



APPEARANCES:

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On behalf of the Plaintiff;

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On behalf of the Defendant  
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On behalf of the Defendant  
William C. Miller.

ALSO PRESENT:

Tom Baker, Videotape Operator

1                    MALCOLM A. BRAHMS, M.D., of lawful age,  
2                    called by the Defendants for the purpose of  
3                    direct examination, as provided by the Rules of  
4                    Civil Procedure, being by me first duly sworn,  
5                    as hereinafter certified, deposed and said as  
6                    follows:

7                    DIRECT EXAMINATION OF MALCOLM A. BRAHMS, M.D.

8                    BY MR. BORLAND:

9                    Q.    Good evening, Dr. Brahms.

10                  A.    Good evening.

11                  Q.    Dr. Brahms, for the benefit of the jury would  
12                  you to state your full name, please?

13                  A.    Dr. Malcolm A. Brahms.

14                  Q.    And, Dr. Brahms, you are a duly licensed  
15                  physician and surgeon in the State of Ohio, is  
16                  that correct?

17                  A.    That's correct.

18                  Q.    And would you tell the jury about your  
19                  educational background beginning with your  
20                  undergraduate college or university experience?

21                  A.    Sure.   I'm a graduate of Ohio College of  
22                  Chiropody and graduate of Western Reserve  
23                  University Medical School, now known as Case  
24                  Western Reserve University Medical School.  
25                  Served a rotating internship at Cleveland City

1 Hospital, now known as Cleveland Metropolitan  
2 General Hospital. A year of rotating surgical  
3 internship at -- residency at that same  
4 institution. A year of orthopedic surgery at  
5 Mount Sinai medical school in Cleveland, Ohio.  
6 And two years at the Indiana University Medical  
7 Center in Indianapolis, Indiana.

8 Q. Doctor, I take it from the description of your  
9 educational background and experience that  
10 you're specializing in a particular branch of  
11 medicine, is that correct?

12 A. Yes. Orthopedic surgery.

13 Q. Would you tell the jury what the specialty of  
14 orthopedic surgery involves?

15 A. Orthopedic surgery is that branch of medicine  
16 that deals with the investigation, the  
17 preservation, and the restoration of the form  
18 and function of the musculoskeletal system by  
19 medical, surgical, and rehabilitative means.

20 Q. And, doctor, after your completion of  
21 postgraduate studies and training did you then  
22 engage in the full-time practice of your' medical  
23 specialty that is orthopedic surgery?

24 That is correct.

25 And you have been engaged full time and

1 continuously in the practice of orthopedic  
2 surgery since what year?

3 A. Since 1955.

4 Q. And, doctor, are you on the staff of any  
5 hospital or hospitals?

6 A. Yes. Mount Sinai Medical Center and Suburban  
7 Community Hospital.

8 Q. And have you taught at any medical schools?

9 A. I am on the staff at Case Western Reserve  
10 University Medical School Orthopedic Department.

11 Q. And do you belong to any professional societies  
12 or groups?

13 A. I do.

14 Q. And what are those?

15 A. Cleveland Academy of Medicine, Ohio State  
16 Medical Association, the American Medical  
17 Association. I am a fellow of the American  
18 College of Surgeons. I am a diplomat of the  
19 American Academy of Orthopedic Surgeons. I am a  
20 member of the American Academy of Orthopedic  
21 Surgeons for Sports Medicine. I am one of the  
22 founding members of the American Academy of  
23 Orthopedic Surgeons for the Foot and the Ankle.  
24 I belong to the Cleveland Orthopedic Club, to  
25 the Clinic Orthopedic Club, to the Mid America

1       Orthopedic Society, to the International Society  
2       of Orthopedics and Traumatologists, and **some**  
3       other minor groups as well.

4   Q.   Doctor, I heard you mention sports medicine;  
5       what, if any, special experience have you had  
6       with respect to sports medicine?

7   A.   I have been in the past the orthopedic  
8       consultant for the Cleveland Bulldogs, the  
9       Cleveland Xndians, and the Cleveland Browns.

10   Q.   Doctor, you indicated you are a diplomat of the  
11       American Board of Orthopedic Surgeons?

12   A.   That's correct.

13   Q.   Can you tell the jury what it means to be a  
14       diplomat of the American Board of Orthopedic  
15       Surgeons?

16   A.   That indicates that I have completed an **AMA**  
17       approved residency in orthopedic surgery and  
18       have passed the tests necessary to qualify being  
19       a member of that board.

20   Q.   Now, is this credential something over and above  
21       simply practicing the specialty of orthopedic  
22       surgery?

23   A.   Yes.   Certification for the board requires a  
24       completion of an AMA approved residency followed  
25       by a written and an oral examination, followed

1 by two years of the mandatory practice of  
2 orthopedic surgery, followed again by a written  
3 and an oral examination. Successful completion  
4 of those requirements entitles one to become  
5 certified in the field of orthopedic surgery.

6 Q. And is this certification something that is  
7 recognized beyond the borders of the State of  
a Ohio?

9 A. Oh, yes. It's not only national, but  
10 international as well.

11 Q. Doctor, have you had occasion to write any  
12 papers that have been published in various  
13 medical and surgical journals?

