SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM:

MARISA DOMIZIO,

PLAINTIFF

- against -

JOHN DOOLAN, D.P.M. & Mantattan FOOTCARE, INC.,

DEFENDANTS.

Ind. No. 8347/06

AUGUST 13, 2008
PART 57
360 ADAMS STREET
BROOKLYN, NEW YORK 11201

P R O C E E D I N G S

B E F O R E: HON. LAURENCE KNIPEL,
SUPREME COURT JUSTICE.

APPEARANCES:

FOR THE PLAINTIFF:
STEVEN J. BASSIN, ESQ.

LAWRENCE M. KARAM, ESQ.

FOR THE DEFENDANT JOHN DOOLAN:
NEIL S. KORNFELD, ESQ.

FOR DEFENDANT MANHATTAN FOOTCARE:
GORDON D. TRESCH, ESQ.

COURT REPORTER:
TIFFANY MILIUS,
SENIOR COURT REPORTER - C.S.R.

THE COURT: We're ready for the jury.

(Jury entering)

THE COURT: You can be seated jurors. Good morning jurors. With that plaintiff may call your next witness.

MR. BASSIN: Thank you very much. I call Dr. Gary Saphire to the stand.

THE CLERK: Raise your right, hand do you swear or affirm the testimony you are about to give in court this day will be the truth, whole truth and nothing but the truth so help you?

THE WITNESS: I do.

THE CLERK: Please have a seat. State your name and address for the record.

THE WITNESS: Gary Saphire, S-A-P-H-I-R-E, 248 Avenue P, Brooklyn, New York 11204.

MR. BASSIN: Thank you very much your Honor.

DIRECT EXAMINATION BY MR. BASSIN:

Q Doctor, can you tell us about your educational background?

A I went to Brooklyn College here in Brooklyn, New York. I attended there from 1970 till 1974. Then I went to Chicago, Illinois, College of Podiatric Medicine. I finished there in 1978 and I graduated cum laude with doctor in podiatric medicine. After that I came back to Brooklyn to

Coney Island Hospital and did my residency in podiatric medicine in surgery in Coney Island Hospital.

Q Thank you. Are you Board certified?

A Yes, I am.

Q Can you tell us in what areas and tell us a little bit about the Board certification.

A The areas I'm Board certified in is podiatric surgery, so I'm Board certified by the American Board of Podiatric Surgery. Also in quality assurance and utilization review. The initial is by the National Board of Podiatry Examiners.

Q Are you a member of any professional organizations?

A Yes, I am.

Q Can you tell us what there are?

A I'm a member of the American College of Foot and Ankle Surgeons, member of the American Podiatric Medical Association and the New York State Podiatric Medical Association.

Q What are your current hospital affiliations?

A I work at Methodist Hospital in Brooklyn.

Q As part of your podiatric practice, do you perform surgery?

A Yes, I do.

Q Approximately how many surgeries do you perform a

year?

A Around 200.

Q Did there come a time -- by the way, have I ever asked you to review a case before?

A Not before this.

Q Have I ever asked you to testify before this?

A No.

Q Do you know Mr. Karam?

A Yes, I do.

Q And have you testified for him before?

A No, I have never testified for him.

Q Okay. Now, did I ask you to review this case as to whether care rendered by the defendants was within the accepted standard of podiatric care?

A Pardon me?

Q Did I ask you to review this case and to render an opinion as to whether or not the defendant's performance of services for Ms. Domizio were within the standards of podiatric care?

A Yes, you did.

Q And in so reviewing did I ask you to review the medical records of Manhattan Footcare and Dr. Doolan?

A Yes, sir.

Q Including the hospital operative reports from Cabrini Hospital?

A Yes.
Q And various x-rays and photographs?
A Yes.
Q And I also gave you copies of the bill of particulars in this case?
A Yes, you did.
Q And did you have an opportunity to review the examination of Ms. Domizio by Dr. Carl Greenberg?
A Yes, I did.
Q And did you have an opportunity today in court to review copies of the x-rays from that?
A I saw those this morning.
Q Did you also see anything else? Did I show you any of the materials in this case such as the e-mails from between Ms. Domizio and Dr. Doolan from London to New York and back and forth?
A Yes, I reviewed those.
Q Did you have an opportunity to review the depositions of both Ms. Domizio and Dr. Doolan?
A Yes, I did.
Q And did I spend to time discussing with you the testimony of Dr. Doolan and Ms. Domizio from Monday?
A Yes, you did.
Q Did you also see some other medical records?
A I reviewed some medical records from Saint

George's Hospital.

Q Did you base your opinion in this case upon the medical records from Cabrini operations and Manhattan Footcare?

A Yes.

Q And the x-rays you saw?

A Yes, sir.

Q Is that correct, what you're basing your opinions on today?

A Yes, it is.

Q Are you being paid for the time you reviewed the records.

A Yes, I am.

Q And are you being paid for your time away from your practice to be here in court today?

A Yes, I am.

Q Approximately how many cases a year do you review?

A Around ten.

Q And how many of them are for plaintiffs? Are they both for plaintiffs and defendants?

A Yes.

Q How is it divided up?

A It's probably 60/40, 70/30 for plaintiffs.

Q How often do you appear in court to testify?

A Three to four times.

Q And did you testify, again, for both plaintiffs and defendants?

A Yes, I did.

Q About the same proportion?

A Most often for plaintiffs.

Q Do you have any quantification about how much of your practice or your income comes from these reviews and testifying?

A It's about three percent.

Q Doctor, after your review of the Cabrini and Manhattan Footcare records and the x-rays, did you have an opinion within a reasonable degree of podiatric certainty as to whether or not the defendants, John Doolan and Manhattan Footcare through Dr. Doolan and also Dr. Tesser and others, departed from good and accepted podiatric practice in their treatment of Ms. Domizio?

A Yes, I do.

Q Are all the opinions that you're going to give expressed with a reasonable degree of podiatric certainty?

A Yes, sir, they are.

Q And did you come to an opinion as to the cause of the different complaints and injuries of Ms. Domizio?

A Yes, I did.

Q And are all of those opinions also based on a standard of podiatric practice at this time?

A Yes, they are.

Q And they're all within a reasonable degree of podiatric certainty?

A Yes, sir.

Q Now can you tell us what your opinion is; did they depart from good and accepted practice?

A Yes, they did depart from good and accepted practice.

Q Can you explain that to us as you sit here today; first, if you could sort of outline it and then we'll go back in detail.

A Yes. The very first departure was taking the history of the patient. The patient came into Manhattan Footcare complaining of pain and numbness in her foot. These signs would lead you to believe that there is some kind of nerve problem or entrapment or neuroma. But this was never investigated. That was something that could simply be investigated with a Mulder's test, which takes all of ten seconds to perform. And had they listened to the patient and heard that she had the sharp pain and had numbness in her toes, they would have investigated this and they would have addressed the -- correct the problem instead of doing surgery that really weren't indicated. So this is really the primary departure. This is where the ball started to roll down the hill.

Other departures were the work up. The x-rays weren't done in a weight-bearing position. We have Dr. Tesser doing his examination and noting that there is a poor capillary refill. Capillary refill is an indicator of circulation. When you press on the end of your finger and take it away your finger will be white and it should come back to pink color in less than three seconds. The doctor who did the -- Dr. Tesser, who did it sees that it's abnormal. He really didn't quantify it but he notes it as being abnormal. This should have been investigated further through vascular studies, or doplar studies or pulse volume recordings to rule out any problems before the surgery was done.

Another thing that really bothered me --

MR. KORNFELD: Objection.

THE COURT: Overruled. I'll allow it.

A There was --

THE COURT: When you say it bothered you, we ask you to testify within a reasonable degree of medical certainty as to a departure from good and accepted practice. I assume -- should I assume using the word bother is a thumbnail for that?

THE WITNESS: Yes, sir.

A This other thing that bothered me, I think is a departure, is that no conservative care was undertaken. Here

we have a lady coming into the office with pain in the bottom of her foot. She's got this pain and numbness. One of the things you can do is put a felt pad on there to try to off weight the metatarsals and see if that helps. You can make orthotics. You can give non-steroidal anti-inflammatories like Motrin. You can make arch supports or orthotics that have been especially fabricated to off weight the metatarsal heads where she is having the pain.

I think that you should try to do some conservative therapy or non-invasive therapy that is not to rush to do surgery. I think that once you have done the surgery you can't undo it as you see here.

I think conservative care should have been undertaken and that may have prevented a lot of the problems that we're seeing now or it would have certainly would have prevented all of the problems if it were successful.

Now the x-rays that I saw, the actual original x-rays from Manhattan Footcare were of such poor quality they were really unreadable. So I don't see how you could use those to make a diagnosis. You can say to me, well, when I held it up to a hot light and I saw this and saw that, why not just take retake and get good x-rays? It's really slip-shod practice.

These are the initial departures.

Q All the pre operative and the prep work done, this

is all done below the standard of care?

A Yes. It really does fall below the standard of care. I think she should have been worked up in light of the alteration of the capillary refill. I think she should have been worked up for conservative care. I think that she should have been, really should have been given conservative care first. I really think that they dropped the ball completely by not doing an adequate history. Had they listened to the patient they would have heard that she had sharp pain in her foot and that she had numbness in her toes.

If you say that to a medical student, they're going to think about a neuroma, some type of nerve entrapment that sharp pain is like when you hit your funny bone, tingly feeling. That's the sensation you can you get with neuroma. You know, how you get numbness in your fingers if you lean to them too long.

Q Before we go onto the next part, let me go through some of that with you. When she first presented, if you remember -- first of all, I will give you the exhibits in this case so you have them in front of you?

(Handed to witness)

Q Doctor, can you explain, did Dr. Doolan do any of the original notes before the operation in the chart that you remember?

A No.

Q And I want you to assume that Dr. Doolan said when he was here testifying on Monday that the reason he didn't do notes is he was there but he saw he tested the notes and Tesser did the notes and there's no reason for him to write down because Tesser did already. I want you to assume that is that the proper procedure for the person doing the surgery?

A No. I think the surgeon is obligated to write a pre-operative note, obligated to meet the standard of care.

Q Now, doctor, I want you to also assume that Dr. Doolan testified that -- first of all, in the notes, did Dr. Tesser do a capillary refill test?

A Yes, he did.

Q And what did he find?

A He found it to be abnormal.

Q Is that something that would be something that should be looked into further before surgery is done?

A Yes, it should.

Q And what could be done to look into it further if in fact there is a capillary refill problem?

