

Dr. Mills - Defendants - Direct

1 E D W A R D M I L L S, M.D., a witness called by the
2 Defendants, after having been first duly sworn by the Clerk
3 of the Court, took the witness stand and testified as
4 follows:

5 COURT CLERK: Thank you. Have a seat, please.

6 Doctor, please state your name and your business
7 office address for the Court.

8 THE WITNESS: Edward L. Mills, MD, 833 Northern
9 Boulevard, Suite 220, Great Neck, New York, 11021.

10 COURT CLERK: Thank you.

11 THE COURT: You may inquire.

12 MR. WYNNE: Thank you, your Honor.

13 DIRECT EXAMINATION

14 BY MR. WYNNE:

15 Q Good afternoon, Dr. Mills.

16 Doctor, do you have a specialty, special area of
17 practice?

18 A Yes.

19 Q What is that?

20 A Orthopedic surgery.

21 Q And can you briefly give the jury an overview of your
22 educational and professional history?

23 A Yes. After college, I graduated from medical school in
24 1994. I went on to do a general surgery internship and an
25 orthopedic residency. I spent an extra year subspecializing

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1 within orthopedic surgery and then I went into practice in
2 orthopedic surgery. I have a practice, surgical practice, and I
3 also perform independent medical examinations from orthopedic
4 surgery standpoint.

5 Q And are you board certified in the field of orthopedic
6 surgery?

7 A Yes.

8 Q Now, Doctor, were you asked some time ago to perform an
9 independent medical examination of Tiffany Halsey on behalf of
10 the New York City Transit Authority?

11 A Yes.

12 Q And did you do that?

13 A Yes.

14 Q And do you recall when you did that?

15 A I did that December 11th, 2009.

16 Q And I forgot to mention, please feel free, if you have
17 notes you'd like to refer to, to use them.

18 And can you tell us what that -- well, before we get to
19 that, can you tell us, before you conducted the examination, did
20 you review any medical records?

21 A Yes.

22 Q Now, there's been testimony that there was a lumbar
23 surgery to Ms. Mills' [sic] spine. Did you have any records for
24 that surgery when you performed the examination?

25 A I did not have the operative report for the lumbar

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1 spine surgery at the time of the examination.

2 Q Was it necessary in order for you to perform your
3 surgery to have those records?

4 MR. GERSHON: Objection. Leading.

5 THE COURT: I'll allow it. Rise when you object.

6 You may answer.

7 A The operative report was not necessary in order for me
8 to do my examination.

9 Q What was the purpose of your examination? What were
10 you trying to find out?

11 A My -- the purpose of my examination was to give my
12 independent opinion on the nature of the case including the
13 history, physical examination, any pertinent diagnostic studies,
14 and then give an overall opinion on what was happening with the
15 case.

16 Q And specifically, what parts of her body did your
17 examination involve?

18 A I examined the lumbar spine, the right shoulder, and
19 the right elbow.

20 Q And can you give us a brief overview of what those
21 actual physical examinations consist of?

22 A In general, the examination consists of range of motion
23 testing, strength testing, and other specific tests to a
24 particular joint or body part.

25 Q And did you go through range of motion tests for each

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1 of the parts of the body that you just mentioned?

2 A Yes.

3 Q And did you reach certain findings?

4 A Yes.

5 Q Can you tell us with regard to the plaintiff's right
6 shoulder what you did and what you found?

7 A Upon examination of the right shoulder, there were
8 signs of surgical scars with no signs of infection, there was
9 full range of motion, there was good rotator cuff strength,
10 there was a negative impingement sign, and no tenderness to
11 palpation.

12 Q When you say "negative impingement sign," could you
13 tell the jury what you mean by that?

14 A Yes. An impingement sign is essentially lifting the
15 arm above the head and the patient or claimant reports pain in a
16 specific area that can correlate with rotator cuff disease.

17 Q And in this case, it was negative?

18 A Yes.

19 Q Which means that she was able to do that without any
20 reported pain?

21 A Yes.

22 Q And with regard to the right elbow, can you tell us
23 what you did and what you found?

24 A Again, there were signs of surgical scars, the range of
25 motion was mildly decreased with flexion but had full extension

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1 and full pronation and supination of the forearm, which is
2 basically rotating the forearm, there was mild decreased
3 strength, but there was no tenderness to palpation.

4 Q And you used that term before and I forgot to ask you,
5 what does tenderness to palpation mean?

6 A Essentially, tenderness to palpation is literally
7 taking something like your hand and palpating a specific area
8 and asking the examinee if they have pain.

9 Q And in this particular case, what was Ms. Halsey's
10 response?

11 A That there was no pain or tenderness.

12 Q And then did you perform an examination and reach a
13 conclusion with regard to her lumbar spine?

14 A Yes.

15 Q And can you tell us what that consisted of and what
16 your conclusions were?

17 A Again, there were signs of surgery without any signs of
18 infection. There was mild decreased motion with complaints of
19 pain with motion, there was mild tenderness to palpation,
20 neurologically, there was good muscle strength, sensation was
21 intact, and there were negative straight leg raises which is a
22 test for irritation of nerves in the back.

23 Q And by saying negative, you mean that there was no
24 indication that there was irritation of those nerves?

25 A Correct.

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1 Q Now, you mentioned that there was mild reduction in
2 range of motion. In your opinion, were any of these reductions
3 in range of motion --

4 THE COURT: A little early. Okay. Stand in
5 recess for fire drill.

6 THE COURT OFFICER: All rise.

7 Jury exiting.

8 (Whereupon, the jury exited the courtroom.)

9 (Whereupon, a recess was taken.)

10 THE COURT: You may be seated. Let's bring them
11 in.

12 THE COURT OFFICER: All rise.

13 Jury entering.

14 (Whereupon, the jury entered the courtroom.)