14 A. I have papers in the major and the minor  
15 journals and a chapter in two of the current  
16 orthopedic textbooks on the market.

17 Q. And, doctor, during the course of your practice  
18 as an orthopedic surgeon have you had occasion  
19 to observe and study and surgically treat  
20 injuries and deformities of the neck and the  
21 back?

22 A. Yes.

23 Q. Now, doctor, at the request of my colleague  
24 Patrick Roche did you examine an individual who  
25 is the plaintiff in this matter, specifically

1 Judy Hamlett?

2 A. I did.

3 Q. And, doctor, in the past have members of my law  
4 firm referred other individuals to you for  
5 examination and evaluation?

6 A. Yes.

7 Q. And is it also true, doctor, that for the time  
8 that you spend in connection with these  
9 examinations and to write the reports that we  
10 request of you and also on the occasions that  
11 you have occasion to give a deposition such as  
12 this evening that you charge for your time?

13 A. Yes, that's correct.

14 Q. And is it fair to say, doctor, that as a common  
15 practice for a doctor who does such an  
16 examination or gives a deposition for purposes  
17 of a trial or hearing to charge for their time  
18 in connection with that?

19 A. Yes, that's correct.

20 Q. And, doctor, would you tell us when it was that  
21 you had occasion to see Judy Hamlett?

22 A. I saw her for the first time on the 14th of June  
23 of 1989.

24 Q. Doctor, can you explain to the jury what a  
25 history is?



1 A. History is that which the patient tells the  
2 doctor when she comes or when they come for an  
3 examination. It is the reasons for coming, the  
4 why's, the wherefore's, the how's, et cetera.

5 Q. **And** can you tell the jury what an orthopedic  
6 examination entails?

7 A. An orthopedic examination includes not only a  
8 history but a physical examination of the  
9 musculoskeletal system.

10 Q. And at the time that you **saw** Judy Hamlett on  
11 June 14, 1989 did you obtain from her a history?

12 A. I did.

13 Q. And would you tell the jury what the history  
14 consisted of that Judy Hamlett gave you?

15 A. She told me that on the 9th of January of 1987  
16 that she was a front seat passenger in **a** truck  
17 which was involved in an automobile accident.

18 She was not wearing a seat belt. She said this  
19 occurred on Interstate 90.

20 MR. GOLDBERG: Let me make an  
21 objection, please, to the statement about **not**  
22 wearing a seat belt. I'll object to that **and**  
23 ask that it be stricken.

24 A. The truck in which she was riding was proceeding  
25 she said in a westbound direction in Elyria,

1 Ohio on what is known as the Black River  
2 Bridge. There was an automobile stopped in a  
3 cross-wise manner. The truck she was riding in  
4 slid into the automobile.

5 The patient reports that her head struck  
6 the defogger fan which is situated in the center  
7 on the top of the upper part of the windshield.  
8 She said that she hurt her back when she was  
9 thrown sideways. She said she struck the center  
10 metal bar in the area of the windshield. She  
11 recoiled landing on her **back** over what is known  
12 as "the doghouse".

13 The patient reported that she injured her  
14 left knee, **but** was not **able** to recall what part  
15 of the interior of the truck that she struck.  
16 Her left forearm was bruised. *She* denied  
17 unconsciousness, but stated that she was  
18 confused. **She** was taken **by** ambulance to the  
19 Elyria Memorial Hospital. She said that she was  
20 awake in the ambulance and at the **hospital**.

21 She was examined there. No **x-rays** were  
22 taken. An ace bandage was applied to her **left**  
23 knee. She was given some medication. There was  
24 no references given to her **for** follow-up  
25 treatment.

1           The following day she was seen by a  
2           Dr. Martin because of her head and her back  
3           pain. No X-rays were prescribed by him.

4           She said that she was seen by Dr. Yosowitz  
5           on the 1st of September of 1987. His  
6           examination included X-rays. A CT scan of the  
7           lumbar spine was also obtained. Medication was  
8           prescribed and physical therapy was prescribed.

9           She said that she was also seen for a  
10          second opinion by Dr. Gary Katz who she said,  
11          "Said the same thing that Dr. Yosowitz said."

12          This patient reported that she was working  
13          as a bartender at the time of the accident and  
14          lost one weekend of work. She also was employed  
15          as a truck driver which she started in 1981. At  
16          the time of this accident she reported that  
17          she was also working on Saturdays as a  
18          receptionist.

19          At the time of my examination in June of  
20          1989 she said that she had low back pain,  
21          occasionally headaches and she takes Tylenol for  
22          that. She said that her left knee no longer is  
23          symptomatic nor is her right forearm. Her  
24          principle difficulty is in her low back region.

25          She said she has difficulty lifting, for

1 example removing a roast from an oven. Lifting  
2 laundry or chairs aggravates her pain. Warm  
3 showers benefits her symptoms, principally the  
4 stiffness.

5 She has difficulty with intercourse.  
6 Coughing and sneezing aggravates her symptoms,  
7 however bowel movements do not. She's not  
8 troubled by walking. Long periods of sitting  
9 and standing aggravate her symptoms.