A Some very simple tests, a doplar study. You can do ankle brachial index. Check the blood pressure of the arm against the ankle. You can check the blood pressure of the arm against the blood pressure in the toe. You can also do a pulse volume recording to see how much blood is coursing

through the toe.

Q And are all of those tests available in the podiatric offices where surgery is done?

A Most, in most offices, sure.

Q Doctor, I want you to assume that Dr. Doolan said in his testimony on Monday that he didn't agree that there is a capillary refill problem and there was another problem actually involved in what happened causing the compromise of the fourth toe.

Now doctor, is it below the standard of practice if one doctor writes a note in there saying it is a capillary refill problem and you're standing there and you are going to be the operating surgeon and you disagree with that finding? Would you then put your own note in saying you disagree with that finding, but just let the notes saying that there is a capillary refill problem stand there alone in the notes of the office?

A The standard of care would dictate if you see a finding you don't agree with that you document your finding and explain why there's a difference.

Q Now, do you notice in the notes did they quantify where, exactly, where the foot pain was or was it general?

A It was general. It was pain and numbness.

Q Now is it below the standard of care or the appropriate care to not define it more specifically in the

notes?

A Yes.

Q Doctor, is one of the reasons to take notes so that anybody reading the file or the notes that is picking up the case would have an understanding of what went on before, is that correct?

MR. KORNFELD: Objection, your Honor.

THE COURT: I will sustain.

Q Doctor, do doctors take notes just for their own -- let me put it another way.

THE COURT: Ask him why doctors take notes.

Q Why do doctors take notes in any case pre operative or any evaluation?

A The reason we take notes and detailed notes so that we know what's going on with the patient, what's happening in the past and where we are going in the future. We start out -- most doctors just take notes, acronyms; subjective, objective and assessment and planning.

The subjective is what the patient tells you about the pain and where the pain is, how long it's been there what they have done for it, what makes it better or worse. The objective is your evaluations and your re evaluations in findings of your physical exam and x-rays. And your assessment is the diagnosis that you make. And then the plan is what we are going to do; make orthotics, surgery

or give you medication.

It's very important to have those documented. We see 50, 100, 125 patients during a week. You can't remember everything. So it is very important for you to keep detailed notes. Also, if you're in a group practice, perhaps one doctor will see the patient and then the next day the patient comes in and the doctor isn't there so you're associate has to now figure out what's going on. So it's really important to have these detailed notes.

Q Have you ever heard the phrase if it's not in the notes it didn't happen?

MR. KORNFELD: Objection.

THE COURT: Sustained. I will sustain.

Q Doctor, you have read the Ms. Domizio's deposition and I want you to assume when she testified here on Monday she said that she had paper in the bottom of her foot between her third and fourth toe.

If somebody came in with that complaint what would you be doing during examination?

A What I would do is investigate two things: First, I would investigate the if there were a neuroma. We would do the Mulder's test.

Second thing is the adjacent metatarsophalangeal. I would squeeze and palpate them to see if there's any pain in the joints. This way you could

isolate whether it is a capsularly problem. In other words, a problem with the bone or whether it is a problem with the nerve.

Q If you would have done that based on this case, if that test were done, do you believe it was accepted practice to do the kind of surgery that ultimately was done in this case or was the surgery needed at all, that kind of surgery?

MR. KORNFELD: Objection, your Honor.

THE COURT: Sustained as to form only.

Q So doctor, based on doing that test for Morton's neuroma, assuming it come back positive, what would you do?

A The next thing I would have done is explain to the patient what she had. You have a nerve entrapment, this is what we can do for you. We can start by changing your shoes. A lot of times just a tight shoe will irritate the nerve. We can then go onto do injections or give you an anti inflammatory medication in the family of Motrin. We can make a custom molded orthotic to spread the bone to not pinch the nerve. We can do cortisone or absolute alcohol injections to decrease the inflammation of the nerve. Or if all else fails we can do surgery and excise the nerve or cut ligament in between the toes to give the bones a little more ability to spread. So this would be a step wise thing. You start out with the least injurious thing to the patient first.

Q Is that the surgery that was done on January 3rd

on Ms. Domizio?

A No, sir.

Q Was that her complaint when she came into see Manhattan Footcare and was examined by Dr. Tesser?

A Yes, it was; plantar pain under the third and fourth toes.

Q And this is the condition that she does have and still has today?

A Yes.

Q And that condition is noted in Dr. Greenberg's --

MR. KORNFELD: Objection. This isn't cross-examination.

THE COURT: I'll allow the question.

MR. KORNFELD: Dr. Greenberg -- there is nothing in evidence.

THE COURT: Greenberg is not in evidence? Sustained.

MR. BASSIN: Subject to connection, your Honor, because I said he would be our witness this afternoon.

THE COURT: I'll allow it subject to connection.

Q Did Dr. Greenberg find in his exam in 2007 that she still have Morton's neuroma?

MR. KORNFELD: Objection.

Q That she had a Morton's neuroma?

THE COURT: In light of the fact witness is coming in I'll allow it.

A I am sorry, would you repeat it?

Q Did Dr. Greenberg in his report find in 2007 find she had a Morton's neuroma?

A Yes.

Q Based on your reading of her deposition and also assuming she stated that she had pain between her third and fourth toe and there was callus there, do you have an opinion as to whether it was Morton's neuroma when seen by Dr. Tesser?

MR. KORNFELD: Objection.

THE COURT: Sustained as to form only.

Q Do you believe -- do you have an opinion as to whether she had a Morton's neuroma when she originally came into Manhattan Footcare in 2002, October of 2002?

A Yes, I do.

Q Did she?

A Yes, I believe she did.

Q Now you stated before that they did not do any weight-bearing x-rays. Why was that important to do and is it the standard of care to do that in this particular case where they said she had hammertoes?

A It is the standard of care to do weight-bearing x-rays if you're going to do bone surgery on a patient.

Weight-bearing x-rays are important because they're reproducible, number one.

When we do an off weight-bearing x-ray your foot can be at a different angle. It can have different position as far as its anterior/posterior position. When you do it weight bearing, it's done how you would normally stand with your full weight on it. Having your full weight on it shows how the bones react to weight bearing. It's important, that's how our feet work down on the ground, under weight. So that gives you a very good idea of what's going on with the foot. You could have some contracture, you could have bending in your toes when you're off weight bearing. But when you stand down they can come straight. When you stand down your feet can spread. There are many reasons we do weight bearing.

Q That would be standard practice to do those weight-bearing x-rays before surgery on the foot?

A Yes.

MR. KORNFELD: Objection.

THE COURT: I'll allow it.

Q Doctor, you have had opportunity to review the x-rays in evidence in this case, is that correct?

A Yes, I did.

Q And would they be helpful in explaining to the jury what you just stated?

A Yes.

Q I will show you the x-rays the copies of them and put them up on a board for you. You can use those.

MR. BASSIN: Can the doctor come down?

THE COURT: Yes.

THE WITNESS: May I have the original films?

MR. BASSIN: Sure, they're right here. We have a light box.

A This is the pre operative x-ray. It's marked plaintiff's 2-A. You can see that there is a little very little detail here. It would be difficult to make any kind of a diagnosis with the toes. The toes are burned out. This x-ray is over exposed. If you recall earlier on I said the simple thing to do would be the re shoot the x-ray and get a better quality x-ray and that takes all of a dollar for the film and maybe two minutes of your time or your staff's time. So that I think is really a departure. It just shows you things aren't really being done with the care that they should be done. We have an x-ray that was enhanced. This went out to a lab and the lab was able to enhance this and get the --

MR. KORNFELD: Your Honor, move to strike. We were told it's just a blow up of the x-ray that's why it was admitted into evidence. Is it the same x-ray?

MR. BASSIN: It's the same x-ray.

THE COURT: This is the same one that's in evidence, I'll allow it.

MR. KORNFELD: I agree with that it is the same x-ray. The witness is now stating that it was changed or something done at a laboratory.

THE COURT: You want to voir dire?

MR. KORNFELD: No, I don't want things that are enhanced and not evidence --

THE WITNESS: It is the same thing, your Honor.

THE COURT: I will ask the witness a question. Tell me about this document here; is it the same?

THE WITNESS: If you look at the initial x-ray the actual that doctor used is exposed.

MR. KORNFELD: Can we do this out of the presence of the jury?

THE COURT: Let me just ask you a question. Is this the same x-ray or isn't this the same image?

THE WITNESS: It is the same image.

THE COURT: What procedure was done? I assume you enhanced --

THE WITNESS: I didn't do it. A lab did it.

THE COURT: Enhanced the image?

THE WITNESS: Yes, so you can see --

MR. KORNFELD: I have never seen an altered x-ray before. I would like to see it out of the presence of

the jury and if I could have a moment to review it. You don't suddenly bring in altered x-ray into court into trial.

MR. BASSIN: It's the same x-ray.

THE COURT: Fair enough. We'll have a very brief hearing on it. Take the jury out just to my chambers in the back. Just take a minute or two jurors.

(Jury exiting).

THE COURT: Just to do it in an orderly fashion. Plaintiff's counsel why don't you inquire of your client.

MR. BASSIN: Doctor, is that what is a hot light? There was some testimony --

THE WITNESS: A very bright light, brighter than the fluorescent bulbs in here. It's used to examine x-rays that are over exposed.

MR. BASSIN: Is that the image that one would get identical to what would happen if you looked at that x-ray, that exact x-ray, but under a hotter light than we have in the court today?

THE WITNESS: Yes, it is.

MR. KORNFELD: So can I have it please?

THE COURT: Yes.

MR. KORNFELD: I don't know why this wasn't done before the jury came in. Judge, I don't have an objection. What I objected to its being enhanced.

Apparently what the witness is saying now is that this is how the x-ray would appear if you're in the operating room and it had a hot light or x-ray box.

THE COURT: It's the same x-ray but under a hot light.

MR. KORNFELD: The term enhanced is different term and that is my objection assuming it was altered.

THE COURT: Enhanced to the extent that it is the same x-ray examined under a hot light. Do you object to that being in evidence?

MR. KORNFELD: No I don't.

(Jury entering)

MR. KORNFELD: Based on the discussion outside the presence of the jury this is the same x-ray. The word enhanced may have been inaccurate so I withdraw my objection.

THE COURT: Objection withdrawn. It is in evidence. Proceed counsel.

Q Doctor, what is the date of that x-ray?

A I have to refer to the -- it's 10/8/02.

Q So doctor, that x-ray was taken on the initial visit isn't that correct?

A Yes.

Q I want you to assume that Dr. Doolan said he looked at that x-ray under a hot light immediately prior to surgery and that would be the essentially image you would get

there?