15 THE COURT: Good afternoon again, jurors. You may
16 be seated. Everyone may be seated.

17 Mr. Wynne, do you remember the question you last
18 asked him?

19 MR. WYNNE: Yes, I do, your Honor.

20 THE COURT: Okay. You may continue.

21 Q Doctor, before I finish my last question, did you and I
22 speak at all during this rather inopportune fire drill we just
23 had?

24 A No.

25 Q Now, you made mention to slight reduction in range of

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Dr. Mills - Defendants - Cross

1 motion for the back and right elbow. In your opinion to a
2 reasonable degree of medical certainty, are the reductions that
3 you found significant such that they would compromise someone's
4 ability to perform their daily functions?

5 A No.

6 Q And did you reach a prognosis with regard to permanency
7 for the lumbar spine?

8 A Yes.

9 Q What was that prognosis?

10 A That permanency would not be expected for the back,
11 right shoulder, or right elbow.

12 Q Thank you, Doctor.

13 THE COURT: Cross-examination.

14 CROSS-EXAMINATION

15 BY MR. GERSHON:

16 Q Good afternoon, Dr. Mills.

17 A Good afternoon.

18 Q Doctor, do you know Dr. Merchant?

19 A Yes.

20 Q He works at the same place as you?

21 A He works at the place where I do independent medical
22 exams, yes.

23 Q He works for the same company?

24 A I don't know specifically what company -- there's a
25 company called All Borough Medical that is a vendor for

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1 independent medical exams. I don't know who he works for.

2 Q Okay, but -- okay.

3 Now, you work out of the same location, right? Or at
4 least on -- you did this exam on December 11th, 2009, correct?

5 A Yes.

6 Q And that would be the same day that Dr. Merchant did
7 his exam? Your exam was done at the same location, 117-12
8 Myrtle Avenue, Richmond Hill, New York?

9 A That's where I did my exam, yes.

10 Q Okay. Now, your office -- that's not your office,
11 right? That's where you do these independent medical exams?

12 A Yes.

13 Q Okay. And do you know these facilities that --
14 withdrawn.

15 Do you know these companies that set up the physicals
16 in certain cases? Do you have your name listed with these
17 companies?

18 A I don't know, to be honest, the exact process. All I
19 know is that this company, All Borough Medical, schedules exams
20 for me to see.

21 Q Okay. So All Borough contacts you, your report,
22 though, went to an entity, not the Transit Authority, went to an
23 entity called Aims Enterprises?

24 A Correct.

25 Q Do you know who Aims Enterprises is?

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1 A I don't know who -- specifically who Aims Enterprises
2 is.

3 Q Do you know why you didn't send your report to the
4 Transit Authority?

5 A No.

6 Q Now, do you recall approximately how many of these --
7 do you do these exams just one time a week also?

8 A It varies.

9 Q Okay. At least one time a week?

10 A No, not necessarily. I would say on average one to two
11 times a week.

12 Q Okay. And when you would do the exams, how many would
13 you do during the course of a day in one particular spot?

14 A Somewhere between 20 and 25 exams.

15 Q A day?

16 A Yes.

17 Q So but for -- that would be the general average,
18 correct?

19 A Approximately, yes.

20 Q So it would be safe to say on the same day you did an
21 examination of Tiffany Halsey, you probably were doing at least
22 20 to 25 other examinations that day, right?

23 A On average, correct.

24 Q Okay. Do you recall approximately how long the
25 examination was of Tiffany Halsey or how long your examinations

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Dr. Mills - Defendants - Cross

1 are generally?

2 A I don't recall specifically. In general, they're
3 approximately 10 to 15 minutes for the exam.

4 Q 10 to 15 minutes.

5 Okay. Now, Doctor, counsel asked you a question
6 earlier about an operative report and you said you didn't need
7 to see it for your purposes, or something along those lines, to
8 paraphrase, right?

9 A I believe I said I did not need to see it to perform an
10 examination, yes.

11 Q Okay. Okay. Then I misheard you, but I'm gonna get
12 back to that in a second.

13 You do -- if you do 20 -- for those medical exams, if
14 you do 25 a day on a two a week, it would be about 50 exams a
15 week -- a day -- a week?

16 A Correct.

17 Q What do you get paid for that?

18 A It varies.

19 Q What's the low and what's the high?

20 A Approximately between 75 to \$150 per exam.

21 Q 150 per exam. Okay. So to keep it simple, let's
22 figure on the average 100. Fair enough? It's actually lower
23 than that, so that's 100, and at 50 exams a week on a
24 two-week -- on a two-week -- I mean a two-day week, that's --
25 you're making \$5,000 for that week, just for that week? And we

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1 could do the math, so I'm not going to belabor the point.

2 Now, in addition to the exams that you do, you also
3 come to court to testify, correct?

4 A Yes.

5 Q And how often do you testify?

6 A Rarely.

7 Q Okay. Ballpark?

8 A I think I've testified two other occasions.

9 Q Okay. So basically, when you're doing this work, the
10 cases that you do, these independent evaluations, for you
11 anyway, they don't get to court, correct?

12 A Correct.

13 Q Okay. And would you say -- would it be safe to say
14 that predominantly, all of those exams are on behalf of
15 defendants, for example, like Transit Authority or other
16 defendants in lawsuits?

17 A Yes.

18 Q And would you say approximately on an average basis,
19 would it be safe to say that you're probably in the 90 to 95
20 percent range for defendants?

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

22 Q You do these exams for -- you do all these exams, and
23 you said they're predominantly defendants. Would it be safe to
24 say it's almost close to a hundred percent for defendants?

25 A The independent medical exams that I perform --

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Dr. Mills - Defendants - Cross

1 Q Yes.

2 A -- are almost a hundred percent for defendants.

3 Q For defendants. Okay.

4 Now, so, Doctor, you work -- you do this work for the
5 defendant, assuming you do these twice a week at \$5,000 per week
6 on a two-day a week, when you're doing two-day weeks of these
7 examinations, would it be safe to say that you get over -- you
8 get paid over \$250,000 to do these exams, correct?

