the answer.

Slow down and start again.

MR. PEWARSKI: Can we read the question back?

THE COURT: Okay.

We will read it back.

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

A. Yes.

Q. Okay.

And that important findings that are made when you look at the film should be included in the report if they are important?

A. Yes.

Q. So that people going back years later can look at that report and rely on it as being an accurate statement of what your interpretation was?

A. Yes.

Q. Did you, anywhere in this report, mention anything about injury or swelling of the neurovascular bundle on the medial side of the ankle?

A. No.

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

MR. PEWARSKI: Could you bring up -- could you go back to the two slices?

Q. Did you see something underneath this blue arrow?

A. What?

Q. Is there something underneath the blue arrow on the left?

A. I don't know. It looks -- I don't know.

Q. Could it be a Vitamin E tablet?

A. Yes.

Q. What is the purpose of the Vitamin E tablet being placed there?

A. The tech puts it where the patient has pain.

Q. Could it also be a point where the surgery was performed?

cd

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A. No.

Q. Not where the incisions were?

A. No.

Q. It does the mean that?

A. No.

Q. Do you know where the incisions were made on this foot?

A. No.

Q. Were any incisions made on the medial side of the ankle?

A. I don't know.

MR. PEWARSKI: Can we go to the other view?

Q. Doctor, would you agree with me, looking at -- this is --

Which one is this? This is D, E?

This is 7E that we have blown out.

If -- Would you agree there is clearly a color demarcation of the whiteness on this film, a line?

A. No.

Q. Do you see -- does it go from bright light to dark right here?

A. Yes.

Q. And that darkness, what is that?

A. It is probably scar tissue.

Q. Is there a plane -- is there a tissue plane there?

A. I don't understand the question.

Q. Is there a tissue plan there?

A. I don't understand the question.

Q. Well, you said that you were a diagnostic radiologist?

A. Yes.

Q. Is there something called a musculoskeletal radiologist?

A. Yes.

Q. Aren't musculoskeletal radiologists the ones that review films like this?

A. No.

Q. Aren't they the ones in the heart of their specialty to review films like this?

A. I done understand the question.

Q. Isn't reviewing an ankle MRI within the -- more in the purview of a musculoskeletal radiologist than a diagnostic radiologist like yourself?

A. I still don't understand what that means.

Q. Do you know what musculoskeletal radiology means?

A. Yes.

Q. And you know what diagnostic radiology means?

A. Yes.

Q. Which one is more trained to review ankle MRI, the

musculoskeletal radiologist or the diagnostic radiologist?

A. For the most part the musculoskeletal radiologist, but

that's not universal.

Q. Now, this white up here, is this fluid?

A. Yes.

Q. Is this fluid?

A. I cannot just say from that that is definitely fluid.

Q. You can't say if this is fluid?

A. I can say there is altered signal in that tissue, yes.

Q. So, is it fluid? Edema? Puffiness?

A. Was that a question?

Q. Yes.

A. It is -- it is increased water content within that

tissue.

Q. Okay.

Did a surgical knife go up here?

A. I don't know.

Q. And you will agree with me that the fact that there is white, that doesn't mean that a knife went there or a tool went there; would you agree?

A. At that portion, yes.

Q. When we are talking about an MRI of an ankle less than four weeks after a surgery, there is going to be swelling throughout the whole ankle area; isn't there? You would expect to see that?

A. Was that a question?

Q. Yes.

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A. Four weeks after the surgery --

Q. Three and a half weeks.

A. -- to see swelling of the ankle.

Q. All around, yes.

Edema on a limb less than four weeks after surgery -- that is not unexpected, is it?

A. In those portions of the ankle, no.

Q. Because there is a whiteness there -- that doesn't mean a knife went there; would you agree?

A. Yes.

MR. PEWARSKI: Could you go back to the --

Strike that for a second.

Q. And, doctor, would you agree with me that these areas here are whiter than this area here? Do you agree?

A. Yes.

Q. And that's the second area being the area of the

neurovascular bundle, correct?

A. Yes.

Q. Can you see cut nerves there?

A. No.

Q. On any of the films -- You went over the films carefully, I am sure, with the plaintiff's attorney, correct?

A. Yes.

Q. Did you see any cut nerves on the films?

A. It is very hard to see cut nerves on the films.

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Q. So you agree. So the answer would be you didn't see any cut nerves on the films, correct?