A Yes.

Q So you between October 8th when they did all the planning between October 8th and December 16th --

MR. KORNFELD: January 3rd.

Q Excuse me. That period of time when they did all of that between that two or three-month period they made all of their decisions in the pre evaluation and the evaluation of this patient and what care she did, based on the x-ray before it was enhanced, isn't that correct?

MR. KORNFELD: Objection.

THE COURT: Sustained at least as to form. You asked him to assume and asked him whether that is correct or not.

Q Doctor, I want you to assume that Dr. Doolan testified here Monday that he examined the x-ray of October 8th under a hot light on January 3, 2003, immediately prior to his surgery, the first surgery on Ms. Domizio.

Doctor, based on that what was the defendant looking at from October 8th through January 2nd as an x-ray, and was it an adequate x-ray to do a proper evaluation in this case without the enhancement?

MR. KORNFELD: Objection.

THE COURT: I'll allow it.

A The x-ray was not adequate. It wasn't a

weight-bearing film. The quality of the x-ray isn't adequate. This is what you're seeing as doctor had seen it under the hot light. When doctor looked at it, now he could see the toes. I don't think that the decision alone to do the surgery was made solely on the x-ray. It is done before because of the inadequate history and physical that was done. I think that those -- you don't do surgery just because of an x-ray. All the gears have to mesh and this is one of the gears.

Q That would be one of things that they did inadequately beforehand?

MR. KORNFELD: Objection.

THE COURT: Sustained.

Q Was that x-ray being used as part of the evaluation below the standard of care in this case?

A Certainly.

Q Any other x-rays you want to describe or is that enough for the moment?

A What we can look at here while we have the x-ray up. We're talking about hammertoes. Hammertoe, your toe should lay in a nice, gentle curve and hammertoe is when your toes bend up this way. I am sure you have all seen the posters in the subway of hammertoes and how they can make your feet look perfect.

If you look at these films you really don't see

hammertoes here. There is a mallet here. You can see that it is bent over. That is the third toe and at the very end the toe is bent down like that. There is a similar deformity in the fourth toe but there are no true hammertoes. You can see there is joint space here. Might be tough for you to see but there is a little black line. You can see here it is joint space. If these were real hammertoes you would not see the joint space here because what happens is the bone, the bone in the toe, the phalanx, rides up over the metatarsal head and when you do the x-ray you would be looking through bone, you wouldn't see that nice space. I don't see a hammertoe there at all in the second toe.

Q Doctor, based on are your experience and your opinion, are these even -- if they were called hammertoes, are these hammertoes that would be operated on or would operate on as hammertoe operations?

MR. KORNFELD: Objection.

THE COURT: Sustained.

Q Is the standard of care when somebody comes in complaining of pain below the foot between the third and fourth toe, is operating on these toes in a hammertoe operation the appropriate care given for that particular complaint?

A In light of everything that we have discussed so far, no. This would be the equivalent of you having handyman

come to your house because your basement is flooded and he tells you you need a new roof because it is leaking instead of going in the basement seeing that the hose is came off the washer. You fix the roof but you still have your flood in the basement. That's what happened here.

Q Thank you very much doctor. Anything further on that x-ray or for the moment?

A No, sir.

Q Let's go back up to the stand. Now I'd like to go back a little bit on the issue of the capillary refill issue that Dr. Tesser writes about in the notes.

A Yes.

Q I think we have already discussed that Dr. Doolan did not write any notes pre operatively?

A That's correct.

Q And tell us about capillary refill and what it means, what the tests and what it indicates?

A As I showed you before capillary refill is demonstrated by proper way to do it is to elevate the leg above the heart and put pressure on the toe for about five to ten seconds and you take your finger off. You will see how long it takes the toe to become pink again. It should be less than three seconds. That's what we all accept. If it's delayed that indicates that there is some kind of a vascular disorder that it can be a blockage in the artery from

hardening or arthrosclerosis or vasospastic disease. You know, some people exposed to cold or are nervous, their hands and feet will go cold and get numb. So it could be indicative of that also. But no matter what if you have this finding, that there's delayed capillary refill or abnormal capillary refill, you must investigate further. Especially if you're planning to do surgery on somebody.

Q And as you described before there are tests one can do in the office?

A Yes, sir.

Q Simple tests?

A Yes.

Q Are they expensive?

A No, they're not.

Q Are they tests that take a long time?

A Probably about 15 minutes.

Q Why is it important to know about any capillary refill issue before a surgery?

A Well, we all know that it's the blood that brings all the nutrients and oxygen to every part of our body. When you have an injury it is important for nutrients and oxygen to get there as well as white and red blood cells to help the area heal. So having good circulatory stats is very important.

Q Is it contraindicated to do a surgery that's going

to include the use of pins or K wire when one has a capillary refill issue?

A What I would say the pins would have to be used very judiciously in a patient that has capillary refill issue. Number one, if we investigated and found that the circulation was adequate that there was no blockage and capillary refill issue was because of vasospasm, we would have to be very careful about correcting the toe and putting a pin in. As we see in this case the pin had to be removed almost immediately after the surgery because the toe, there was a vasospasm. So it's not an absolute contraindication.

Q In this particular case based on the fact that there was a finding of capillary refill issue and then no further tests were done, was it a departure to do a surgery that included a K wire that then had to be removed immediately following the surgery?

A Yes, I think it was. I think that we had to do the testing before we did the surgery.

Q So doctor, to summarize this issue then, the pre operative evaluation as it was done in this case was a departure from good and accepted standards of podiatric practice?

MR. KORNFELD: Objection.

THE COURT: I will sustain.

Q Was it a departure from good and accepted

podiatric practice to waive a pre evaluation when surgery was done?

A Yes.

Q Was the surgery performed actually necessary in this case?

A No.

Q Was other surgery indicated?

A Yes.

Q Was that other surgery done on January 3, 2003?

A No.

Q Doctor, let's move onto the surgeries themselves.

MR. KORNFELD: I am sorry, can we have the last two questions read back.

(Requested portion of testimony read back.)

Q Now --

THE COURT: Let me ask you this: What was the other surgery that should have been done?

THE WITNESS: An excision of the neuroma.

THE COURT: What would that be?

THE WITNESS: Excising the pinched nerve or cutting the ligament to allow for more space.

THE COURT: I am sorry for interrupting.

Q Doctor, had they done the incision, had they worked on the neuroma and done excision of the nerve, would she have needed subsequent surgery on her toes 2 and 4 at

all?

A I believe not.

Q So can you tell us based on that what damages she sustained because of the departure of pre evaluation, departure of the first surgery?

MR. KORNFELD: Objection, your Honor.

THE COURT: What damages she sustained, sustained as to form.

Q Let's try another way. Specifically based on those departures what damage was sustained by Ms. Domizio?

MR. KORNFELD: Objection, your Honor. May we approach briefly?

THE COURT: I will sustain as to what you mean by what damage was done. Sustained.

Q Would she have needed the second surgery of December 16, 2003?

MR. KORNFELD: Objection, your Honor.

THE COURT: Overruled.

A No.

MR. KORNFELD: Judge, it's beyond the scope of disclosure, your Honor.

THE COURT: It's sufficiently within. I'll allow it.

MR. KORNFELD: The expert disclosure.

THE COURT: I'll allow it. He said she didn't

need this operation at all.

MR. KORNFELD: That's not in the disclosure either.

THE COURT: Approach a second.

(Whereupon, discussion held at side-bar off the record)

THE COURT: Jurors I have to put something on the record, a legal matter but you stay here, we'll go in the outside hallway.

(Whereupon, proceedings take place outside presence of jury)

THE COURT: The record will indicate we are out of the presence of the jury now.

Now if I recollect correctly, Dr. Doolan testified that the plaintiff presented with hammertoes and he did hammertoe surgery. This doctor says that the plaintiff was misdiagnosed, really didn't have hammertoes but had neuroma, Morton's neuroma, and should have had surgery for Morton's neuroma. Counsel, you're objecting to that testimony?

MR. KORNFELD: We both are your Honor. First, there is no nothing in the plaintiff's expert disclosure that indicates the defendants failed to render a proper diagnosis. In addition there's nothing that connects what the plaintiff is allegedly about to ask of these departures with any of the

injuries. This is boiler plate.

MR. TRESCH: If you look at the expert disclosure, the first couple of pages talks about departures and then you get to Page 3 and it is the last paragraph and the only mention of damages at all is the last three lines, "re operating, performing arthroplasty is not indicated effectively destroying joints."

That's all that's said about damages. There's no indication that this witness would testify to connect any of the patient's current symptoms or complaints to any particular deviation the type of surgery the done, the manner of surgery done. Anything that the witness has already mentioned about deviation is -- it's just not -- there's no indication that witness has any opinion about why the patient currently has complaints and the patient testified about various complaints short second toe, she talked about discomfort when walking long distances. You go back to her testimony Monday and there's all sorts of stuff. This witness not only never saw the plaintiff but as of the expert disclosure, never indicated he had an opinion about why the patient still has complaints.

In addition, now because we heard about it already this morning, this witness may be asked an opinion regarding the IME of Dr. Greenberg.

THE COURT: Let's deal with one thing at a

time.

MR. KARAM: The expert response on Page 1 says that the expert failed to address representing complaint of plantar pain. That's exactly what he's talking about in terms of neuroma. Top of the second page, "didn't provide her with the information potential ideologies of the plantar pain and reasons for proposed surgery."

That is the connection to the neuroma. Admittedly, the word neuroma is not in the response but I don't think it makes the response defective or precludes the witness from testifying to it.

THE COURT: All throughout the response he is talking about how the various departures caused her to become worse.

MR. TRESCH: Where does it say that?

MR. KARAM: All over the place; "resulted in worsening the condition, shortening, retraction and dorsiflexion of the digit."

He did that in one fell swoop by saying the surgery was not necessary. He's saying the same thing, all be it differently than the way the attorney recorded it in the expert response.

MR. TRESCH: The problem is he just said "damages." What are you talking about, "damages?" There's different things here.

THE COURT: So I will sustain it as to form only but you can go into all these matters this that counsel brought up.

(Whereupon, following proceedings in open court)

Q Doctor I will ask you --

MR. KORNFELD: Judge, the objection is sustained?

THE COURT: Sustained as to form.

Q Doctor, for the first and second -- were the first and second surgeries necessary?

A No.

Q Let's discuss the first surgery itself?

A Yes.

Q You have an opinion within a reasonable degree of podiatric certainty as to whether or not the surgery performed by Dr. Doolan on January 3, 2003 was below the standard of care?