9 A If it's done every week like that, yes.

10 Q Okay. So we'll figure from there, I mean, I didn't go
11 to 150, I used 100, so I went a little lower than your usual --
12 than your highest asking price, but we're talking 250, so let's
13 say 150 grand, somewhere 150 to 250 grand from doing a hundred
14 percent defendant's work, right?

15 A Correct.

16 Q Okay. Now, let's go into -- you did a -- you did a 10-
17 to 15-minute exam, right?

18 A I don't recall specifically. Some vary. On average,
19 they're 10 to 15 minutes.

20 Q Any of them shorter?

21 A Rarely.

22 Q What's the longest one you did?

23 A I would say close to an hour.

24 Q Do you have any indication here that it was an hour
25 here?

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1 A I don't recall.

2 Q Okay. But you have no -- you never go to a location
3 like this Richmond Hill location and then just do like one exam;
4 it's always people coming, they know you're there, and you're
5 seeing about 20 a pop, right?

6 A Correct.

7 Q Now, do you work the full day or is it half a day? How
8 does that work? What were your hours?

9 A It's usually afternoon into evening.

10 Q So afternoon starting when?

11 A Afternoon around 2 o'clock on average.

12 Q 2 o'clock and evening ending when?

13 A They can end -- it could be five, six, seven hours,
14 depending on how long it takes.

15 Q So 2 o'clock, you're saying sometimes you work till
16 8 o'clock?

17 A Easily.

18 Q Okay. All right. And during that time -- that's when
19 you see the 20 to 25 patients, I got ya.

20 Okay. Now, Doctor, you didn't need the record,
21 according to your testimony, to perform an exam, but since your
22 only connection with this case is one visit by Miss Halsey to
23 you for however long it was, would you agree that in order to
24 make an independent -- accurate independent medical evaluation,
25 it would be important to see whatever medical records that you

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1 could?

2 A Not necessarily.

3 Q Okay. So are you saying that if there are medical
4 records that are available, you wouldn't want to see them if
5 it's -- you don't consider it important to see them just to see
6 what they say or don't say?

7 A I -- I didn't say they're not important. I said it's
8 not necessary to have them and give an opinion.

9 Q Okay. So let's start with -- let's start with one
10 record, Jamaica Dedicated.

11 Did you ever look at that record before giving -- doing
12 your report?

13 A Which record?

14 Q Jamaica Dedicated. That's the physical therapy place
15 that she was treating for 15 months.

16 A I don't recall.

17 Q Well, you say you don't recall or no?

18 A I don't recall if that was --

19 Q Okay. Well, you have your report in front of you,
20 right?

21 A Yes.

22 Q And your report says, it's actually in bold letters,
23 "review of available records," so why don't you just read
24 through it and tell the jury whether or not anywhere in that
25 report you wrote that you reviewed the records from Jamaica

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1 Medical.

2 A They're not specifically listed here, so unless they're
3 listed in one of the other records that are listed, I do not
4 believe I reviewed them.

5 Q Okay. Well, just so we don't have to have any
6 questions, you can run it down one-by-one and you tell me which
7 ones you think might be Jamaica Dedicated Medical and I'll tell
8 you if it was or wasn't. How's that?

9 MR. WYNNE: Objection.

10 THE COURT: Sustained.

11 Q Are there any that you think might be? Should I go
12 down the list with you?

13 A I don't recall.

14 Q Okay. If I told you that none of these records were
15 Jamaica Dedicated, would you believe me?

16 MR. WYNNE: Objection.

17 A Yes.

18 THE COURT: I'll allow it -- sustained.

19 Sustained.

20 Q Okay. So let's talk about the MRIs. Now, you reviewed
21 the MRI reports, correct?

22 A Yes.

23 Q And you gave an opinion today about her prognosis,
24 correct? You said you actually said they're not permanent,
25 right?

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Dr. Mills - Defendants - Cross

1 A I said that at the time of my exam, permanency would
2 not be expected.

3 Q Okay. Doctor, did you at any time ever review the MRI
4 films of the right elbow?

5 A I don't recall.

6 Q Well, Doctor, take a look. You say you don't recall.
7 "Review of available medical records," and I'll call your
8 attention to number 15 where it says MRI report of the right
9 elbow. Is there anything in that document that indicates that
10 you reviewed the MRI film?

11 A No, but it would not be listed there. If -- if the
12 claimant brings the films, sometimes they're reviewed at the
13 time of the examination.

14 Q Is there anywhere in your report that you indicate
15 films? Yes or no?

16 A No.

17 Q Okay. And you actually specify MRI report. I would
18 venture a guess that if you reviewed the films, you would put
19 MRI report and films, would you not?

20 A Not necessarily.

21 Q So you don't have an independent medical evaluation --
22 an independent -- an independent recollection of this exam,
23 right?

24 A Correct.

25 Q And would it be safe to say with all these exams you

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Dr. Mills - Defendants - Cross

1 do, however many, 50 a week, you don't have an independent
2 recollection of basically anything when it comes to this stuff,
3 right?

4 A Correct.

5 Q So you have to rely on the report you do in case these
6 are one of these exceptional times when you come to court,
7 right?

8 A Correct.

9 Q Right?

10 A Correct.

11 Q So wouldn't it be safe to say that if, at the very
12 least, if you reviewed a film, it would be good practice to have
13 it in your report? This way, you could come to court, you don't
14 have to say, "I don't recall," you could actually say, "Yeah, I
15 looked at the film definitively because I wrote 'film',"
16 correct?

17 A I'm not sure what the question was.

18 Q Okay. There's nothing in there that says "film," does
19 it, Doctor --

20 MR. WYNNE: Objection.

21 Q -- as far as the right elbow, correct?

22 THE COURT: Sustained.

23 Q Okay. Let's take a look at the right shoulder. Is
24 there anything in that document -- in your report, did you ever
25 review an MRI film of the right shoulder?