A. Yes.

MR. PEWARSKI: Could you bring up the report with the first page of the impression?

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

MR. PEWARSKI: Could you blow up this paragraph here?

BY MR. PEWARSKI:

Q. Now, the only soft tissue that you identified as having altered signal is the pre-Achillies bursa; is that correct?

A. Yes.

Q. I'm sorry?

A. Yes.

Q. And the pre-Achillies bursa -- you say it is probably representing edema, correct?

A. Yes.

Q. And the pre-Achillies bursa is a small bursa where the Achillies tendon attaches to the back of the calcaneus, correct?

A. No, that's the retrocalcaneal bursa.

Q. Where is that?

A. It is superior to that behind the ankle.

Q. Maybe I misspoke. Maybe I didn't describe what I was

thinking in my brain.

But the pre-Achillies bursa is between the calcaneus and the Achillies tendon?

A. No.

Q. Where is it?

A. Between the ankle and the Achillies tendon.

Q. Okay.

Okay.

And you said that --

Can you tell let me ask you this: Was there altered

signal in the pre-Achillies bursa prior to Dr. Lombardi's surgery?

A. I do not know.

Q. Well, you looked at the -- you looked at the 2005 films, correct?

A. Yes, but I didn't memorize it. I have to look at it again to answer your question.

Q. But did you look to see -- were you curious whether -- the only thing that you mentioned about soft tissue edema that was mentioned specifically in your report -- didn't you check to see if it was there on the March 2005 report?

A. I don't recall.

Q. If it was on the March 2005 report, it wouldn't be surgically connected; would you agree?

A. It would be more chronic than acute.

♀

Q. Now, I would like you to assume that these films were discussed by another witness here brought by the plaintiff's counsel -- you are doctor number seven on the stand, not counting my client -- that Dr. Boc, a podiatrist who -- he is claims to be able to read MRIs -- looking at the MRI in 2005 -- March 2005 -- testified here before this jury that as to the 2005 MRI it showed inflammatory changes in the bursa area; this is a bursa behind the Achillies tendon, this whitish structure, inflammatory changes that may be considered in this area soft tissue, whitish in color; assume that there were those types of changes on the 2005 film.

Would you agree that the only thing you mentioned here about the pre-Achillies bursa that could be something that pre-existed any of the surgery?

A. Obviously without having -- without the films in front of me, I can't tell.

Q. Now, can you -- now, you also talk here about altered bone marrow signal. Do you see that?

A. Yes.

Q. Altered bone marrow signal within the superior aspect of the calcaneus and the posterior aspect of the talus?

A. Yes.

Q. Okay.

Were there changes like that on the 2005 MRI?

A. Yes.

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Q. Okay.

So, when you point to this area here about the superior aspect of the calcaneus and the posterior aspect of the

talus, you said they are probably postsurgical in origin. You were wrong on this report.

A. Correct.

Q. Correct?

A. Probably, yes.

Q. Because on the 2005 film, those reactive bone changes were present, correct?

A. Correct.

Q. And are you familiar with something called an Os Trigonum?

A. Yes.

Q. Did Mr. Flomenhaft mention anything to you about the Os Trigonum?

A. Yes.

Q. Would you agree with me an Os Trigonum would be located directly above the superior aspect of the calcaneus and

directly behind the posterior aspect of the talus?

A. Yes.

Q. With respect to that, you covered yourself a little bit in the impression on that point; am I correct?

MR. PEWARSKI: Can we blow up the impression on the first page?

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

Q. You didn't take the position that this was definitely post surgical changes, did you?

A. Without having the pre-surgical examine present, there would be no way to be certain that this was happening.

Q. I agree with you, and you say here "probably." You have used the words "probably postsurgical in origin."

A. Correct.

Q. "Although alternative etiologies," and that's a fancy-doctor word for cause?

A. Yes.

Q. "Although alternative etiologies including infectious, inflammatory or traumatic changes cannot be excluded."

Do you agree?

A. Yes.

Q. Would you agree with me that an Os Trigonum bone can cause reactive changes in the calcaneus directly below it and the talus directly in front of it?