A The surgery itself was not indicated by the patient's complaints.

Q And as the surgery was performed, doctor, was that performance of the surgery elements of the performance below the standard of care?

A Using the pin in the fourth toe, doctor excised bone at this joint and this joint in the fourth toe which

made that toes very unstable and it required the K wire, that pin to go in to hold it in place. We know from the initial visit to Manhattan that there was some problem with capillary refill and that should have been investigated prior to doing the surgery, prior to undertaking an aggressive bony reception in that fourth toe. So I believe that that did fall below the standard of care.

Q Was it an excessive amount of bone taken from the second and/or fourth toe?

MR. KORNFELD: Objection.

THE COURT: Sustained.

Q Do you have an opinion as to the amount of bone that was taken from the second and fourth toe during the first procedure?

A Yes.

Q What is your opinion?

A The adequate bone was resected in the second toe. The bone was resected through the surgical neck of the proximal phalanx. I think the proximal phalangeal head -- first of all, you have to accept these weren't indicated, so it's almost a moot point. Too much didn't have to be resected, of course too much bone was resected. If the surgery were indicated, that would have been an adequate bone resection. In the fourth toe I think the bone resection was over aggressive.

Q Was that a departure?

A Yes, in light of the necessity of the K wire it was.

Q I want to ask you about the December 16th surgery; all of the opinions are all within a reasonable degree of podiatric surgery?

A Yes, they are.

Q On the second surgery on December 16th, do you have an opinion as to where that surgery was done within the standards of appropriate podiatric care accepted in podiatric care?

A Yes, I do.

Q What is your opinion?

A My opinion is that it wasn't because doctor went into correct the deviation of the toe, the upward deviation of the toe by removing more bone. At this point excessive bone was removed trying to correct that. You can look at the post-op x-rays. You can compare them and see how much bone was taken off. It was really far in excess of what should have been done. Matter of fact, I don't think any bone should have been resected. At that point soft tissue recision would have been helpful at that point.

Q Would looking at the x-rays help you at this point?

A Yes, I think it would.

If we look this is the post-op view and this is the pre-op view and you can see that additional bone was resected. You can see that that flare has been taken away. It is difficult for you to see on this, because, again, it's burned out. But you can see that there was the flare in that head so additional bone was resected to try to drop this toe down and you can see that large space there now.

Q That's the second toe?

A Yes, the second toe, yes.

Q That is the second surgery of December 16, 2003?

A Yes.

Q You see it in that x-ray right afterwards?

A Yes.

Q Doctor, I want you to assume there's been testimony that additionally in the record on Monday that there were additional x-rays taken between the first and second surgery but the only x-ray in the file between those dates essentially is one in August of 2003. Would the availability of the other x-rays taken at Manhattan Footcare would that have been helpful to you in your review of this case to see exactly how the treatment was done?

A Yes, it would.

Q And the failure to have those, it would be -- and those are normally kept in the ordinary course of a practice right?

A Yes, they are.

Q And it is a departure not to keep x-rays in a case, isn't that correct?

A Yes, it is.

Q Now based on that there are these other x-rays, what value would they have had to the doctor or doctors treating the patient between the first and second surgeries?

A What those x-rays would have done is documented the progress or lack thereof of the patient after the surgery. So they're important. You know, what you can see is if the toe was in a good position at first and then deflected or deformed after the surgery. You would see if the toe was shortening. It gives you -- just like the book you're reading, you turn it page by page and see what happens.

Q Doctor, again, based on the January 16th postoperative x-ray and looking at that toe number 2, what is the future of that toe?

A We're talking from this point forward, what will happen over time when we cut the bone there's bleeding and this is now a void. This is an empty space in here. What we do is sew the capsulae and tendon back around that empty space but the bone bleeds when it is cut. That is why you get the black and blue with a fracture. What happens here you get a bleeding hematoma or blood clot in that space.

Over time that gets reabsorbed by the body and scar tissue takes its place.

Now scar tissue or fibrosis will form and over time that will contract. And what you have to appreciate is that all the tendons on the top of the foot and bottom of the foot pull the toes backwards that is why the toe reflects or retracts. If time passes, three, six, eight months, this is going to reabsorb and the scar tissue will mature. As it matures, it contracts and shrinks down. So you would expect the toe to come back toward the foot and shorten, as well as move upward.

Q You say move upward, what do you mean by that?

A Dorsiflexion.

Q Approximately how long after the surgery does that take to happen?

A Usually the shrinkage usually takes three to six months after the surgery.

Q Doctor, you said you reviewed some e-mails from Ms. Domizio from London in January immediately post-op of the second operation. Did she -- what did she complain of in those e-mails?

A Complaining of pain in the toe because the toe was out of position and was rubbing against her shoe.

Q When you say "the toe", which toe?

A The second toe.

Q On the?
A Left foot.
Q And she complained about that as early as January of 2003 -- I am sorry, 2004?
MR. KORNFELD: Objection, your Honor.
Q When did she complain about that?
A I don't recall.
Q Doctor, did you see Ms. Domizio's toe?
MR. KORNFELD: Objection.
THE COURT: Approach.
Q Doctor --
THE COURT: You want to amend?
MR. BASSIN: Yes. Your Honor may we approach.
THE COURT: Yes.
(Whereupon, discussion held at side-bar off the record)
Q First of all doctor, based on your review of the records and the x-rays would you expect that her toe would be short today?
A Yes, I would.
Q And I want you, as a hypothetical doctor, I want you to assume that her toe is short end and slightly raised, toe number 2 on the left foot?
A Yes.
Q Do you have an opinion as to whether or not that

was caused by the first and/or second surgery with Dr. Doolan?

A Yes, I do.

Q And what is that opinion?

A I believe it was absolutely caused by the first and second surgery, the combination of both.

MR. BASSIN: Your Honor, subject to connection this afternoon as to what Dr. Greenberg, who we subpoenaed in this case also but by agreement, is coming in this afternoon I would like to ask the doctor some questions based on what he's going to testify to.

THE COURT: Yes.

Q Doctor, do you agree with the following: That Ms. Domizio has pain in plantar --

MR. KORNFELD: Objection. This isn't cross-examination.

THE COURT: I'll allow it depending on the question.

Q That Ms. Domizio has pain in plantar hyperkeratosis at the left third MPJ consistent with plantar flexion third metatarsal and MPJ capsulitis?

MR. TRESCH: How can this witness agree or disagree, he didn't examine her.

THE COURT: I'll allow you to get into that, I'll allow it.

MR. TRESCH: He is reading a report by another doctor.

THE COURT: The doctor will be in to testify.

MR. KORNFELD: Note my objection also.

THE COURT: You have an exception.

Q Do you agree with that?

A Yes, I do.

Q I want you to -- do you agree with the following statement: Ms. Domizio has a Morton's neuroma, left third interspace causing her numbness and pain in that region?

A Yes, I did.

Q Do you agree that Ms. Domizio has iatrogenic shortened second toe due to her second surgery?

A Yes.

Q I have no further questions.

THE COURT: Cross?

MR. KORNFELD: Yes.

CROSS EXAMINATION BY MR. KORNFELD:

Q Doctor, do you also agree that the plaintiff in this case has a normal heel-to-toe gait?

A I have not seen her walk.

Q Normal heel-to-toe gait is a good thing, correct? I mean, that's what you want to have?

A Yes, it is.

Q Doctor, am I correct that your theory of this case

essentially is Dr. Tesser and Dr. Doolan were both wrong and this patient did not have hammertoes?

A No, you're not correct.

Q What's that?

A No, you're not correct.

Q By the way doctor, hammertoes, it's not an uncommon podiatric problem, correct?

A It is common podiatric problem.

Q It is something that you see in your office frequently, correct?

A Yes, sir.

Q And it's something that when a patient walks in you can actually see hammertoes, it's something that you can see as a doctor?

A Absolutely.

Q It's not like heart disease or cancer or where you need to take a test and get the test results when you say the patient might have heart disease or cancer, correct?

A Yes, sir.

Q From a cosmetic standpoint hammertoes can be very unnatractive?

A Yes, they can be.

Q Often when patients have hammertoes they are self conscious about how their feet look?

A Yes.

Q You probably have many patients who don't want to wear open toe shoes because they have hammertoes or don't want to walk on the beach because people may see their feet, fair enough?

A Yes.

Q Hammertoes can be painful?

A Yes.

Q So in addition to being potentially ugly they can also hurt a patient?

A Yes, sir.

Q In fact they can be so painful that sometimes patients can't wear certain types of shoes right?

A Yes, sir, that's correct.

Q And they often can cause a patient to limit their activities, fair enough?

A Yes.

Q You told this jury that in your opinion you believe that in January of 2003 this patient should have had neuroma surgery, correct?

A Yes, sir.

Q Now when someone has pain from a neuroma -- first patients can have neuroma and not need surgery?

A That's correct.

Q There are many types of deformities that don't need operation?

A Yes.
Q Bunions but may not have to operate?
A Yes.
Q So the mere fact that this patient in your opinion had neuroma, that in and of itself doesn't mean she should have an operation?
A That's correct. It should have been approached conservatively first.
Q What you were telling the jury this morning was January 3rd of 2003 she should have had neuroma surgery. Do you recall that testimony yes or no?
A Yes, I do recall that but what I also recall --
Q Doctor, please.
A What I --
Q Doctor, please. You would agree you told this jury you testified about three times a year?
A Correct.
Q What is the rate of compensation that you're receiving today?
A $3000.
Q $3000. And you are also paid for the time you spent before today reviewing the case and talking with the lawyers?
A Yes.
Q How much did you charge for that?

A $350.
Q Per hour?
A Yes.
Q How many hours did you spend reviewing this case?
A Five hours.
Q So that's about 15 or 17 hundred dollars, 1750, so about 47 hundred dollars?
A Yes.
Q And you testified about three times a year in court?
A Yes.
Q And you review about ten cases a year you said?
A Yes.
Q Each one is about five hours?
A It would be as little at 30 minutes or as much as five hours.
Q So average about three hours?
A Probably less than three hours.
Q Hammertoes are a deformity, correct?
A Yes, they are.
Q Hammertoes are caused by different things, correct?
A Yes.
Q They're caused -- some say that genetics play a part in hammertoes?