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1 A It's gonna be the same answer. I don't recall.

2 Q You don't recall.

3 Once again, I'll call your attention to number 16 and
4 it says "MRI report of the right shoulder." Doesn't say a word
5 about films, does it?

6 A That's correct.

7 Q And how about the MRI film of the lumbar spine of
8 August 6, 2008? Did you ever review that film?

9 A I don't recall.

10 Q Okay. But you have a report, once again, and there's
11 nothing about -- any mention in that number 17 about your
12 reviewing anything other than reading the report, correct?

13 A That's correct.

14 Q Okay. And, in fact, in all of your records that you
15 mention from number 1 to number 17, isn't it true that the word
16 film doesn't even come up once?

17 A If that's what you say. I'd have to review everything,
18 but --

19 Q Please do. It's your report, not mine.

20 A I do not see the word film listed in here.

21 Q Okay. Doctor, from any time prior to you doing your
22 report, did you ever review the operative report for my client's
23 lumbar spine?

24 A I don't recall.

25 Q You don't recall? Okay.

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Dr. Mills - Defendants - Cross

1 Well, Doctor, is it in your -- is it in your available
2 records? Does it state anywhere in your available records that
3 you reviewed the operative report of her lumbar surgery?

4 A No.

5 Q Now, that's something you would list if there was a
6 surgical report that you would've reviewed, right?

7 A Correct.

8 Q In fact, Doctor, you actually put on number 2, you
9 reviewed the operative report of March 6, 2009 to her bicep --
10 triceps tendon, right?

11 A That's correct.

12 Q And, in fact, Doctor, it was -- you also said -- wrote
13 in there that you reviewed the operative report from -- from
14 3/6 -- I'm sorry, from 10/7/08 with respect to the surgery of
15 the right shoulder, correct?

16 A Correct.

17 Q So, Doctor, not being able to recall could -- can we
18 draw the conclusion then, would it be safe that based on the
19 fact that you did list the surgeries you did review and that the
20 lumbar surgery is not listed in your report, would it be safe to
21 say that you didn't review the report of her lumbar spinal
22 surgery at any time before you rendered this report?

23 A Yes.

24 Q Okay. And, Doctor, the admission to that -- she had a
25 five-day admission to Winthrop Hospital during that time. Did

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Dr. Mills - Defendants - Cross

1 you review that?

2 A I don't believe so.

3 Q Okay. And, Doctor, have you ever reviewed the
4 operative report of her lumbar spine?

5 A No, not that I know of.

6 Q Okay. Now, did you know there was a surgery to her
7 back?

8 A Yes.

9 Q And did you ever ask anybody, like, "Guys, I'm -- there
10 is a surgery to the back. I'm the orthopedic surgeon on behalf
11 of the Transit Authority coming here to render an independent
12 medical evaluation," did you say, "Come on, give me the goods.
13 Give me an op -- give me the operative report?"

14 A I don't recall.

15 Q Did you -- withdrawn.

16 Do you even know what kind of surgery she had?

17 A I don't know specifically what type of spine surgery or
18 lumbar surgery she had.

19 Q Do you know what they did with the facet joints in the
20 surgery?

21 A No.

22 Q Do you know what they did with the disks, if anything,
23 in the surgery?

24 A No.

25 Q How about the lamina?

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Dr. Mills - Defendants - Cross

1 A No.

2 Q How about the foramina?

3 A No.

4 Q Doctor, it would be safe to say you don't really know
5 very much at all about what was done on that surgery date,
6 correct?

7 A Correct.

8 Q Okay. Now, you do know, though, that her -- it was a
9 fusion, Doctor, just so you got -- I'll tell you what it was.
10 It was a fusion and it's a pretty -- well, withdrawn.

11 Okay. Okay. Now, your exams -- let's work in reverse.
12 You did a shoulder exam and you found that normal, right?

13 A Yes.

14 Q Now, then you did a -- did an examination of the right
15 elbow, correct?

16 A Correct.

17 Q All right. Now, I believe on that there were a couple
18 of normal findings, but let's go in normal findings.

19 You said supination -- supination is this, right? Is
20 this -- what is supination?

21 A Rotating the forearm palm up, yes.

22 Q Okay. So you said, isn't it true -- first of all, you
23 said she was 80 degrees out of 80 degrees, correct, and that was
24 normal, correct?

25 A Correct.

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Dr. Mills - Defendants - Cross

1 Q Isn't it true that supination of the elbow, actually,
2 normal is 90 degrees?

3 A No.

4 Q That's not true?

5 A There are variations on what's considered normal.

6 Q Okay. All right. Do some people consider 90 degrees
7 normal?

8 A Yes.

9 Q How about pronation? Do some people -- is 90 degrees
10 on pronation normal?

11 A Possibly.

12 Q Could they vary five degrees, 15 degrees? Is it random
13 with every doctor?

14 A I don't know how much they vary, but there are numerous
15 variations documented for normal ranges of motion.

16 Q Okay. So let's look at -- let's look at flexion. You
17 indicated that flexion was 130 degrees, correct?

18 A Correct.

19 Q And by the way, how did you measure that? Did you do
20 it by eye?

21 A I don't recall.

22 Q Okay. So there is a tool that you can use to measure
23 range of motion, right?

24 A Yes.

25 Q Goniometer?

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1 A Correct.

2 Q We discussed a little of that with the doctor this
3 morning, but is there anything in your report that indicated
4 range of motion of the right elbow, forearm was 130 degrees as
5 measured by a goniometer?

6 A No.

7 Q If you used a goniometer, and since you have no
8 independent recollection of any of these exams short of your
9 report, wouldn't you wanna put in, "Hey, I measured this by
10 goniometer?"

11 A I don't routinely use a goniometer.

12 Q Isn't this a device, though, that gives you actual
13 measurements down to the degree?

14 A It can possibly give you -- it can give you a number
15 down to a degree, but the accuracy of that device is in
16 question.