A. Yes.

MR. PEWARSKI: Can we bring up the back MRI?

Can we blow up these four paragraphs here?

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

Q. Now, you mention, sir, that the posterior tibial nerve comes out of the sciatic nerve; am I correct?

A. Yes.

Q. The sciatic nerve comes out of what level of the spine?

A. It comes out from L4 down.

Q. Okay.

Where it says L1-2, it says "right posterior disc herniation," that is a herniated disc, correct?

A. Yes.

Q. "Protruding three millimeters impinging on the thecal sack," correct?

A. Yes.

Q. And the thecal -- the spinal cord only goes to, I think, L1?

A. It can go down to L1, but usually it stops down T12 and L1.

Q. So if it another doctor said it stops at L1; is that accurate for the most part?

A. Yes.

Q. Okay.

So L1-2 is where the spinal cord ends, and they call it the horse's tail?

A. Yes.

Q. That one cord goes into a bunch of nerves?

A. Yes.

Q. Out of each one of those levels nerve roots come out,

and they go to different places in your body, correct?

A. Yes.

Q. Your groin area? Your thighs? Your butt? Your calves? Your feet? Okay? Correct?

A. Yes.

MR. FLOMENHAFT: I thought I turned this off for a second.

MR. PEWARSKI: Do you want to take that?

Q. So the next part -- so at L1-2, the disk is impinging on the thecal sac?

A. Yes.

Q. Can that cause pain?

A. Yes.

Q. L2-3 and L3-4 is not herniations, but they are bulging, correct?

A. Yes.

Q. And they are impinging on that thecal sac too, correct?

A. Yes.

Q. Could that be causing pain?

A. Yes.

Q. And then facet arthropathy -- what is a facet?

A. It is where the vertebral bodies go down. It is this area -- behind. It is these joints that allow the vertebral

bodies to line up.

Q. And those are hypertrophic changes, correct?

A. Yes.

Q. That is like abnormal bone growth?

A. It is abnormal bone growth, wear and tear.

Q. And those changes are stenosing, am I correct, the

foraminal --

A. Yes.

Q. That's where the nerve roots come out of the spine?

A. Yes.

Q. What he does have going on where the nerve roots are coming out -- he has disease, and it is stenosing?

A. Yes.

Q. And that can cause pain?

A. Yes.

Q. That can project down in your leg?

A. Yes.

Q. And it could be pain in your foot too, correct?

A. Yes.

Q. L4, L5 -- that's the next level found going down the back?

A. Yes.

Q. And that is showing five millimeters flattening of the thecal sac?

A. (Non-verbal response.)

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Q. That is really pressing in; would you agree?

A. Yes.

Q. That's a problem. That is severe disease. Would you agree?

A. It is mild to moderate disease.

Q. Would you call this disease moderate to severe?

I would like you to know that other people have called this moderate to severe. Would you agree with that? You won't disagree with that?

A. I would say it was in the range of moderate disease.

Q. To severe?

A. I have seen a lot worse than this. To say this is severe -- I would say this is middle of the road in terms of disease.

Q. So, L5-S1, diffuse bulging discs associated with osteophytic ridge -- that is a bone growth, correct?

A. Correct.

Q. And that is a bone growth also flattening the thecal sac?

A. Combined with the disk, yes.

Q. There are places where that is pressing into the nerves, correct?

A. Yes.

Q. -- and facet arthropathy with hypertrophic change and foraminal stenosis bilaterally.

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Bilaterally means to the right leg and the left leg?

A. Both, yes.

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

MR. PEWARSKI: Give me a minute, doctor.

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

Q. Just going back to the report of the ankle MRI, you will agree with me, sir, that you make no mention of any abnormal finding on the medial side of this ankle; would you agree?

A. No.

Q. You wouldn't?

Okay.

Would you agree the only soft tissue that you describe

being -- having edema -- that is specifically identified is the pre-Achillies bursa?

A. Yes.

Q. Would you also agree with me --

MR. PEWARSKI: Could you go to the second page.

Q. The only area that you talk about soft tissue swelling is in the lateral aspect of the ankle, correct?

A. Yeah -- but they are two different processes, yes.

Q. I understand that.

You describe edema in the pre-Achillies bursa and in

the lateral aspect of the ankle, correct?