A That's correct.
Q You are aware that her mother had hammertoes?
A Yes. She told me this morning.
Q And her mother had hammertoe surgery, you heard that?
A Yes.
Q You told this jury that this patient had sharp pain prior to the January 3rd surgery, correct?
A Yes.
Q Those are the words that you used, sharp pain?
A Yes.
Q Can you show us where in the records it says that she had sharp pain because sharp pain may be consistent with someone who has neuroma, correct?
A Yes.
Q And it may also be consistent with some who has hammertoes, correct?
A No.
Q Well, maybe consistent with one who wears tight shoes?
A Yes.
Q Show us where it says sharp pain.
A It doesn't. Patient presents to office with pain left foot along with numbness.
Q So when you told the jury that she reported sharp

pain, that is something that you didn't get from the medical records or from her deposition, correct?

A That's correct.

Q So that something that you created in order to make your theory of this case more believable to this jury here?

A No.

Q Doctor, you would agree that this patient tried conservative treatment prior to having surgery with Dr. Doolan?

A Not that I know.

Q You are aware that she wore pads under her feet prior to surgery?

A Yes.

Q You are aware that she tried to wear more comfortable shoes prior to the surgery?

A Yes.

Q You are aware that she limited her activity prior to Dr. Doolan's surgery?

A Yes.

Q You are aware that doctors offered her orthotics but she declined to get them?

A Yes.

Q Those are all examples of conservative treatment?

A Yes, they are.

Q And you are aware despite all those attempts the patient still had complaints of pain, correct?

A That's correct.

Q By the way, when you have a neuroma, let's say third and fourth interspace, a Morton's neuroma, if it's symptomatic or painful because they're not always?

A That's correct.

Q If it is you would expect someone walking to try to avoid that area?

A Yes.

Q They wouldn't put pressure on the area, correct?

A That's correct.

Q But you are aware that, doctor, that this case the patient prior to surgery had hardened calluses under her third and fourth toes because that is where she was bearing weight, correct?

A I believe it was under the fourth toe.

Q You are also aware prior to the surgery she shaved her own calluses?

A Yes.

Q And you're also aware that she had podiatrists shave her calluses?

A Yes.

Q Those are all examples of conservative treatment right?

A For a callus, yes.
Q One of the ways to treat hammertoes is by dividing the corns and calluses, that's called conservative treatment?
A Yes, and the calluses would have to be on top of the toes.
Q The corns could be on top of the toes and the calluses might be on the bottom of the toes, correct?
A No. I believe the hammertoes --
Q If your answer is no that's fine. Hammertoes usually stem from muscle imbalance, correct?
A That's correct, yes.
Q And they also stem from tendon imbalance, correct?
A Oh, yes. The muscles are connected to the tendons.
Q So the answer is yes to my question?
A Yes, to both.
Q So people who have hammertoes have imbalances or problems with their muscles and tendons of their feet, correct, they're not functioning normally, fair enough?
A Yes.
Q Other causes of hammertoes might be improperly fitting shoes?
A That's correct.
Q In fact neuroma could be caused by wearing improperly fitting shoes, right?

A Yes.

Q And there are different types of digital deformities, I think you mentioned Mallet toe. I guess from a lay standpoint a doctor might tell a patient hammertoes but under that category there's mallet toes and claw toes?

A Yes.

Q And those are digital deformities where there are contractures at certain joints?

A That's correct.

Q Would you agree that calluses are systemic of a problem of the bone?

A Could you rephrase that please?

Q Calluses are system have of a problem of the bone?

A I don't understand the question.

Q I want you to refer you to your website. You have a website true?

A Yes, I do.

Q I want to read your section on calluses. The actually are systemic of a problem with the bone?

A I believe that's mis-wording meaning connected with, not systemic. I don't think that's good wording. Or perhaps a result of.

Q Doctor, you would also agree that when you have calluses symptoms can range from sharp, shooting pain to dull, aching soreness?

A Yes.
Q And calluses typically develop under metatarsal head?
A Yes.
Q Response to pressure?
A Yes.
Q And this patient had this prior to Dr. Doolan's first surgery?
A She had the calluses under her second, third and fourth metatarsal heads.
Q Other than that grammatical mistake, are there any other mistakes in your website?
A Not that I am aware of.
Q You can develop painful calluses under the ball of your foot due to the hammertoe, correct?
A That's possible sure.
Q Because it causes the hammertoe, causes the metatarsal head to drop down and you described earlier --
A Yes.
Q And in this case you had those calluses as you said pre operatively under the second, third and fourth toes, correct?
A That's correct.
Q By the way, you are aware that nine weeks before going to Manhattan Footcare Dr. Segal performed hammertoe

surgery on her?

A He performed some kind of a surgery.

Q Well, can you look at the note from August 8th -- October 8th in the chart?

A I have it in my hand.

Q You heard that at that time Manhattan Footcare a doctor would write a short note and then a doctor would write a more complete note later. You see 10/8/02 patient has surgery nine weeks ago by Dr. Segal across the street?

A Yes.

Q What does that mean?

A I believe that it is metatarsal MPJ capsulotomy or tenotomy. Doctor eluded to that later on in his notes or in his deposition. Looking where the scars were placed it was most likely capsulotomy, tenotomy.

Q Minimal incision surgery that's called?

A It's hard to say whether it was minimal incision or open.

Q On October 8th the note also indicates that the sites were consistent with the surgical sites consistent with previous site of surgery?

A Yes.

Q So Dr. Tesser noted on October 8th that there was a metatarsal capsulotomy on 2 through 5 and able to see where the incisions were, correct?

A Yes.
Q That surgeon didn't use pins, correct?
A No.
Q That surgery failed, correct?
A I would have to say yes if she went onto further treatment.
Q Well, she reported pain and numbness, increase in pain and numbness since that last surgery so that means it is a failure?
A Yes.
Q And the hammertoes were still present according to Dr. Tesser and Dr. Doolan, correct?
A She had hammertoes.
Q That means that the surgery failed?
A I don't know that that was done for hammertoes. There's nothing in the notes that said that that was for hammertoes.
Q What other basis would there be for a doctor to operate on toes 2, 3, 4 and 5 by metatarsal capsulotomy?
A Could be some tendon contracture.
Q Doctor, in reviewing these records you're obviously asked to sometimes read between the lines and use your years of the experience in interpreting records, right?
A Sometimes you have to.
Q And you would agree, doctor, that the patient had

hammertoe surgery nine weeks before?

A She had tenotomy and capsulotomy.

Q Most likely for the hammertoes?

A Yes, but nowhere in the record does it reflect that.

Q You are aware, by the way, that the plaintiff went to three doctors before Dr. Tesser and none of those doctors ever told her she had a neuroma?

A Yes, I am.

Q Are those doctors all wrong?

A Perhaps she hadn't had the symptoms by that time. You can develop the symptoms when she saw Dr. Tesser.

Q Other than numbness, other than numbness, which Dr. Doolan attributed to the prior surgery, other than numbness, what indication do you have in the records that she had a neuroma on October 8th when she came to the office?

A The pain and numbness.

Q Well, pain can be consistent with someone who has hammertoes?

A That's correct.

Q Pain could be consistent with someone who had failed surgery nine weeks earlier?

A Yes.

Q A numbness could be consistent with someone who had failed surgery nine weeks earlier too, correct?

A That is correct.
Q Surgery doesn't always work, correct?
A That is correct.
Q We know that Dr. Segal's surgery didn't work, fair enough?
A That's correct.
Q And we know Mr. Day's surgery in London didn't work either. By the way, none of the records that you have reviewed other than that one note by Dr. Tesser indicate that this patient has delayed capillary refill, correct?
A That's correct.
Q In fact, the Cabrini Medical Center in New York City cleared her for surgery?
MR. BASSIN: Objection, your Honor.
THE COURT: Overruled. I'll allow it.
Q They cleared her for surgery, correct?
A Cabrini Medical Center?
Q It is a hospital in Manhattan.
A The one that closed, right. I was thinking you're asking me if the hospital cleared her. I would imagine a medical doctor cleared her for surgery.
Q An M.D. cleared her for surgery?
A That is what I would think, yes.
Q So is it your testimony that the medical doctor at Cabrini improperly cleared her for surgery in January 2003?

MR. BASSIN: Objection, your Honor. Record is not evidence.

THE COURT: Overruled.

A I think the medical doctor properly cleared her for surgery, yes.

Q Doctor, you would agree there are risks to hammertoe surgery?

A Yes, there are.

Q There are some known complications that are reported in the medical literature correct?

A Yes.

Q For an arthroplasty, which Dr. Doolan did, some of the known and accepted risks are lack of toe purchase?

A That's correct.

Q That's when the toe doesn't reach the ground?

A Yes.

Q That can happen even when the doctor does surgery?

A Yes.

Q Recurrence of the deformity is known and accepted risk right?

A Yes.

Q So even if a doctor does surgery properly the hammertoe can come back, correct?

A Yes it can.

Q Another potential risk is a shortened digit,

correct?

A That's correct.

Q So if a doctor does surgery properly the toe can become smaller?

A Yes it could.

Q And another risk is flail toe where it becomes floppy?

A That's correct.

Q And all the risks that I just told you are risks that can occur in the best of surgical hands?

A That's correct.

Q You are aware, by the way, that Dr. -- excuse me, Mr. Day in London used three pins?

MR. BASSIN: May we approach please?

THE COURT: All right.

(Whereupon, discussion held at side-bar off the record)

Q So you are aware that Mr. Day used pins on the second, third and fourth toes where he did surgery?

A Yes.

Q And you are aware that he didn't diagnose neuroma?

A Yes.

Q And you are aware that he did not do any neuroma surgery, correct?

A Yes.

Q And you are also aware that a week after he removed the pins the toes contracted and shortened?
A Yes.
Q You would agree that means that his surgery failed?
A Yes, it did.
Q Now you told this jury you never examined plaintiff, correct?
A I examined plaintiff this morning.
Q During the course of this lawsuit did you prepare any report of anything?
A No, I didn't.
Q And you have learned that the plaintiff is functioning quite well?
A Yes.
Q You know she's able to go to the gym, she uses the elliptical machine, she bikes?
A Yes.
Q She has a normal heel-to-toe gait, correct?
A Yes.
Q You would agree -- well one of her complaints she can't wear high heels, correct?
A Yes.
Q That was a problem that she had back in October of 2002 also, correct?

A I am not aware of that.
Q Well, you did review her deposition testimony, correct?
A Yes, I did.
Q Assume there's been deposition and trial testimony where she said she had trouble wearing heels and high heels?
A Accepted.
Q Would you agree that women invite foot problems with high heels?
A So we're going to blame the victim? Do they invite problems? High heels cause problems. I am glad I don't wear them but I don't think they're bringing it on themselves.
Q Let me just refer you to your website, doctor, the one that's on the web, it says under your "high heels section" you write "women invite foot problems with high heels." Do you stand by those words?
A Yeah, they can cause problems.
Q Do you stand by these words?
A No, I'm going to revise that.
Q So now that's the second thing you want to change?
A I appreciate your help.
Q There are plenty more but I will just stick to a couple.
A Let's do a few more.