17 Q Okay. Well, it can give you a number down to the
18 degree, and when we're talking about degrees, we're talking
19 about numbers, right? We're not talking about letters, right?

20 A We're talking about numbers, correct.

21 Q Now, it's interesting, though, because about five
22 minutes ago, I seem to recall you saying that you didn't recall
23 whether or not you did or did not use a goniometer, but then a
24 couple of questions later, you said -- I think you said "I don't
25 usually use one?"

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Dr. Mills - Defendants - Cross

1 A That's correct.

2 Q So it would be safe to say the chances are you didn't
3 use one here?

4 A There is a good chance I did not use one.

5 Q Good chance you didn't use one. Okay.

6 And by the way, when you're doing these measurements,
7 did you ever measure it against her left arm?

8 A I don't recall.

9 Q Would you agree that sometimes doctors measure the
10 injured arm against the non-injured arm because you get a good
11 read on what's normal for that person?

12 A That's an option.

13 Q Did you exercise that option?

14 A I don't recall.

15 Q Is there anything in your report -- please take a
16 look -- is there anything in your report that indicates that you
17 ever measured the opposite arm or the left arm?

18 A No.

19 Q If you measured the left arm, wouldn't you have put the
20 measurements in?

21 A Not necessarily.

22 Q So -- wait a second. So you're saying that you're
23 doing range of motions by eye of her right elbow and forearm and
24 that you don't know whether or not you did or did not measure
25 the left, but if you measured the left, you wouldn't put it down

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1 in your report so then you can say, hey, wait a second, flexion
2 was this amount of degrees of the healthy arm and it was this
3 amount of degrees of the unhealthy arm? You wouldn't put that
4 in your report?

5 A Not necessarily.

6 Q Don't you think that would be important?

7 A Not necessarily.

8 Q Okay, Doctor.

9 Okay. Strength. Strength was decreased, right, in
10 that arm, correct?

11 A Strength was mildly decreased to the elbow.

12 Q To the elbow. Okay? Strength was decreased, correct?

13 A Mildly, yes.

14 Q Mildly. Okay.

15 Let's go to the lumbar spine, Doctor, and I believe you
16 asked -- you were asked on direct, these minor range of motions,
17 they weren't significant, let's start with -- let's start
18 with -- sorry. Let's start with flexion, Doctor.

19 You said on this exam, by the way, same thing with
20 this, you probably didn't use a goniometer?

21 A Most likely not. I don't --

22 Q Okay. Now, on your test of flexion, you found that her
23 range of motion was 65 degrees, correct?

24 A Correct.

25 Q And you said in your report of flexion, that it was

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Dr. Mills - Defendants - Cross

1 normal? Normal was 75 degrees, correct?

2 A Correct.

3 Q Okay. So just on those numbers alone, that would be a
4 14 percent limitation on flexion of her lumbar spine, correct?

5 A If that's what the math is, that's correct.

6 Q Okay. Now, Doctor, I had -- there was testimony this
7 morning that there was another doctor who said normal range of
8 motion on flexion of the lumbar spine, and I underlined it so
9 we'd all remember, he said it was 90 degrees. Would you
10 disagree with that?

11 A As I said, there are multiple normal ranges of motion
12 that are documented in the literature.

13 Q So are you saying that the variation of normal could
14 extend to 15 degrees?

15 A Absolutely.

16 Q Okay. Well, Doctor, would it be safe to say if we went
17 according to the doctor that testified this morning on behalf of
18 Transit Authority and normal was 90 degrees, that would mean
19 that Tiffany Halsey with respect to flexion of the lumbar spine
20 had a limitation of 28 percent, would you agree with that?

21 MR. WYNNE: Objection.

22 THE COURT: I'll allow it.

23 Q Would you agree with that?

24 A If you use those numbers and if that's the correct
25 math, I would agree with it.

km

Dr. Mills - Defendants - Cross

1 Q So whether we use Dr. Merchant's numbers of 90 degrees,
2 of 28 percent or flexion of -- your -- your measurements of 14
3 percent, we're still talking about a limitation on flexion,
4 correct?

5 A Yes.

6 Q Now, Doctor, let's talk about extension. You said
7 extension, normal extension, I mean, not normal extension, you
8 said that extension measured to 10 degrees, correct?

9 A Correct.

10 Q What is extension, Doctor? Show us what extension is.

11 A Extension is if someone is standing, if you lean
12 forward, it's flexion, if you lean backwards, it's extension.

13 Q Thank you.

14 And extension, you said on your -- based on your exam,
15 that Tiffany had extension of 10 degrees, correct?

16 A That's correct.

17 Q Okay. And you said that normal was 20 degrees,
18 correct?

19 A That's correct.

20 Q Which means that even on your numbers, Tiffany had a
21 50 percent reduction of range of motion of extension of her
22 lumbar spine, at least on that examination, correct, Doctor?

23 A Correct.

24 Q Wouldn't you consider 50 percent significant?

25 A Not necessarily.

km

Dr. Mills - Defendants - Cross

1 Q 50 percent limited range of motion is not significant?

2 A It depends.

3 Q Okay. But once again, Doctor, there was a doctor on
4 behalf of the Transit Authority who testified this morning, and
5 once again, I underlined and circled, who said that normal
6 extension was not 20 degrees, but it was actually 30 degrees.
7 Would you agree with that or is that doctor wrong?

8 MR. WYNNE: Objection.

9 THE COURT: Could I have a sidebar?

10 (Whereupon, an off-the-record conference was held
11 between the Court and counsel at the sidebar out of the
12 hearing of the jury.)

13 (Whereupon, the following occurred in open court:)

14 THE COURT: Sustained as to form. Rephrase your
15 question.

16 Q Doctor, I want you to assume that this morning,
17 Dr. Merchant, your associate, came in here and testified that
18 normal extension was not 20 degrees but 30 degrees. Do you
19 disagree with that? Yes or no?