A. Yes.

Q. You do not describe any soft tissue swelling on the medial side of the ankle, correct? You did not write that. You

wrote lateral.

A. Yes.

Q. And you could have written medial?

A. Yes.

MR. PEWARSKI: Thank you.

THE COURT: Okay.

Re-direct?

MR. FLOMENHAFT: Thank you, judge.

RE-DIRECT EXAMINATION

BY MR. FLOMENHAFT:

Q. Before we go to the ankle, let's wrap up the lumbar spine imaging.

MR. FLOMENHAFT: If you can, just get that back up again.

Q. So you just told us a few minutes ago that you would describe that as moderate disease, but you have seen a lot

worse?

A. Yes.

Q. By the way, I want you to assume the date of birth says he was born in '47, so he was about what was he fifty-nine when this was taken in 2006?

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A. Yeah.

Q. Am I doing that correct?

So how unusual is this presentation in the lumbar spine for a fifty-nine-year-old man?

A. Not that unusual.

Q. Why is that?

A. Because there is a lot of wear and tear and chronic changes, especially in an active person, and you get changes in

the spine.

Q. Although it was developed a few minutes ago that these changes have a potential to cause pain, how common is it for these very same changes which was described as moderate disease to be not associated with pain?

A. Common.

Q. Why?

A. Because it comes on over a long period of time, and people get used to it and adjust to it, and it is just feels normal at that point. They really don't feel the pain.

Q. Or there may not be any pain at all?

A. Yeah.

MR. PEWARSKI: That's a leading question.

THE COURT: Overruled.

Q. Or there may not be any pain at all?

A. Yes.

Q. Why may there not be any change at all?
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A. Because it is chronic changes, and the people get used
1
to it. These people are used to pressing on the thecal sac, but
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it is not the nerves themselves.
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Q. Can you show us in that x-ray what you are describing?
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A. These are the nerves that are coming out, and they are
5
engulfed in the thecal sac which is a sac of fluid. It flows in
6
it, and the nerves come out of that sack, and they exit the
7
foramen, but the disk is not touching the nerve. It is just
8
touching the sac, and it may not cause nerve pain.
9
Q. Is there any indication in your report and what you
10
saw that any of these disks were touching any of these nerves?
11
A. No.
12
Q. And, by the way, this thecal sac which has the spinal
13

fluid and these nerve fibers, are the nerve fibers stuck in one
14
place?
15
A. No, they are floating around.
16
Q. They are floating around?
17
A. Yes.
18
Q. What happens to the rest of the nerve?
19
A. They are pushing the nerves away.
20
Q. Away, so there is no contact.
21
MR. FLOMENHAFT: Let's go back to the ankle.
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Let's go to 7D.
23
Q. And so you just heard a number of questions regarding
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whether or not this whiteness, this bright signal that we see on
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7E -- why this couldn't be just fluid three and a half weeks
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after the surgery, and your answer -- you said, Not just fluid.

MR. PEWARSKI: Objection.

THE COURT: Overruled.

Q. As I was sitting and listening, I wanted to know the answer why not just fluid?

A. Because most of the post-surgical fluid, the changes, the inflammation of the tissue, because of the trauma and instrumentation would usually be reabsorbed. What is left is the bright signal because of water content, and it would be scar tissue forming.

Q. You don't know anything about the surgery? You just knew there was a surgery?

MR. PEWARSKI: That's leading.

THE COURT: Overruled.

Q. What is it about this presentation, just looking at this imagine alone, which indicated to you that this brightness was not just fluid, but scar tissue in the vicinity of the

medial side of the flexor hallucis longus tendon to the posterior portion of -- of this imagine?

A. Because it isn't just bright. If you look at it, there is other tissue within the brightness. There is that strandy gray mild dense structures that are in the structure.

Q. Can you come up and show that to us?

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

MR. FLOMENHAFT: Can we have that pole?

A. This area here, although bright, you have bright areas in it. You can see. It is just not white fluid. It is just not white. It's got areas in it that are darker. They have strands in them that are strandy, wispy.

Q. What is the significance of that wispiness?

A. That is scar tissue.

Q. What about on the medial side of the flexor hallucis longus tendon?

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

THE COURT: Overruled.