10 She said that she has difficulty getting up  
11 after she sits. Occasional kneeling and  
12 stooping aggravates her symptoms. Occasionally  
13 she's awakened by pain.

14 She said she has difficulty now bowling,  
15 horseback riding, and dancing, and that she is  
16 unable to do any aerobics. She said she does  
17 all the routine household duties and it's not  
18 necessary for her to do any gardening or lawn  
19 work or to shovel snow.

20 That was the history that she gave me.

21 Q. Now, doctor, did she mention to **you** that she had  
22 had migraine headaches in the past before this  
23 accident?

24 A. She did not tell me anything about migraine  
25 headaches.

1 Q. Doctor, did you then have occasion to examine  
2 this individual, Judy Hamlett?

3 A. I did.

4 Q. And would you tell us what your examination and  
5 findings consisted of?

6 A. Physical examination revealed that we're dealing  
7 with a **40** year old, **245** pound, 5 foot **9** and a  
8 half inch female. The examination showed that  
9 she had varicosities of her lower extremities.

10 The examination of her neck, the cervical  
11 spine revealed that **she** was able to bend her  
12 head forward which we call flexion, and backward  
13 which we call extension. Able to turn her head  
14 in both directions and to bend her head to  
15 either side within a normal range and without  
16 any evidence of muscle spasm.

17 Her shoulder motions were carried out to a  
18 normal range. Her reflexes found to be  
19 physiological, meaning normal. She demonstrated  
20 no evidence of any trapezius muscle soreness or  
21 any scapular angle tenderness.

22 She demonstrated no sensory **loss** to a  
23 pinprick. Her grip strength **was** eight and ten  
24 pounds per square inch bilaterally which is a  
25 normal grip strength. She demonstrated some

1        difficulty moving on and off the examining  
2        table.

3                The patient was able to bend forward 60  
4        degrees. She -- the straight leg raising sign  
5        was permissible to 65 degrees, that's on both  
6        sides with pain referable to her back more so  
7        with raising the right leg than the left leg.

8                She demonstrated no evidence of any muscle  
9        spasm or any loss of sensation to the pinprick.  
10       She demonstrated no motor weakness. Her  
11       reflexes were physiological, meaning normal.  
12       The measurement of her calves were found to be  
13       equal demonstrating no atrophy.

14               Her pulses were palpable meaning that  
15       circulation was adequate. Her hip joint motions  
16       were found to be within normal limits. And the  
17       flip sign which is a correlating, corresponding  
18       sign to the straight leg raising sign was  
19       questionably positive on both right and the left  
20       side.

21               The examination of her left knee was within  
22       normal limits. No evidence of any instability.  
23       No evidence of any fluid on her knee which we  
24       call a fusion. No evidence of ligament  
25       instability, and no evidence of a knock-knee or

1 bowlegged deformity.

2 That was the examination.

3 Q. Now, doctor, can you tell the jury what the  
4 difference is between what is called a  
5 subjective complaint as opposed to an objective  
6 finding?

7 A. Sure. Subjective means that much the patient  
8 tells the doctor. Objective findings are those  
9 which the doctor can see, feel, measure, and  
10 record.

11 Q. For example, when a person says that they are  
12 feeling pain in a certain area of their body,  
13 how would you characterize that?

14 A. That's subjective.

15 Q. And if a doctor during an examination finds the  
16 evidence of muscle spasm, what type of an  
17 indication would that be?

18 A. That's objective.

19 Q. And can you tell the jury what the evidence of  
20 muscle spasm would indicate?

21 A. Muscle spasm would indicate an involuntary  
22 attempt of splinting of movement, whether it's  
23 in the back, the knee, the arm, et cetera.

24 Q. And when you say involuntary, you mean what?

25 A. Out of the control of the patient.

1 Q. And specifically with this individual did you  
2 find any evidence of muscle spasm when **you**  
3 examined the neck area?

4 A. No evidence of muscle spasm either in the area  
5 of the neck or the back.

6 Q. Now, doctor, did you have occasion to examine  
7 X-rays in connection with this individual?

8 A. Yes, X-rays were obtained here on the date of  
9 her examination and they were reviewed. **And** the  
10 X-rays demonstrated that the patient has  
11 narrowing of the L4-5 interspace as well as of  
12 the L5 S1 interspace, the sacroiliac joints and  
13 hip joints were found to be normal.

14 She did have what is known as a congenital  
15 abnormality manifested by a partial  
16 sacralization of her 5th lumbar vertebra, more  
17 **so** on the right than on the left.

18 Q. Now when you say a congenital abnormality, how  
19 would you explain that to the jury?

20 A. Meaning that the patient was born with the  
21 abnormal anatomy that was evident in the **X-ray**.

22 Q. And you indicated, I believe, that the **X-rays**  
23 showed a narrowing between the L4 and the L5  
24 spaces, is that correct?

25 A. Yes. L4-5 more **so** than -- and also some at L5



1 | § 1.

2 Q. Now do you have an opinion to a reasonable  
3 medical certainty or probability as to whether  
4 the narrowing that you observed at L4, L5 was  
5 the direct result of the particular accident  
6 that we're talking about?

7 | A. I have an opinion.