Q I noticed, by the way, the bibliography where you list books to read, there is not one book written after 1994 but you agree it's your obligation as a doctor to stay current with podiatric medicine?

A Yes.

Q Now to say that this patient needed neuroma surgery on January 3rd, 2003 is what you would describe as jumping the gun, right?

A Yes.

Q Because the only indication that you have in the notes and in the testimony that this patient had a neuroma as of that time period was that she had pain and numbness which two doctors attributed to a prior surgery, correct?

A Correct.

Q So you don't know either way as you're sitting here whether this patient had a Morton's neuroma in January 2003 correct?

A Correct.

Q Orthotics would be helpful for Ms. Domizio as far as you know?

A I think they would be.

Q Do you know why she wasn't wearing them the other day?

A No.

Q You would recommend her to wear them?

A I most certainly would.
Q You are aware that her third toe on her right foot underlaps her second toe?
A Yes.
Q That is a deformity?
A Yes, it is.
Q And that deformity is caused by muscle and tendon imbalance that this patient has?
A Most likely congenital deformity.
Q Born with it?
A Just born with it, yes.
Q Fair to say that surgeons have to not only be skillful but they have to exercise their judgment when they're operating on a patient?
A That's correct.
Q For example, there are many different surgical approaches that surgery can take when operating on a patient for certain conditions?
A What do you mean?
Q For example, there are a hundred different ways to correct a bunion?
A Yes.
Q And there are different ways to correct hammertoes also?
A Yes.

Q We know, for example, Dr. Segal tried a metatarsal and capsulotomy approach and that didn't work?
A Yes.
Q And you're not here to criticize that right? And you know Mr. Day tried using three pins and that didn't work?
A That is correct.
Q A that is another approach. We know that Dr. Doolan had a different approach; he did arthroplasty?
A Correct.
Q You are away that Mr. Day also removed bones?
A I believe he did an osteotomy.
Q That is where he did the metatarsal?
A No, in the phalanx.
Q The proximal phalanx?
A Yes. So he didn't --
Q There is no question right now doctor. You ever do a redo surgery in are your practice?
A Yes, sure.
Q You have done it because other patients come to you after a failed surgery by another doctor?
A Yes.
Q And you have done it on your own patients too?
A That is correct.
Q So the mere fact that you had to operate on a patient the second time doesn't mean that you did something

wrong the first time right?

A Not necessarily.

Q But the patients that you have operated on a second time after you have operated a first time did you depart the standard of care the first time?

MR. BASSIN: I object.

THE COURT: Sustain.

Q We know from the pre-operative x-rays that the patient has no fractures, correct?

A That is correct.

Q No dislocations?

A Correct.

Q No tumors, correct?

A Correct.

Q No bone diseases, correct?

A Correct.

Q No infections, correct?

A None on the bone, correct.

Q And no foreign objects in the foot, correct?

A Correct.

Q So the x-rays do give you some information, correct?

A Yes.

Q And you told us and you would agree that the doctor should not base his decision to operate on x-rays

alone?

A Absolutely.

Q A doctor doesn't treat x-rays, he treats patients right?

A That's right, sir.

Q A doctor has to listen to the patient's complaints correct?

A That's correct.

Q History of complaints, correct?

A Yes.

Q What they did to address those complaints?

A Yes.

Q Take x-rays and other tests?

A This is correct.

Q There are a number of different types of hammertoes, correct -- well, for example, you're familiar with the term flexion or stabilization?

A Yes.

Q And flexion or substitution?

A Yes.

Q And extension or substitution?

A Yes.

Q Extension or substitution, that could be observed during the swing phase of gait?

A That's correct.

Q So that means for a doctor to diagnose that it's a type of hammertoe, for a doctor to diagnose that, he has to see the foot move?

A It's really not a type of hammertoe. It is an ideology so that is --

Q Sorry to interrupt you. You can't see that on the x-ray, you have to watch the person walk or put the patient through a test with your hands?

A You have to watch the person walk, yes.

Q That is the same with extension or substitution and flexion or stabilization?

A Yes.

Q As you're sitting here now, doctor, you would agree that Ms. Domizio does not have a problem with her capillary refill?

A Today this morning when I checked her foot she had no problem with it.

Q You would agree that based upon your common sense and reading between the lines the fact that she had four surgeries by three different doctors at different institutions that this patient probably doesn't have a capillary refill issue, fair enough?

A Yes.

Q You would agree that Dr. Doolan exercised sound, good medical judgment when he removed the K wire from her

fourth toe after the surgery?

A Absolutely.

Q Because if he didn't remove it if he ignored the patient's symptoms and didn't remove it the fourth toe might have become gangrenous?

A Yes.

Q And if it became gangrenous, you may have to amputate?

A You would have to amputate it.

Q Obviously before testifying today you spoke with the lawyers who retained you for this case?

A Yes, I did.

Q And I'm sure they told you that there are a few discrepancies with the dates of service and the billing records?

A We didn't discuss that.

Q You don't rely on billing records when you treat patients?

MR. BASSIN: Objection.

THE COURT: Sustained. I'll allow you to ask you what's good and accepted.

Q When a doctor treats patients, they don't rely on insurance records, they rely on their own records?

A Yes.

Q So you would agree discrepancies in the billing

didn't harm the patient in any way?

A No.

Q And you would agree I think there's testimony an x-ray or two might be missing from the chart, that didn't harm the patient?

A Missing x-rays didn't directly harm the patient.

Q And the fact that two notes were written on each date, that does harm the patient?

A No, just poor record keeping.

Q Actually, the second note is a lot easier to read. The handwriting is a lot nicer?

A Yes.

Q So it's good record keeping to have neat handwriting?

A You shouldn't have to write it twice. You should do it right the first time.

Q Soft tissue contractures can occur after any surgery. Have you heard of something called scar tissue adhesions?

A Yes.

Q That can occur after surgery?

A Yes.

Q And that is something that a scar could be on the outside or on the inside?

A The scar goes from the skin all the way down as

far as your cut.

Q And when a patient scars it is often unpredictable correct?

A Yes, it is.

Q And it is even unpredictable in the patient, for example, you can do a surgery on the second, third, fourth and they can have more scar tissue on one of the other toes, can happen right?

A Yes.

Q After you perform surgery and remove bone there could be bone regrowth?

A Yes.

Q The fact that Ms. Domizio has the muscle and tendon imbalance in her foot that caused the hammertoes in the first place, you would agree that those issues were kind of a life-long issue?

A Yes, I do.

Q The tendon the problems that she has that caused her to have the hammertoes and deformities they're with her, correct?

A Yes.

Q And that wasn't caused by any of the doctors right?

A No.

Q Wasn't caused by Dr. Segal Dr. Doolan or Mr. Day?

A No.
Q You participate in continuing podiatric education, doctor?
A Yes, I do.
Q It is part of a requirement as a podiatrist in New York State?
A Just to enhance my education.
Q And you attend occasional lectures?
A Yes.
Q Go to the New York Clinical Conference?
A Yes.
Q That's conference where podiatrists go and listen to lectures?
A Yes.
Q You obviously have respect for your professional colleagues?
A Yes.
Q You will go to their lectures and listen to advances and issues regarding podiatry and surgery?
A I do workshops also out in Illinois at the Orthopedic Learning Center to enhance my surgical skills.
Q At times you may defer to other doctors if you have questions?
A Yes.
Q You might even refer a patient to another doctor?

A Yes.

Q In New York there are some very well trained podiatrists who you might consider authorities in the field?

A There are well trained podiatrists, yes.

Q And there are some leading authorities, correct?

A Authorities, I don't know. But there are plenty of good guys here in New York.

Q Your old colleague Dr. Butler would be one of them?

MR. BASSIN: Objection as to specifics.

THE COURT: Overruled.

Q Someone who you respect?

A Well -- I think you should move onto another name.

Q Dr. Treppel?

A Yes, very good guy.

Q Kevin Jules?

A Yes.

Q Excellent surgeon and good teacher?

A Both of those guys are excellent guys, good surgeons, good guys, good teachers.

Q Would agree there are situations in medicine where two different doctors can have different opinions as to how best to treat a patient?

A Oh, yes.

Q Sometimes there could be more than one right way

to treat a patient?

A Yes.

Q That's often the case with surgery. Sometimes different surgeons can have different approaches but both of those approaches might be accepted ways of doing the procedure?

A Yes.

Q More than one way to skin a cat?

A Yes.

Q I don't mean to speak disparagingly of any animals.

A I have two cats at home you can skin.

Q You would agree people heal differently?

A Yes, I do.

Q You mention that you're at Methodist hospital now?

A Yes.

Q Department shares at hospitals or podiatric supervisors at hospitals or surgery centers, you would agree that they're often respected doctors in the community or at the hospital?

A Yes most often.

Q They frequently teach and supervise other doctors and residents?

A Yes.

Q They even may help formulate policy at

institutions?

A When I was a chief at Brooklyn Hospital, yeah, I formulated the policy there and gave privileges. So yes, that's what I --

Q That's something that chairman's and supervisors do?

A Yes.

Q You have privileges at Grammercy Park Center?

A Yes.

Q You are aware that the clinical podiatric supervisor since 2003 has been my client, Dr. John Doolan?

A Yes.

Q And that means he is the podiatrist in charge?

A Yes.

Q And he is in charge of quality assurance, credentialing and delineation of the types of procedures that doctors can perform there?

A That's correct.

Q So in some respects when you're at Grammercy you work for him, fair enough?

MR. BASSIN: Objection.

THE COURT: I'll allow it.

A No.

Q You're under his supervision when you are at Grammercy, not at the Brooklyn institution?

A Well, I will say that I have been there and I have never seen doctor, I have nobody looking over my shoulder. So I don't -- I am under his supervision. He does credential me but under direct supervision I would have to say no.

Q I didn't say direct supervision but I will move on. You are aware that Dr. Doolan, you read his deposition and you are aware that he did some of his training at here in Brooklyn at Inter-Faith Medical Center, correct?

A Yes.

Q And you don't have privileges at Inter-Faith?

A No, I don't.

Q Am I correct, doctor, that in May of 2008 which is three months ago you testified in a case on behalf of a plaintiff suing a doctor against Inter-Faith Medical Center in this very building?