MR. PEWARSKI: What is it asking, judge?

MR. FLOMENHAFT: Sure.

MR. PEWARSKI: I know we want to get done.

THE COURT: Let's move along.

MR. FLOMENHAFT: Sure.

BY MR. FLOMENHAFT:

Q. What about the imaging that we see on the medial side of the flexor hallucis longus tendon which was significance for you as not just representing or not representing fluid too much?

A. Well, you can see that same -- you can see that same type of signal, the same structure that is wrapping around this way around the tendon and coming over here which looks exactly

the same as the stuff that is over here. It is over here as well.

Q. What about within the posterior tibial neurovascular bundle?

A. Again there is some bright signal here that you don't see in a neurovascular bundle.

Q. It was brought out that you saw post-surgical changing because you didn't say that you saw it was --

MR. FLOMENHAFT: Can counsel just sit down?

MR. PEWARSKI: I will sit down. I will sit down, but I wanted to see.

MR. FLOMENHAFT: I'm sorry.

Q. Counsel brought out that you reported post-surgical changes, but you didn't report specifically in any of the posterior tibial neurovascular bundles or on the medial side of the flexor hallucis longus tendon.

A. Correct.

MR. PEWARSKI: Objection.

THE COURT: Sustained.

Q. Is there a reason why you weren't specific in your report of -- in your description of the -- the -- the post-surgical changes in your report on the ankle MRI?

A. Yes.

Q. Why is that?

A. Because I had no knowledge about what the surgical

procedure that was done and what was specifically was being looked for.

Q. Okay.

And were -- how does that relate to that?

MR. PEWARSKI: I object to the form of that question.

THE COURT: Overruled.

Q. How does that relate to that?

A. Well, it relates -- it requests just a general report showing that there was changes in the tissue posterior to the ankle in general.

Q. By the way, you said during cross-examination that one thing you said was wrong regarding something you thought was post-surgical in an area where you saw reactive changes. What was that?

A. It was involving the bone pertaining to the bone

marrow, changes in the talus and calcaneus.

Q. Would that be the same as posterior --

MR. PEWARSKI: That's a leading question.

MR. FLOMENHAFT: It is differential.

THE COURT: I will allow it.

Q. Same as posterior subtalar joint arthritis?

A. Yes.

Q. You don't know if the surgery encompassed those reactive changes?

A. Correct.

Q. Were those reactive changes acute or chronic?

A. Not on my study.

Q. But these changes are acute?

MR. PEWARSKI: Objection to the leading.

THE COURT: Overruled.

A. These were new changes that were seen and represent acute change which was secondary to the surgery.

Q. What about these imagines? Tell us -- they are new?

A. One that there is such bright signal, that usually you don't get that type of scarring that we are seeing.

Q. Now, you were asked a few times by counsel on cross-examination regarding your view of the 2005 MRI which I arranged for you to see.

A. Yes.

Q. How, if at all, has that effected your opinion about what these imagines show?

MR. PEWARSKI: Improper re-direct.

I object.

THE COURT: Overruled.

MR. FLOMENHAFT: He asked him about it.

A. Comparing the two examinations, some of these were chronic in origin, some of the changes, and others were acute in terms of their proximity to the surgery.

Q. Which were acute?

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A. The changes that you are seeing posterior to the ankle in this area.

Q. What area is that?

A. Posterior to the talus.

Q. What about with respect to the -- what, if anything, do the comparison of the 2005 MRI with the 2006 MRI indicate to the nature -- indicate with respect to the nature of the changes that you see in the posterior tibial neurovascular bundle on the 2006 MRI?

MR. PEWARSKI: Objection.

Improper re-direct.

THE COURT: Overruled.

A. It was -- between the two examinations there was a change in the size and signal intensity of the neurovascular bundle.

Q. What the nature of that change?

A. It is enlarged compared to the previous one and also had abnormal signal.

Q. Did you have an opinion with radiologic certainty what caused that change that we see in the 2006 imagines depicted, the posterior tibial neurovascular bundle?

MR. PEWARSKI: Objection.

THE COURT: Sustained.