**8** Q. What is that opinion?

9 A. I do not think that the accident caused her  
10 narrowing at either 4, 5 or 5 S1. The  
11 structural abnormality that I mentioned  
12 characterized either as a lumbarization of the  
13 transverse process or a sacralization is a  
14 mechanical decreased movement at the L5 S1 space  
15 causing increased motion at the L4-5 space.  
16 This is a degenerative process even without a  
17 congenital abnormality narrowing of interspaces  
18 in a patient of this age and principally a  
19 patient this weight is not uncommon.

20 Q. Now, doctor, do you have an opinion as to a  
21 reasonable medical certainty or probability as  
22 to the diagnosis of any injuries sustained by  
23 Judy Hamlett in this motor vehicle accident?

24 A. Oh, I think she had --

25 MR. GOLDBERG: Show an objection to

1 the question. You may answer.

2 A. I do think she had soft tissue injuries at the  
3 time of the accident along with some contusions  
4 and bruises, et cetera. I think that those soft  
5 tissue injuries, however, would respond  
6 favorably in the period of time along with the  
7 benefit of the medications that was prescribed.

8 Q. And, doctor, do you have an opinion as to  
9 whether this individual has any medical problems  
10 which are direct and a proximate result of this  
11 accident which are of a permanent or chronic  
12 nature?

13 A. I have an opinion.

14 Q. And what is that?

15 A. Oh, I don't think there is any ~~proncity~~ to the  
16 soft tissue injuries that she sustained.

17 MR. BORLAND: Off the record.

18 VIDEOTAPE OPERATOR: Off the  
19 record.

20 - - - -

21 (Thereupon, a discussion was had off  
22 the record.)

23 - - - -

24 VIDEOTAPE OPERATOR: We're on the  
25 record.

1 Q. Now, Dr. Brahms, a number of medical records in  
2 connection with this individual were submitted  
3 by Mr. Roche to you for your review, is that  
4 correct?

5 A. Yes.

6 Q. And specifically these records included the  
7 emergency room record of Elyria Memorial  
8 Hospital for the date of the accident, is that  
9 correct?

10 A. Yes.

11 Q. And a report of the Lorain County Emergency  
12 Medical Services, that is the ambulance?

13 A. Yes.

14 Q. A March 31, 1988 report of Dr. Gerald Yosowitz?

15 A. Yes.

16 Q. And a March 27th, **1989** report **of** Dr. Yosowitz,  
17 is that correct?

18 A. Yes, that's right.

19 Q. Now, doctor, in connection with the review of  
20 Dr. Yosowitz's reports did you note that  
21 Dr. Yosowitz had ordered a CT scan of both the  
22 neck area and the low back area?

23 A. Yes, that's right.

24 Q. And did **you** note the findings of Dr. Yosowitz  
25 with respect to the CT scans that were

1 performed?

2 A. Yes.

3 Q. And what were those findings?

4 A. In the CT scan of the cervical spine it showed a  
5 mild protrusion of the interspace between the  
6 5th and 6th cervical vertebra.

7 Q. And in connection with that finding, what if any  
8 significance does that have for this particular  
9 individual?

10 A. I don't think that a bulging or a mild  
11 protrusion of a disk in this level of cervical  
12 spine has any significance unless there is nerve  
13 root irritation.

14 a. Is there any evidence for this particular  
15 individual for nerve root irritation?

16 A. No, it's quite specifically stated in the report  
17 that there is no evidence of a disk herniation.

18 Q. Okay. And as to the CT scan of the lower back  
19 or the lumbar spine?

20 A. Yes, CT scan of the lumbar spine showed a bulge  
21 -- bulging at the L4-5 disk level narrowing of  
22 the L4-5 disk space and some narrowing of the  
23 L5, S1 disk space.

24 Q. And, doctor, do you have an opinion to a  
25 reasonable medical certainty or probability as

1 to the whether the specific findings noted on  
2 that CT scan were the direct and proximate  
3 result of the motor vehicle accident in  
4 question?

5 A. I have an opinion.

6 Q. And what is that opinion?

7 A. I doubt if that's the result of the automobile  
8 accident.

9 Q. Doctor, further I note that from Dr. Yosowitz's  
10 report that the doctor ordered these CT **scans**  
11 performed after his first examination of this  
12 particular patient and they were, in fact,  
13 performed on September **10, 1987** following his  
14 first examination **of** September 1, **1987**.

15 A. Yes.

16 Q. Doctor, based upon your review of the records  
17 and specifically Dr. Yosowitz's report of March  
18 **31, 1988** and the history that he obtained from  
19 this plaintiff, do you have an opinion to a  
20 reasonable medical certainty as to whether the  
21 CT scan which was ordered for the neck area or  
22 the cervical area was a reasonable and necessary  
23 expense in connection with any injuries she  
24 sustained as a result of this accident?

25 A. I have an opinion.

1 Q. And what is that opinion?

2 A. Based on the subjective symptoms and the  
3 physical examination the reasons for a CT scan  
4 were quite meager as far as cervical spine.  
5 There have been more reasons to support a CT  
6 scan of the lumbar spine than any of the  
7 cervical spine at all.

8 Q. And in connection with the CT scan of the  
9 cervical spine or that is the neck area, it's my  
10 understanding that this was done without the  
11 presence of die.