20 A I disagree.

21 Q Okay. Are you aware of the fact that if Dr. Merchant
22 was right, Tiffany's range of motion would not have been reduced
23 in half by 50 percent, it would actually be 66 percent
24 limitation of her range of motion and extension? Are you aware
25 of that?

Dr. Mills - Defendants - Cross

1 A Yes.

2 Q Is 66 percent significant?

3 A Not necessarily.

4 Q When does it become significant, when someone is
5 frozen?

6 MR. WYNNE: Objection.

7 A No.

8 THE COURT: Objection sustained.

9 Q Okay. Right lateral bending, you said that Tiffany
10 measured 20 degrees right lateral bending, right?

11 A Correct.

12 Q And you said normal -- we'll just use your language.
13 You said normal was 30 degrees, right?

14 A Correct.

15 Q 33 percent limitation; significant, not significant?

16 A I would say not significant.

17 Q Not significant.

18 Okay. Left lateral bending, 20 percent -- 20 degrees
19 was the measurement. According to you, 30 degrees was normal.
20 Another 33 percent limitation. Again, not significant?

21 A Not significant.

22 Q Okay. Right rotation and left rotation, you tested
23 that, right?

24 A Yes.

25 Q Now, Dr. Merchant -- Dr. Merchant -- I want you to

km

Dr. Mills - Defendants - Cross

1 assume Dr. Merchant didn't test that and I want you to further
2 assume that Dr. Merchant said they don't even test rotation very
3 much anymore. Is that true? Do you agree with that statement?

4 A No.

5 Q No. Okay.

6 So he would be wrong if he said that, right?

7 A I'm not sure who doesn't test for rotation, whether
8 it's a specific entity, but rotation is tested for.

9 Q Okay. So if someone said they didn't test something
10 because doctors don't do it anymore, then that wouldn't be the
11 case, would it?

12 A I would disagree with that doctors don't test rotation
13 anymore.

14 Q As would I.

15 MR. WYNNE: Objection.

16 THE COURT: Sustained. Sustained.

17 Q Let's -- you tested rotation, so let's look at right
18 rotation. 20 degrees, correct?

19 A Yes.

20 Q And normal is 30 degrees, right?

21 A Yes.

22 Q Another 33 percent limitation, not significant, Doctor?

23 A I would say not significant.

24 Q Left rotation, 20 degrees, your measurement, 30 degrees
25 normal. Another 33 percent limitation. Not significant?

km

Dr. Mills - Defendants - Cross

1 A Correct.

2 Q Are these normal findings?

3 A They are slightly decreased findings.

4 Q Slightly decreased? 50 percent is slight?

5 A We're talking 10 degrees in every plane.

6 Q But it's based on what's normal?

7 A Correct.

8 Q So if it's based -- if normal is a certain number and
9 your degrees are half that, a 50 percent limitation is not
10 significant?

11 A I would say correct.

12 Q Are these normal findings?

13 A No.

14 Q Did she -- in fact, when you tested, were any of her
15 findings on range of motion normal?

16 A No.

17 Q As far as her back?

18 A No.

19 Q Now, do you know when -- what time of day you did this
20 exam?

21 A I don't recall.

22 Q You're aware -- I don't know if you're aware, in fact,
23 but this was actually -- this exam was done about two and a half
24 months after she had the lumbar surgery. Are you aware of that?

25 A Yes.

km

Dr. Mills - Defendants - Cross

1 Q Okay. So you do know the date of the lumbar surgery,
2 right?

3 A Yes.

4 Q All right. So you know something about the surgery,
5 you know there was a back surgery that was done in '09, right?

6 A Yes.

7 Q Okay. That's good.

8 So, Doctor, do you recall whether or not you did these
9 range of motion tests before or after Dr. Merchant got to see my
10 client on the very same day?

11 A I don't recall.

12 Q Would it surprise you if I told you on that very same
13 day, Dr. Merchant came in to testify and he said her range of
14 motions were completely normal? Would that surprise you?

15 A No.

16 MR. WYNNE: Objection.

17 MR. GERSHON: I'll rephrase the question.

18 THE COURT: Rephrase the question.

19 Q Doctor, I want you to assume that this morning,
20 Dr. Merchant came in and testified before this jury that on her
21 range of motion exam to Tiffany's lumbar spine, on the very same
22 date, at the very same location where you performed your tests,
23 his was completely normal and yours was completely abnormal.

24 MR. WYNNE: Objection.

25 Q Does that make sense to you?

km

Dr. Mills - Defendants - Cross

1 THE COURT: We'll assume that what you're
2 saying -- it will be up to the jury to decide whether what
3 you're saying is -- the assumption is correct.

4 You want a sidebar?

5 MR. WYNNE: Please.

6 THE COURT: Sidebar.

7 (Whereupon, an off-the-record conference was held
8 between the Court and counsel at the sidebar out of the
9 hearing of the jury.)

10 (Whereupon, the following occurred in open court:)

11 THE COURT: Objection overruled.

12 You may answer it if you remember it.

13 Could I have it read back also?

14 MR. GERSHON: If he doesn't remember, I could ask
15 it again. I remember.

16 Q Do you remember it, Doctor?

17 A If the question is does it surprise me -- is that what
18 the question was?

19 Q I'll just ask it again.

20 Doctor, on the very same day, at the very same
21 location, Tiffany saw both you and Dr. Merchant. You don't
22 remember who went first, whether you saw her first or
23 Dr. Merchant saw her first, but she saw one after the other, and
24 your findings, every finding, as you testified,
25 flexion/extension right lateral and left lateral bending, right

Dr. Mills - Defendants - Cross

1 rotation, left rotation was abnormal to one extent or another,
2 correct?

3 A Correct.

4 Q Dr. Merchant came in -- assuming Dr. Merchant came in
5 and testified this morning that every range of motion test he
6 did except for the rotation, which he didn't test, was normal,
7 does that coincide with your findings? Does that make sense to
8 you? Does that surprise you?