Q. On cross-examination you use the word "probably" to post-surgical changes in your report.

A. Yes.

Q. Did the opportunity to make that comparison effect your opinion regarding the probability of post-surgical changes in the 2006 MRI?

A. I thought it made it that was almost definitely changes secondary to the surgery.

Q. What was(sic) changes?

A. One of the signals back here behind the talus -- the signal that we see here, and also the signal that we see medial to the flexor hallucis longus, and also the enlargement with altered signal involving the posterior tibial neurovascular bundle.

Q. What about that comparison made it indefinite?

MR. PEWARSKI: Objection.

THE COURT: Sustained.

Q. What was the significance of that comparison for you?

A. That there was a change. There was a change in the appearance of the neurovascular bundle prior to the surgery to after the surgery.

Q. What does that change indicate about the neurovascular bundle in 2006?

A. That there was involvement and damage.

Q. Okay.

One more question: He asked you about the difference of a musculoskeletal radiologist and a diagnostic radiologist.

You said, Not being universal; what do you mean by that with respect to that question?

A. Musculoskeletal radiologists have fellowship training -- when they come out of fellowship, musculoskeletal radiologists go through one year of extra fellowship behind their radiological training, and they usually do it in a hospital -- an orthopedic hospital, and they are looking at a lot of bones and joints. They may look at twenty or thirty thousand cases during that time for which they are only looking at musculoskeletal studies, and we have had musculoskeletal radiologists in our group; but also diagnostic radiologists after having twenty years experience have looked at tens of thousands of these, and they also have expertise in this.

Q. Have you looked at thousands of ankle MRIs?

A. Yes.

Q. And thousands of lumbar MRIs?

MR. PEWARSKI: This is leading.

THE COURT: Overruled.

MR. FLOMENHAFT: Thank you.

RE-CROSS EXAMINATION

BY MR. PEWARSKI:

Q. Just so we have your testimony correct, what you have told the jury is that this area here on the lateral side of the flexor hallucis longus tendon and this area here on the medial side looks the same to you?

A. Yes.

Q. This doesn't look darker to you?

A. What were you pointing at?

Q. For the question that I just asked you -- the area on the lateral side of the flexor hallucis longus tendon and the medial -- this area here that you circled with your finger and this area here on the medial side -- you said looked the same,

correct?

A. You are pointing --

Q. That's what you told the jury.

A. You are pointing at two different structures, not the ones that I pointed to.

Q. Okay.

MR. PEWARSKI: And can you bring up the report of the ankle.

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

Q. Could you pull the ankle report out, doctor?

Where on this report does it say involvement and the damage of the neurovascular bundle?

A. It does not.

Q. Anywhere, correct?

A. Correct.

Q. Where on this report does it say changes on the medial side of the ankle?

A. It does not specifically say that.

Q. It -- it says on the lateral side, correct?

A. Correct.

Q. And going back briefly to the back study were it says how all of these changes could mean no pain.

A. Yes.

Q. Why was the study being done?

A. That I don't know.

Q. Well, were you given a history, a clinical history?

A. Low back pain with right radiculopathy.

Q. So he had pain?

A. Yes.

Q. And it was radiating?

A. Correct.

MR. PEWARSKI: Thank you.

THE COURT: Is that it?

MR. PEWARSKI: That's it, your Honor.

Thank you.

THE COURT: Counsel, approach.

Doctor, you are excused. You can step down.

(Witness excused from the courtroom at this time.)

MR. FLOMENHAFT: Your Honor, plaintiff rests.

THE COURT: Okay.

MR. FLOMENHAFT: Thank you very much.

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THE COURT: Thank you, ladies and gentlemen, for your kind attention.

We have completed the plaintiff's case. We are not working tomorrow, and I received a note from one of the jurors, and we will take that up next week, so you don't have to come in tomorrow.

We will see you 10:00 o'clock on Monday. Have a nice weekend.

Same admonitions; don't discuss the case.

Have a nice weekend.

COURT OFFICER: Jurors, please rise and follow me out this way.

(Whereupon, the jury exits the courtroom.)

COURT OFFICER: The jurors have left the courtroom.

THE COURT: Do you want to put anything else on

the record?

MR. FLOMENHAFT: No, judge.

THE COURT: Okay.

(Whereupon the trial was adjourned to April 8, 2008, 2013.)

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