12 A. Yes.

13 Q. And can you tell us if you have an opinion to a  
14 reasonable medical certainty how the -- how a CT  
15 scan of the cervical spine without die compares  
16 to the performance of a CT scan of the cervical  
17 spine with die?

18 MR. GOLDBERG: I'll object to the  
19 question.

20 A, Yes. It is a general opinion of radiologists  
21 **and** orthopedic surgeons and neurosurgeonu,  
22 perhaps even neurologists that the value of CT  
23 scans without die is of questionable diagnostic  
24 value. It certainly is -- does not have the  
25 same degree of value that an MRI would have over

1 a CT scan. And in answer to your question it is  
2 a difficult examination and of minimal  
3 importance as far as the cervical spine is  
4 concerned.

5 Q. Now, doctor, based on your knowledge,  
6 background, and experience, do you have an  
7 opinion to a reasonable medical certainty or  
8 probability as to whether a charge of \$550 for a  
9 CT cervical spine without contrast and an  
10 additional \$140 for a multiplaner reconstruction  
11 of that CT scan, whether that represents -- that  
12 total of \$690 represents a reasonable charge for  
13 that type of service that is performed generally  
14 in this area of Ohio?

15 A. It seems to me that the price of the CT scan  
16 itself is higher than that I understand. I  
17 don't perform CT scans and do not have the --  
18 have the instrumentation since that's done in  
19 the X-ray office. But it seems to me that price  
20 is excessive.

21 The multiplaner business is an added  
22 expense because it creates from a CT scan a  
23 three dimensional picture. Again, the reasons  
24 for the CT scan and cervical spine, in my  
25 opinion, were minimally necessary.

1 MR. BORLAND: Thank you, doctor.

2 MR. GOLDBERG: Can **we** go off the  
3 record?

4 VIDEOTAPE OPERATOR: Off the  
5 record.

6 - - - -

7 (Thereupon, a discussion was had off  
8 the record.)

9 - - - -

10 VIDEOTAPE OPERATOR: We're on the  
11 record.

12 - - - -

13 CROSS-EXAMINATION OF MALCOLM A. BRAHMS, M.D.

14 BY MR. GOLDBERG:

15 Q. Doctor, my name is Jim Goldberg and I represent  
16 Judy Hamlett and I am here actually for Howard  
17 Mishkin.

18 Mr. Mishkin was here at the examination  
19 that you had of Judy Hamlett, is that correct?

20 A. That's correct.

21 Q. Now, you examined Judy on June 14th of '89, is  
22 that correct?

23 A. That's correct.

24 Q. That's the only time you have ever seen her?

25 A. That's correct.



1 Q. You never examined her before that date?

2 A. I did not.

3 Q. And when you examined her **am I** correct that you  
4 did not examine her for purpose of treating her?

5 A. That **is** correct.

6 Q. The sole purpose of your examination **was** to  
7 report to Mr. Roche, **is** that correct?

8 A. The sole purpose of my examination was to  
9 examine her and to write a report.

10 Q. That was to be sent to **Mr.** Roche?

11 A. That's correct.

12 Q. **You** were actually hired by **Mr.** Roche, the lawyer  
13 for Brian Roache?

14 A. I have never been hired by anybody.

15 Q. He called you and asked you to do **it**?

16 A. That's correct.

17 Q. He paid you for doing **it**?

18 A. That's correct.

19 Q. But you **don't** consider that to be hired?

20 A. I **do** not consider **it** to be hired.

21 Q. Okay. You have been paid a fee for doing **your**  
22 evaluation?

23 A. I have.

24 Q. And that was **by Mr.** Roche?

25 A. That is correct.

1 Q. Am I correct that your fee for the examination  
2 on behalf of Mr. Roche is a \$100 for the  
3 examination?

4 MR. BORLAND: Objection. Move to  
5 strike.

6 A. No, the price is \$125.

7 MR. BORLAND: Objection. Move to  
8 strike this entire line of questioning.

9 Q. In addition to that \$125 am I correct that you  
10 were paid an amount to prepare your letter that  
11 you sent to Mr. Roche?

12 A. Yes, that's correct.

13 Q. And what was that amount?

14 A. \$150.

15 MR. BORLAND: Objection. Move to  
16 strike.

17 Q. Now, you reviewed certain medical records and  
18 reports concerning Judy Hamlett, correct?

19 A. Yes.

20 Q. And in your direct examination you indicated  
21 what those were, is that correct?

22 A. That's correct.

23 Q. Now, I have looked at records, am I correct that  
24 that is all that you did review were the records  
25 that were mentioned in your direct examination?