9 A Does it surprise me? No.

10 Q It doesn't surprise you. Okay.

11 Would it -- would it be surprising for someone who was
12 two and a half months post lumbar fusion with bone graft and
13 removal of disk -- would it surprise you that every range of
14 motion in that person's back was normal?

15 A It would not surprise me.

16 Q It would not surprise you.

17 So in addition -- so you put in your report that she
18 had complaints of pain -- it wasn't just range of motion, she
19 had complaints of pain in all ranges of motion, correct?

20 A Yes, correct.

21 Q And anything in your report that indicates that you
22 thought she was faking the pain?

23 A No.

24 Q Now, you also said -- so it wasn't just that she had
25 limited range of motion every time she tried to move; in a way,

km

Dr. Mills - Defendants - Cross

1 that was to get to the normal range of motion, she had pain,
2 correct?

3 A Correct.

4 Q So basically everywhere she moved, there was nowhere to
5 move her back where this woman didn't have pain, right?

6 A She had complaints of pain with motion, yes.

7 Q Okay. Now, in addition to the complaints of pain, you
8 also palpated certain things, you touched her as part of the
9 exam, right?

10 A Correct.

11 Q And when you touched her or you palpated her, you found
12 tenderness over the midline, correct?

13 A Correct.

14 Q What is the midline, Doctor?

15 A The midline is basically the spinal column.

16 Q Okay. That's not a normal finding either, is it?

17 A No.

18 Q Okay. And neither is pain on range of motion at every
19 level, is it?

20 A Not normal.

21 Q And in addition to that, you also found she had
22 tenderness not just over the midline, but over the bilateral
23 paraspinal muscles, correct?

24 A Correct.

25 Q And that's abnormal, isn't it?

km

1 A Correct.

2 Q So, Doctor, but your opinion was that her prognosis was
3 good, right? That was your opinion; prognosis good?

4 A Yes.

5 Q And your -- and your opinion was that permanence was
6 not expected, right?

7 A Correct.

8 Q So I just wanna understand, based on your own findings,
9 she has limited range of motion of flexion of her lumbar spine
10 with pain, extension of lumbar spine limited with pain, right
11 lateral bending of the lumbar spine limited with pain, lateral
12 bending -- left lateral bending of the spine -- of the lumbar
13 spine limited with pain, right rotation with pain and limited,
14 left rotation with pain and limited, all normal findings.
15 Tenderness over the midline and over the bilateral paraspinal
16 muscles, all abnormal findings and yet, you said that her
17 prognosis is good and her -- her -- and her -- and her injuries
18 were not permanent?

19 A I said her prognosis was good and permanency is not
20 expected.

21 Q Not expected.

22 Are you aware of the fact that she also had a lumbar
23 fusion at L4-L5?

24 A In addition to the surgery on September 25th, 2009? Is
25 that what you're asking?

Dr. Mills - Defendants - Cross

1 Q No. I'm talking about that surgery.

2 A You'll have to repeat the question.

3 Q Are you aware of the fact that she had lumbar fusion at
4 L4-L5 in September of 2009?

5 A I'm aware she had spine surgery and I believe you said
6 she had a fusion, so yes, I'm aware.

7 Q Okay. Well, let me you ask this. Are you familiar
8 with fusion?

9 A Yes.

10 Q Do you do any?

11 A I do not do spine surgery.

12 Q Okay. You still active in the operating room?

13 A Yes.

14 Q Do you ever do any spinal surgeries?

15 A In training, I've done multiple spinal surgeries, but
16 I'm not a spine surgeon in practice.

17 Q Okay. Are you aware of the fact, though, Doctor, that
18 when you do a fusion, by definition, one of the things you do is
19 remove the disk in between the two vertebrae?

20 A Yes.

21 Q Okay. Are you aware of the fact that then, whether or
22 not bone is taken out or not, which happened to be done in this
23 case, but that's for another day, we don't have to talk about
24 the specifics of the surgery with you, with respect to the --
25 with respect to the -- once the disk is taken out, are you aware

km

Dr. Mills - Defendants - Cross

1 that one way or another, whether it be with hardware or whether
2 it be with bone grafting, the two vertebrae are fused?

3 A Correct.

4 Q Okay. Would you also agree, Doctor, that the disk
5 doesn't make it -- make its way back in between the two
6 vertebrae?

7 A Unlikely, yes.

8 Q Unlikely? No, it's not unlikely, Doctor. Wouldn't you
9 agree it's medically impossible?

10 A Disk material can degenerate. I would not say it's
11 impossible. I would say it's unlikely.

12 Q Now, would this material regenerate, if it was taken
13 out, if there be no disk material to regenerate in a fusion?

14 A You're removing microscopic cells.

15 Q You're saying that in a fusion when the disk is
16 completely taken out and the two vertebrae are fused together
17 with bone graft, you're saying that somehow that disk where
18 there is no more can regenerate?

19 A Disk material can regenerate. I'm not saying it's
20 likely. It would happen in this case.

21 Q Okay. Doctor, you would disagree with me then if I
22 told you that was an absolute medical impossibility?

23 MR. WYNNE: Objection.

24 THE COURT: I'll allow it.

25 Q Would you disagree with me then if I told you that is

km

Dr. Mills - Defendants - Cross

1 fantasy, an absolute medical impossibility?

2 A That disk material can regenerate?

3 Q That disk material can regenerate after a fusion when
4 there is no disk material in between the two vertebrae. I'd be
5 wrong?

6 A Fusions can fail.

7 Q That's not what I'm talking about, Doctor. That's not
8 what I'm talking about.

9 I'm asking you, in a fusion, when the disk material has
10 been taken out and the bones are fused with bone graft, if I say
11 to you that regeneration of the disk at that point, since there
12 is no disk, is a medical impossibility, you would disagree with
13 that?

14 A I would not say -- if -- if the fusion is a successful
15 fusion, I would say it's highly unlikely to have regeneration of
16 the disk material.