A Yes.

Q Is it your testimony that Dr. Tesser was mistaken when he diagnosed the plaintiff with hammertoes on her second, third, fourth and fifth toes on October 8th and again on October 25th of 2002?

A There was no evidence in the x-rays that there were hammertoes.

Q Do you think that Dr. Tesser made it up?

A I don't know how he came to that conclusion but we can see there that there is no contracture of the toes.

Q Well, doctor, based on what you know about Dr. Tesser and based on what you know about Dr. Doolan professionally, based on what you know Dr. Segal did, you would agree that this patient had hammertoes in October of 2003 wouldn't you?

MR. BASSIN: 2002.

Q 2002?

MR. BASSIN: First surgery was in 2003.

Q I will re ask question. You would agree based upon what Dr. Segal did, what Dr. Tesser wrote down, Dr. Doolan's testimony and what you know about him professionally, that this patient most likely had hammertoes when she presented to Manhattan Footcare in October of 2002?

A Yes.

Q And you would agree based upon those same factors that she had hammertoes on her second, third, fourth and fifth toes?

A If you include mallet toe as a hammertoe, yes.

Q You would agree there is a lot more persuasive and reliable evidence in this case that this patient had hammertoes in October of 2002 than a neuroma?

A That's hard to answer.

Q Let me make it easier for you Dr. Segal believed this patient had hammertoes, correct?

A Yes.

Q He performed hammertoe surgery on five toes?
A And his surgery failed.
Q And he didn't diagnose the neuroma?
A That's correct.
Q When the patient presented in October of 2002 to Manhattan Footcare. The only indication of nerve pain was numbness, correct?
A Correct.
Q And numbness was consistent of someone as you told us earlier who had previous surgery?
A It could be but numbness and pain were the things that were suggested of a neuroma.
Q Numbness and pain were consistent with having had surgery recently correct?
A It could be from that.
Q Numbness and pain are consistent with someone who wears tight shoes?
A Could be.
Q You would not operate on a patient and remove a neuroma because she said my foot is numb and it hurts and there are hammertoes present?
A I would go through her history and work up before I would decide to on a patient.
Q The amount of bone removal is judgment call, correct, during surgery and arthroplasty procedure?

A Yes.
Q During the surgery did something called the step wise approach?
A Yes.
Q That's when you reduce the contracture and if it's reduced great, if not we go to the next level to try to reduce it?
A That's correct. That's how we do a hammertoe.
Q And from reading the operative report, that's what he did right?
A Yes.
Q Good, accepted practice?
A Yes.
Q You read the operative report?
A Yes.
Q January 2003 and December 16th?
A Yes, I did.
Q And just from the reading of the operative reports those descriptions are both in accordance with good and accepted standard of podiatric practice?
A Yes.
Q So if you read those operative reports you would say good job, that's the way to do it, fair enough?
A Yes.
Q Am I correct that you have learned that, I think,

approximately a year ago the plaintiff was examined by Dr. Greenberg?

A Yes.

Q And you learned that at that time she had a neuroma?

A Yes.

Q And you would agree that there's no indication -- I will withdraw the question.

All the opinions you gave today have been to the best of your ability?

A Yes, sir.

Q Other than going back and changing your website we're okay?

A I think we are.

Q No further questions.

THE COURT: Counsel?

MR. TRESCH: Just a few and we're almost done.

CROSS EXAMINATION BY MR. TRESCH:

Q You understand Dr. Doolan testified that it was his decision and his decision only to do the surgery? He evaluated the patient pre-operatively and it was his decision, not anybody else, to proceed with surgery on January 3rd, 2003?

A Yes.

Q And it is the surgeon who's going to do a

procedure's responsibility to make that decision?

A Yes, it is.

Q Dr. Doolan, if he wanted, could have ordered more x-rays prior to the January 3rd surgery?

A Yes, he could have.

Q You understand Dr. Doolan saw the patient and examined her two perhaps three times before he did surgery on January 3rd?

A From my reading of his deposition I think it was only once.

Q He testified in this courtroom that he would have seen the patient once and maybe twice in the office and the second or third time doing pre-operative examination at Cabrini on the day of the surgery?

A That maybe is the one that I'm questioning. So maybe once.

Q Did you look at the notes at Cabrini?

A We know but you're asking me if he saw her three times. I think he saw her once in the office that he testified to and at pre-op in Cabrini.

Q You understand Dr. Doolan testified that he was, he and only he, did the actual operation, both operations he was the operating surgeon?

A Yes.

Q There are other people around, some nurses, other

doctors but --

A Assistive doctors, yes.

Q But he did the operations?

A Yes.

Q And you have no reason to dispute that do you?

A No.

Q You understand that Dr. Doolan after the first surgery on January 3rd, 2003 followed the patient especially from April 25, 2003 through December 16, 2003 seeing four out of five times before the second surgery?

A Yes.

Q Because you saw the notes?

A Yes.

Q You understand that after the second procedure on December 16, 2003 the Dr. Doolan followed the patient by seeing her in the office on December 30, 2003 and then via series of e-mails and you saw those too when she went back to London?

A Yes.

Q You understand that the records at Cabrini indicate by the examining physician, I think it was an M.D., cleared her for surgery indicating no vascular issues, do you remember seeing that?

A No, I don't remember seeing that. There were no vascular issues but I know she was medically cleared for

surgery.

Q And Mr. Day did surgery again in May of 2005 right?

A That's correct.

Q As did Dr. Doolan and Dr. Segal before?

A Yes.

Q Dr. Doolan could have ordered more post-op x-rays between the two surgeries if he thought that was appropriate, correct?

A Certainly.

Q Thank you.

THE COURT: Before we do redirect let me ask you a question.

You just said that a moment ago that the plaintiff when she presented in 2002 in fact did have hammertoes, is that right?

THE WITNESS: These are mallet toes.

THE COURT: A version of hammertoe?

THE WITNESS: Yes.

THE COURT: Did she also have Morton's neuroma.

THE WITNESS: I believe she did with the complaints that she presented with the numbness and pain.

THE COURT: All right. Fine. With that counsel.

MR. BASSIN: May we have a short break for

three to five minutes.

THE COURT: Okay we will. Jurors a very brief break. Use the facility and we will call you back.

(Brief recess taken.)

THE COURT: Bring in the jury.

(Jury entering)

THE COURT: Counsel redirect?

MR. BASSIN: Thank you very much.

REDIRECT EXAMINATION BY MR. BASSIN:

Q Doctor, is exercising bad judgment not good, accepted podiatric practice?

MR. KORNFELD: Objection.

THE COURT: I will sustain as to form anyway.

Q Would you agree one can exercise judgment but when it is bad judgment it is bad podiatric practice?

MR. KORNFELD: Objection, your Honor. This is redirect, not cross-examination.

THE COURT: All right. Sustained.

Q Doctor, if one operated without proper work up would that be in your mind bad judgment?

MR. KORNFELD: Objection.

THE COURT: I'll allow it. You can answer.

A Yes.

Q Would that be a deviation from accepted podiatric practice?

A Yes.
Q There was some questions asked to you regarding Dr. Segal's procedure some months before Ms. Domizio presented to Manhattan Footcare. You never saw any operative records from that did you?
A No, I didn't.
Q And nobody showed you that from the defense, right?
A That's correct.
Q And the only evidence you know of is in the note of Dr. Tesser on October 8th right?
A That's correct.
Q And he got that information from Ms. Domizio right?
A Yes.
Q And then this was some statements made by Ms. Domizio in her deposition, right?
A Yes.
Q And he didn't remove any bone did he, Dr. Segal?
MR. KORNFELD: Objection.
Q That you know of?
THE COURT: I'll allow it if you know.
A Having looked at the pre-op x-rays I didn't see any bone removed so I would have to conclude that Dr. Segal did not remove bone.

Q Now Mr. Day, when he operated on her toe in July 2005, he wasn't operating on hammertoes was he?

MR. KORNFELD: Objection.

THE COURT: If you know I'll allow it.

A No, he wasn't.

Q He was just operating on a toe she was complaining was up in the air and painful?

MR. KORNFELD: Objection.

THE COURT: I will sustain.

Q What was he operating?

A He was operating on deformed toes that were the result of the surgery.

Q Result of which surgery?

A Of the first and second.

MR. KORNFELD: Objection move to strike.

THE COURT: I'll allow it.

A That were a result of Dr. Doolan's surgeries.

MR. KORNFELD: Objection, your Honor. How is this witness testifying as to records of the surgery that is not in evidence?

THE COURT: You asked him about the surgery, I'll allow counsel to ask him. Overruled.

Q Now the only evidence in the record regarding capillary refill of any issues is Dr. Tesser's notoriety?

A That's correct.

Q And that was a positive finding of some issue with capillary refill, is that correct?

A Yes.

Q And would that indicate any indication any other test were done in that work up for any blood flow or capillary problems?

A There are no indications of such tests.

Q Is it a problem and departure from accepted practice not to do further testing at that time?

A Yes.

Q And is it a fact that there was in fact a blood flow problem in the second in the fourth toe during immediately post operatively in the first surgery?

A Yes, there was.

Q And now you testified that there was some indication of hammertoes. Are all hammertoes necessarily candidates for surgery?

A No.

Q Is there an indication based on what you have seen in the evidence and the x-rays that these hammertoes were candidates for surgery?

A I don't think they were candidates for surgery.

Q When you talk about hammertoes what do you mean by hammertoes; could they run the gambit or what?

A Okay, you can have a flexible hammertoe -- a

hammertoe is the contracture of the toe where it's dorsiflexed at the MPJ plantar flexed at the proximal phalangeal joint. Some of these hammertoes can then be flexible that you can take the toe and straighten it out with your fingers or push up on the toe and it will straighten out if you push up on the metatarsal head. There can be rigid deformities that is where it stays fixed like that in that hammertoe position. Those are the two broad differentiations.

Q In this particular case do you have an opinion as to what kind of hammertoe she may or may not had?

A They appear not bony deformities that they weren't fixed. As a matter of fact there is very little evidence of hammer into those toes on x-ray. We don't see contracture of the metatarsal phalangeal joints, the joints back here in the joint and we don't see narrowing of the joint spaces in the metatarsal phalangeal joints or proximate phalangeal joins on the pre-op x-rays.

Q You discussed in your testimony mallet toes. How do they compare of differentiate from hammertoes?

A Mallet toes are a cousin or brother of a hammertoe. A hammertoe is a contracture if the MPJ at the proximal phalangeal joint while a mallet toe is contracture at the distal part of the toe. If you have both of those deformities together that is called a claw toe. Those are

three types of hammertoe deformities.