1 A. Plus the X-rays, yes.

2 Q The X-RAYS that you had taken?

3 A What is correct

4 Q Am I correct that you did not review the actual  
5 scans done by Dr. Yosowitz?

6 A That is correct

7 Q The only knowledge you have of those scans is  
8 reading the reports of them, correct?

9 A What is correct

10 Q You did not review any X-rays, pictures taken by  
11 Dr. Yosowitz?

12 A I did not

13 Q Now, when you reviewed the records that were  
14 provided to you, I assume by Mr. Roche, is that  
15 correct?

16 A Yes

17 Q The purpose was to assist you in preparing your  
18 report which you submitted on June 16th, 1989?

19 A Sure, that's right

20 Q Am I not in anyway to help in treating of Jerry  
21 Hamlett?

22 A That is correct.

23 Q Were you provided with the office records of

24 Dr. Yosowitz?

25 A No, I was not

1 Q. Have you ever seen those?

2 A. I have not.

3 Q. Again, you did not inspect the actual CT scans  
4 of Judy Hamlett of her lumbar or cervical spine,  
5 did you?

6 A. That's correct.

7 Q. You did not, I assume, request the opportunity  
8 to see the actual film?

9 A. I didn't think it was necessary.

10 Q. Do you charge for this deposition?

11 A. Oh, I think we are all going to get paid for  
12 this time.

13 Q. You charge Mr. Roche, correct?

14 A. I submit a bill to Mr. Roche, that's correct.

15 Q. Can you tell us what that charge is?

16 A. Yes, sure.

17 Q. What is it?

18 MR. BORLAND: Objection.

19 A. It is \$500 for the first hour and \$150 for every  
20 half-hour after that.

21 MR. BORLAND: Move to strike.

22 Q. And you expect to be paid by Mr. Roche for that  
23 testimony?

24 A. I know I'll be paid.

25 Q. Okay. Am I correct that you have been called on

1 many occasions to merely examine a plaintiff and  
2 to prepare a report for the defendant's  
3 attorney?

4 A. Yes, that's right.

5 Q. Am I correct that you have been called upon on  
6 numerous occasions to review matters for the law  
7 firm of Meyers, Hentemann, Schneider and Rea?

8 A. Yes, that's right.

9 Q. Mr. Roche is a member of that firm?

10 A. Yes, that's right.

11 Q. You keep records, am I correct, of various  
12 patients that you see for various lawyers?

13 A. I don't keep records of various people that I  
14 see. I keep office files as you **see** here and  
15 they are filed in alphabetical order.

16 Q. You have actually examined patients in the past  
17 for Mr. Roche, is that correct?

18 A. Oh, absolutely.

19 Q. In addition to reviewing ~~matters for~~ the defense  
20 for Meyers, Hentemann, Schneider and Rea, you  
21 have reviewed matters for other defense firms,  
22 is that correct?

23 A. Yes, that's right.

24 Q. Am I correct you have testified for the firm of  
25 Baker & Hostetler?

A. Yes.

Q. You have testified for the firm of Reminger and  
Reminger?

A. Yes.

Q. Am I correct that you testified by deposition  
for defense firms approximately one time every  
other week?

8 A. Oh, probably more than that when I'm in the  
city.

10 Q. Well, about how often?

11 A. Well, I would say on an average of about maybe  
12 40 weeks out of the year I would say twice a  
13 week would be more realistic than once a week.

14 Q. And the other 12 weeks do I indicate from what  
15 you have said that you are out of town then  
16 usually?

17 A. Yes. I'm going away next week to the Canadian  
18 Rockies and I will be away again later on this  
19 summer. I am out of town frequently.

20 Q. Back a couple years ago your deposition was  
21 taken in a case and you said then that you  
22 averaged approximately six examinations for the  
23 defense firms during the course of each week.

24 Is that about the number that you still do now?

25 A. Yes, I think that's right.

1 Does this monetary business decide whether  
2 this patient was hurt or not?

3 MR. GOLDBERG: I'll ask that be  
4 stricken from the record as not responsive to  
5 any question that I ask.

6 Q. Doctor, how many years have you been doing these  
7 defense medical examinations?

8 A. Well, I have been in practice now 34 years and I  
9 would assume that I have been doing that maybe  
10 as long as somewhere in the neighborhood of 30  
11 years or more.

12 Q. Now --

13 A. That also includes my own patients which are  
14 plaintiffs.

15 Q. Now, doctor, you examined Judy Hamlett one time  
16 on June 16th, '89?

17 A. That's correct.

18 Q. That was --

19 A. That's the 14th of June.

20 Q. June 14th was it?

21 A. Right, right.

22 Q. I'm sorry.

23 That was a little bit over two years and  
24 five months after her accident?

25 A. Yes, that's right.

1 Q. Am I correct that you did not see her or treat  
2 her or review her records during the course of  
3 those two years and five months at all?

4 A. I think that in my first statement about this  
5 patient I said that I examined her for the first  
6 time on the 14th of June of 1989.

7 Q. Have you seen any of the physical therapy  
8 records that she had with Dr. Yosowitz?

9 A. I have not.

10 Q. Doctor, would you agree that if you treat a  
11 patient over an extended period of time you are  
12 in a better position to evaluate the medical  
13 condition from an orthopedic standpoint than if  
14 you see a patient on one occasion two and a half  
15 years after the incident?

16 A. I think that any doctor who treats a patient  
17 acutely after the injuries has a better  
18 opportunity to determine what those acute  
19 injuries are. I think that my examination gives  
20 me a better opportunity of determining whether  
21 or not there is any chronic or residual  
22 manifestations of injury.