17 Q By the way, don't they -- if a fusion is done right,
18 the whole idea about it is taking out the entire disk?

19 A If it's done correctly, yes.

20 Q Do you know -- you didn't look at the operative report,
21 so you don't know if this -- if this surgery was done up to your
22 standards, right?

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

24 Q Okay. Doctor, are you saying that the two vertebrae
25 being fused is not permanent?

km

Dr. Mills - Defendants - Cross

1 A Two vertebra being fused is most likely permanent
2 meaning the bones fuse.

3 Q Okay. So assuming this was a successful surgery,
4 Doctor, you'd agree that at the level of L4-L5, Tiffany Halsey's
5 injuries are permanent --

6 A It depends --

7 Q -- correct?

8 A -- on what you mean by injuries. If -- if you're
9 talking about a functional disability, I would say there is no
10 permanency expected.

11 Q What I'm asking you, Doctor, is whether or not it is
12 your opinion that the lumbar spine fusion at L4-L5 is a
13 permanent condition, assuming that it's done right.

14 A I'm not -- I'm not sure what you're asking. If you're
15 asking if the fusion's permanent, I would say yes.

16 THE COURT: Counsel, can I have a sidebar? You're
17 going to tell me -- okay. No need.

18 MR. GERSHON: Two minutes.

19 THE COURT: No need.

20 Q But yet, in your prognosis, you said permanency is not
21 expected, correct?

22 A With respect to her overall function and disability.

23 Q Okay. And you don't know how she's doing now, right?

24 A No.

25 Q All you know is all the abnormal findings she had on

km

Dr. Mills - Defendants - Redirect

1 that day, right?

2 A Correct.

3 Q Thanks. I have nothing further.

4 THE COURT: Any redirect?

5 MR. WYNNE: Yes, Judge, just briefly.

6 REDIRECT EXAMINATION

7 BY MR. WYNNE:

8 Q Doctor, the findings that you noted were two and a half
9 months after the lumbar surgery that the plaintiff had, correct?

10 A I'm sorry, I didn't hear the beginning.

11 Q The findings that you noted with regard to range of
12 motion in the lumbar spine were two and a half months after
13 Ms. Halsey had her surgery?

14 A Correct.

15 Q And are the -- the limitations that you found in range
16 of motion unusual for someone who's two and a half months post
17 lumbar surgery?

18 A No.

19 Q And just one more thing. With regard to the MRI films,
20 taking and reading MRI films is its own medical specialty, isn't
21 it?

22 A Correct.

23 Q And what do you call someone who does that?

24 A A radiologist.

25 Q And do other professionals, other doctors such as

km

Dr. Mills - Defendants - Recross

1 yourself who specify -- who work in a particular area of
2 medicine rely on the reports generated by radiologists as part
3 of their practice and in forming the medical conclusions?

4 MR. GERSHON: Objection.

5 THE COURT: I'll allow it.

6 A I would say in some cases, yes.

7 Q Thank you.

8 THE COURT: Okay.

9 MR. GERSHON: Couple more for recross.

10 RE CROSS-EXAMINATION

11 BY MR. GERSHON:

12 Q Doctor, you read MRI films? You have that ability,
13 right?

14 A Correct.

15 Q Okay. So and you've read MRI films before, right?

16 A Correct.

17 Q Okay. So and you've read MRI films that radiologists
18 read just to make sure they got it right, correct?

19 A Correct.

20 Q It's always good practice to read the MRI films
21 irrespective of whether or not a radiologist read them or not,
22 right, just to make sure you know what's there?

23 A It depends on the circumstances, what you're referring
24 to as good practice.

25 Q Well, are radiologists wrong sometimes?

km

Dr. Mills - Defendants - Recross

1 A They can be.

2 Q So if you're gonna go in, do surgery, give an opinion,
3 it's probably a good idea to look at the films so you could see
4 for yourself, right?

5 A I would say if I was the operating surgeon, I would
6 look at the films myself, if that's what you're talking about is
7 good practice, yes.

8 Q Okay. But not if you were just gonna come testify in a
9 court case, right?

10 A I review what's available to me.

11 Q Okay. And you don't ask for what's not available,
12 right?

13 A That's not accurate.

14 Q Okay. Well, you didn't ask for this here, right?

15 A I don't recall.

16 MR. WYNNE: Objection.

17 Q Just one more.

18 Doctor, counsel asked you two and a half -- two and a
19 half months post -- I'm gonna quote him -- two and a half months
20 post lumbar fusion, it's not -- it's not unusual to find someone
21 with limited range of motion, and you said it's not unusual,
22 correct?

23 A That's correct.

24 Q So let's look at the flip side of that. So if -- I
25 want you to assume that this morning, Dr. Merchant came in and

km

Dr. Mills - Defendants - Recross

1 said her range of motions were completely normal in the lumbar
2 spine. Then the other side of the coin, Doctor, wouldn't those
3 findings be unusual?

4 A Possibly.

5 THE COURT: Okay.

6 Q So I'm -- nothing further.

7 THE COURT: Okay. You may step down. You may
8 step down.

9 Okay. We've completed the testimony for today. I
10 told you we wouldn't go to 4:30, and I'm gonna ask you to
11 please be prompt, we'll start -- have you come back at
12 9:15. Someone had a difficulty, I won't say who, but
13 someone did come in a little late, so leave a little
14 earlier to make sure you come in on time, and I don't see
15 us working the entire morning, but I do see us working the
16 afternoon, as I mentioned, and we're on schedule. It looks
17 like the -- both sides will rest tomorrow afternoon and we
18 will have summation and charge on Monday morning.

19 Please don't discuss the case among yourselves,
20 and please try to be prompt tomorrow morning at 9:15.

21 THE COURT OFFICER: All rise.

22 Jurors exiting.

23 (Whereupon, the jury exited the courtroom.)

24 (Whereupon, the trial was adjourned to November 4,
25 2011.)

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