Q Do you know which toes were hammertoes and/or mallet toes on the left foot prior to the surgery?

A From my recollection it was the third and fourth toes appears to be contracted at the distant phalangeal joints which would make them mallet toes.

Q Was there any indication or any indication that the number 2 toe was either a hammertoe or in any way either hammer or mallet toe?

A No.

Q And yet that toe was operated on also?

A Yes.

Q And bone was taken out of that toe?

A That is correct, sir.

Q Now doctor, there are comments that Dr. Segal did a procedure again mentioned in Dr. Tesser's note.

Is that proof by itself that procedure and the note that's there that he was operating on her for hammertoes or that she needed hammertoe surgery from Dr. Segal?

A I am sorry, would you repeat that?

Q Just the note that Dr. Tesser has in the record, it's an indication of Dr. Segal's second operation, right?

A Yes, correct.

Q Just based on that note itself, that note by itself an indication or proof that Ms. Domizio had systemic

hammertoes that needed surgery back when Dr. Segal purportedly operated on her?

A No.

Q Now, Mr. Kornfeld mentioned the name of series of doctors who he said were illustrious or something to that effect?

MR. KORNFELD: That's what the witness said not what I said.

MR. BASSIN: He said you gave them all the credit in the world.

THE COURT: Whatever was said he mentioned a list of doctors.

Q If these doctors are hired by an attorney to come in here to testify for the defense would that necessarily mean that everything they said is the gospel and the only way that podiatry can be done?

MR. KORNFELD: Objection.

THE COURT: I'll allow it.

A No.

Q You have gone to lectures of illustrious podiatrists or podiatrists that are mentioned by defense attorneys asking cross-examination questions of plaintiff's witnesses and you have heard them lecture and have, therefore, been occasions where you disagree with whether they're saying during the lectures?

A Yes.

Q Nobody comes into court with a laurel on their hair and God's opinion --

MR. KORNFELD: Objection.

THE COURT: Sustain that objection.

Q Now if a patient comes into see a doctor and says that she has pain and numbness on her left foot what should the doctor do to find out what is wrong with that patient; should he do tests?

MR. KORNFELD: Objection, beyond the scope.

THE COURT: I'll allow it.

A Yes. It should be thoroughly investigated.

Q And was it done was it thoroughly investigated in this case and in an appropriate and accepted podiatric way?

A No.

Q Mr. Kornfeld asked you about the step wise procedure. He suggested to you that Dr. Doolan did the step wise procedure?

A Yes.

Q And you saw in his operative note that he did a step wise procedure in that first procedure?

A That's correct.

Q I want you to look a that second operative note that's in evidence and I would like you to ask you, any step wise procedure is noted in that particular surgery or did he

go immediately to cutting and removal of bone? That is, the December 16, 2003 operative report.

A I found it.

Q Does that report indicate that a step wise procedure was used?

A No.

Q Thank you very much doctor.

THE COURT: Anything?

MR. KORNFELD: I have some questions.

THE COURT: Sure.

RE CROSS EXAMINATION BY MR. KORNFELD:

Q Let me just touch upon few of the areas just questioned about.

First, doctor, based upon what you know in this case, all the records you reviewed and your training and experience, you would agree that Dr. Segal performed hammertoe surgery on the patient, correct?

A No. It's a tenotomy and capsulotomy.

Q To correct hammertoe deformities correct?

A I would have to assume that.

Q And that's your best guess based upon your training and experience and your knowledge about this patient reviewing all the records?

A Best guess, yes.

Q You would agree based upon the records of

Manhattan Footcare and the operative report on January 3rd of 2003 that the patient had a hammertoe on her left second toe correct?

A That's what's indicated in the operative report.

Q Indicated in the operative report as well as the records written by Dr. Tesser before the surgery, correct?

A That's correct.

Q So you would agree based upon your review of the records, two different doctors make a diagnosis that this patient had a hammertoe in her left second toe, correct?

A That's correct.

Q And that's the type of diagnosis that you told this jury that can be made by looking at the foot, correct?

A That's correct.

Q You talked about pain and numbness, meaning that the patient in your opinion based upon those two complaints you believe the patient may have or have had neuroma, correct?

A That's correct.

Q You would agree first as to pain, pain is consistent with a lot of different conditions of the foot, correct?

A Correct, sir.

Q Pain is consistent with someone who had surgery recently?

A It could be.

MR. BASSIN: Objection, your Honor. I didn't have anything in my redirect regarding the neuroma, nothing.

THE COURT: Nothing about the neuroma?

MR. KORNFELD: Judge, you actually questioned the witness.

MR. BASSIN: In the direct or direct case?

THE COURT: After he finished questions after cross.

Q So you would agree that pain is consistent with someone who had surgery nine weeks or little longer ago?

A That's a possibility.

Q So the mere fact that she has pain doesn't mean she has a neuroma, correct?

A That's correct.

Q Pain is also consistent with someone who has hammertoes right?

A Pain can be a symptom of a hammertoe.

Q In fact, on your website you wrote under hammertoes they may also feel pain in your toes or feet and have difficulty finding comfortable shoes?

A That's correct.

Q And this patient had pain and difficulty finding comfortable shoes, correct?

A Yes.

Q And those are both symptoms with someone with hammertoe deformities, right?

A Difficulty finding comfortable shoes, yes. But we don't know the location of pain. That was never stipulated.

Q If you don't know the location of the pain you can't tell this jury to reasonable degree of medical certainty that this patient had a neuroma in October of 2002 and January of 2003, isn't that correct?

MR. BASSIN: Objection to the question.

THE COURT: Overruled.

Q Is that correct, doctor, yes or no?

A No. Let me finish what I'm saying --

Q Doctor.

A No. Let me just --

MR. BASSIN: Would you let him answer the question?

MR. KORNFELD: It is a yes or no question.

THE COURT: It is a yes or no question. Counsel I'll allow you to go back on this topic.

Q Numbness, that is consistent with someone who recently had surgery?

A Possible, yes.

Q The mere fact that this patient had numbness when she presented to Dr. Tesser in 2002 that doesn't mean she had a neuroma, correct?

A It doesn't mean that she doesn't. Doesn't mean that she didn't.

Q Neuroma is more consistent with someone with a burning, tingling pain. Correct?

A I am sorry, ask that again please.

Q I will move on. You would agree that based upon everything you know, doctor, not just one thing but all the records and your training and experience that in October of 2002 patient had hammertoe deformities 2 through 5 or cousins of hammertoe as you described, correct?

A Correct.

Q And she had pain, correct?

A She had plantar pain, pain in the bottom of her foot.

Q Did she have pain, yes or no?

A Yes.

Q And you agree that she tried conservative treatment prior to the surgery in January of 2003?

A Yes.

Q And she still had pain, correct?

A Yes.

Q And there does come a time you would agree when a doctor should operate on a patient when the patient has pain not relieved by conservative treatment?

A Yes, that's correct.

Q You do it at least 200 times a year?
MR. BASSIN: Objection to what he does.
MR. KORNFELD: He testified to it.
THE COURT: I'll allow it.
A Yes. That's correct.
Q You mention Mr. Day's surgery at the end of questioning?
A Yes.
Q Quite simply, you would agree that the plaintiff testified his surgery was a complete failure?
A Yes, it failed.
Q Thank you.
THE COURT: Counsel?
RE CROSS EXAMINATION BY MR. TRESCH:
Q Doctor, I think you said it is up to the operating surgeon to make sure there is a proper pre operative work up of the patient; he has to make that determination before proceeding to surgery?
A Yes, sir.
Q In this case it was Dr. Doolan, correct?
A Yes.
Q And if Dr. Doolan felt that further vascular studies were needed to complete the pre-op work up he could have ordered more studies?
A Yes.

Q And you understand he testified in court this week that he examined the vascular status of the patient on two, three occasions including the morning of the surgery and did not find any reduced or delayed capillary refill?

A Yes. I understand that that was his testimony.

Q He could not confirm Dr. Tesser's finding of October 8th?

A Yes.

Q Thank you.

THE COURT: Counsel redirect?

MR. BASSIN: Yes, your Honor few questions.

REDIRECT EXAMINATION BY MR. BASSIN:

Q Doctor, again, the patient came in complaining of plantar pain, correct?

A Yes.

MR. KORNFELD: Your Honor, just object to the continuing leading questions. Every question has been leading.

THE COURT: Sustained as to leading in general but I'll allow you to get to the topic.

Q Where was the pain she was complaining of?

A Plantar, on the bottom of her foot.

Q Complaining of pains in her toes?

A No.

Q Did you read her deposition where she stated --

MR. KORNFELD: Objection, your Honor.

THE COURT: Sustained as to form.

Q Where did she state the pain was like in the bottom of her foot?

MR. KORNFELD: Objection.

THE COURT: I'll allow it.

MR. KORNFELD: That's not evidence your Honor.

THE COURT: I will sustain then.

Q Did you hear any -- I want you to assume that she testified on Monday that she had a sharp pain in the bottom of her foot.

MR. KORNFELD: Objection.

THE COURT: Jurors, it's your recollection that shows whether or not she in fact testified to that but I'll allow the hypothetical.

Q And Mr. Kornfeld talked about numbness and pain, correct?

A Yes.

Q With that information would it have been appropriate, acceptable podiatric care to do further testing to find out exactly what that meant?

A Yes.

Q Did they do that in this case?

A No.

Q Did anything in the records that they wrote

specify where the pain was in her foot?

A No.

Q And did anything in those records show that they did further testing to find out where the pain was and what kind of pain was?

A No.

Q Is it acceptable would it be appropriate podiatric practice before you operated on somebody to find out exactly where the pain was and what was the cause of the pain and not make a guess?

A Yes.

Q Thank you.

THE COURT: Counsel?

MR. KORNFELD: Thank you.

RE CROSS EXAMINATION BY MR. KORNFELD:

Q Do you think Dr. Doolan just guessed?

A No, I don't.

Q By the way, you would agree doctor, you were asked to assume the plaintiff testified she had sharp pain. Assume she didn't testify as to that, okay?

A Okay.

Q That would change your answer wouldn't it?

A Yes.

Q Thank you. No further questions.

THE COURT: Counsel anything?

MR. TRESCH: No questions.

THE COURT: Thank you very much.

(Witness exiting).

THE COURT: Okay jurors we're all done for the morning see you back at 2:00.

(Whereupon, luncheon recess taken and afternoon session taken by Official Court Reporter, Celena Edwards)