23 Q. Have you -- in other words, you feel that you  
24 have a better ability to determine chronic or  
25 permanent injury than Dr. Yosowitz?



1 A. I don't think I said that. I think that I said  
2 if I examined a patient late two years later I  
3 can determine at that point in time whether the  
4 patient has any residual manifestations. I  
5 didn't say I was a better doctor than  
6 Dr. Yosowitz.

7 Q. Well, I don't think I indicated that either.

8 A. Well, I think that you said could I determine it  
9 better than Dr. Yosowitz which would indicate to  
10 me that you inferred that Dr. Yosowitz is not as  
11 capable as I am or I as he is in determining  
12 chronic or residual manifestations.

13 Q. I may have misunderstood, but I think you said  
14 gave you a better understanding and I may  
15 have --

16 A. Because of the interval of two years later I  
17 think that I or any other orthopedic surgeon can  
18 make that determination.

19 Q. Has your diagnosis ever changed over a period of  
20 time after treating patients?

21 A. Oh, absolutely.

22 Q. Will you agree that a physician who sees a  
23 patient on a regular basis after an injury is in  
24 a better position to make an accurate diagnosis  
25 than a physician who saw the patient on one

1 occasion?

2 A. I think you will have to give me an element of  
3 time.

4 Q. Well, let's talk about a period of two and a  
5 half years?

6 A. Well, I think that, again, two and a half years  
7 later is a good determination of something that  
8 the patient had probably as long as three month3  
9 after her injury from that time on. But I  
10 think, as I said before, a doctor who treats the  
11 patient acutely at the time of the injury and  
12 for a period of weeks thereafter would be able  
13 to determine the acute effects of the injury.

14 And again anyone who sees a patient later  
15 can tell whether or not there is anything that  
16 lasts, that is chronic, that is residual. And I  
17 think I have pretty good opportunity in this  
18 examination to make that determination.

19 Q. Would you say the greater the length of  
20 observation the greater the chance of a definite  
21 diagnosis?

22 A. Well, I think that would happen within the first  
23 three to six weeks, but nothing after that.

24 Q. When you -- when you performed your examination  
25 you asked Miss Hamlett questions, didn't you?

1 A. Yes.

2 Q. Your history of Miss Hamlett took from about  
3 12:45 P.M. until 1:10 P.M. or approximately 20  
4 to 25 minutes, is that correct?

5 A. The examination?

6 Q. Your history.

7 A. The history exactly 12:52 to 1:07.

8 Q. Your examination consisted of ten minutes of  
9 examination, is that correct, from about 1:10 to  
10 1:20?

11 A. The examination took from 1:07 to 1:17, that's  
12 correct.

13 Q. Ten minutes?

14 A. Right.

15 Q. Since that time you have not seen the patient?

16 A. That is correct.

17 Q. When you spoke to Judy Hamlett was she candid  
18 and honest with you?

19 A. Yes, certainly.

20 Q. Was she responsive to your questions?

21 A. Sure.

22 Q. Did you have any feeling during the examination  
23 that she was trying to fool you or exaggerate in  
24 any respect?

25 A. No, I don't think so.

1 Q. Now, your X-rays that you had taken here  
2 revealed narrowing of L4-5 interspace and I  
3 think you also said some narrowing of L5, S1?

4 A. That's correct.

5 Q. If I understand you correctly from your direct  
6 examination, your opinion is that the L4-5  
7 interspace narrowing is a congenital  
8 abnormality?

9 A. I didn't say that,

10 Q. What did you say?

11 A. I said that the patient has a congenital  
12 abnormality of the end of her lumbar spine where  
13 it meets the sacrum.

14 Q. Is that what you call lumbarization?

15 A. Correct.

16 Q. That's something that you feel she **was** born  
17 with?

18 A. Oh, I know that.

19 Q. And your opinion as to L4-5 interspace narrowing  
20 is that you doubted it was a product of the auto  
21 accident?

22 A. I know it isn't because Dr. Yosowitz mentioned  
23 it in his initial examination which was also  
24 sometime after her initial injury and those  
25 things don't occur in a short period of time.

1           It takes a long time for a narrowing to occur.

2   Q.   Can you tell me how long you would expect to  
3       first see narrowing in an injury such as this?

4   A.   Probably 18 months to 2 years.

5   Q.   So what you are saying is that Dr. Yosowitz saw  
6       narrowing when he first saw her which was less  
7       than 18, 19 months --

8   A.   That's exactly right.

9   Q.   -- it would be then be your opinion that that  
10      was existed before the accident?

11   A.   That's right.

12   Q.   Can L4-5 interspace narrowing be related to  
13      trauma?

14   A.   Yes.

15   Q.   Would you agree that a CT scan is a more  
16      diagnostic tool in terms of assessing the disk  
17      spaces and the disks then regular X-rays?

18   A.   Yes.   In the lumbar spine, yes.

19   Q.   Would you agree that the CT scans ordered by  
20      Dr. Yosowitz show not only narrowing, but  
21      bulging and protrusion of the disks?

22   A.   Yes, which is not an uncommon finding.

23   Q.   You have indicated that you feel that she had a  
24      congenital abnormality in her low back and you  
      have also indicated that you feel she had some

1 pre-existing narrowing, is that correct?

2 A. That's right.

3 Q. Do you have any evidence whatsoever that this  
4 patient experienced any low back pain or neck  
5 difficulty prior to the automobile accident of  
6 January of '87?

7 A. The patient did not give me any information  
8 referable to that.

9 Q. Would you agree that a woman of Judy's age would  
10 have can have these type of abnormalities and  
11 pre-existing conditions that show up on X-ray  
12 and live a normal life without experiencing main  
13 or disability?

14 ~~A. Sure.~~

15 Q. Would you further agree that you have treated  
16 patients that have protrusions or bulging of the  
17 disk spaces that have not had pain and then are  
18 involved in automobile collisions and begin to  
19 experience pain and disability in the neck and  
20 back area after the accident?

21 A. I have to dissect that to tell you that people  
22 who do have narrowing and may have bulging disk  
23 without symptoms, and there are people who have  
24 normal interspaces and have symptoms. So that  
25 the answer to your question is a qualified yes.

1 Q. If the condition which you talked about being  
2 the congenital condition if, in fact, that  
3 existed, did that make Judy Hamlett more  
4 susceptible to problems?

5 A. I think a person who has that abnormality in the  
6 anatomy do have mechanical back aches especially  
7 later on in life with or without injury.

8 Q. Would you agree that narrowing in the spine does  
9 not in and of itself cause pain?

10 A. I know that's true.

11 Q. Many people have such narrowing and it never  
12 causes them pain and they never know they have  
13 the narrowing?

14 A. I couldn't say never, but not enough to bother  
15 them from their normal activities except for  
16 periods of time, intermittent pain which doesn't  
17 last too long.

18 Q. If they didn't never have pain and they didn't  
19 have X-rays taken, they wouldn't know, would  
20 they?

21 A. I think that's true.

22 Q. Would you agree that in Judy Hamlett's situation  
23 that if she never had any pain in her neck and  
24 back before this incident and she, in fact, had  
25 this narrowing when she was involved in the car

1 accident then in all probability the symptoms  
2 that she is experiencing today were activated by  
3 the auto accident?

4 A. I think that I eluded to the fact that the  
5 patient did sustain soft tissue injuries. It  
6 has nothing to do with the presence or the  
7 absence of narrowing.

8 Q. Well, are you indicating then that the symptoms  
9 that she is experiencing today are as a result  
10 of the auto collision?

11 A. No, I didn't say that at all --

12 Q. Are you --

13 A. I'm just dissecting it to tell you that people  
14 who have no narrowing and have soft tissue  
15 injuries have pain and they get over it. And  
16 people with narrowing who have pain get over  
17 it.

18 Q. You have not seen any records on Judy since your  
19 examination, correct?

20 A. That's correct.

21 Q. Assuming that Miss Hamlett had no pain in her  
22 low back and in her neck prior to the automobile  
23 collision and that she had pain thereafter would  
24 you agree that the pain was probably caused by  
25 the automobile collision?



1 A. The answer is soft tissue injuries in a patient  
2 of this age and weight would be present not  
3 longer than twelve weeks, probably eight weeks,  
4 anywhere from one to eight weeks.

5 Q. Would you agree that the pain she did have was  
6 probably caused by the automobile collision?

7 A. For the first eight weeks, yes.

8 Q. In your examination you asked Judy Hamlett about  
9 her current problems, didn't you?

10 A. Yes.

11 Q. Those were her subjective complaints, correct?

12 A. That's correct.

13 Q. You have no reason to believe that she wasn't  
14 telling the truth?

15 A. I think we went over that once and I said no.

16 Q. Again the subjective complaints are important in  
17 arriving at a diagnosis, right?

18 A. Oh, absolutely.

19 Q. When you saw her two years and five months after  
20 the accident she complained of low back pain and  
21 occasional -- and occasional headaches, is that  
22 correct?

23 A. Yes, that's correct.

24 Q. She complained of difficulty lifting, removing a  
25 roast from the oven, lifting laundry, putting on

1 her pantyhose, correct?

2 A. Yes.

3 Q. She also told you that she is troubled by  
4 walking and that long periods of sitting and  
5 standing aggravate her symptoms?

6 A. Yes.

7 Q. And she also reported that she has difficulty  
8 getting up after sitting?

9 A. Sure.

10 Q. During your examination, doctor, Miss Hamlett  
11 had difficulty moving about on the examining  
12 table?

13 A. Uh-huh --

14 Q. And getting on and off the examining table?

15 A. Sure.

16 Q. Now, her straight leg raising sign was  
17 permissible to 65 degrees bilaterally, correct?

18 A. Yes.

19 Q. What is normal?

20 A. That's normal.

21 Q. Is 65 the level for normal?

22 A. Yes, in a patient of this weight 65 degrees is  
23 within normal limits, 65 when it's less than 60,  
24 65 in a patient even of lesser weight that's the  
25 lower limits of normal.

1 Q. After 65 degrees she had pain in her back,  
2 correct?

3 A. She had pain referable to her back at that  
4 point.

5 Q. You do admit that the patient did sustain  
6 certain injuries as a result of the subject  
7 collision, correct?

8 A. I think I said that at least three times now  
9 that she had soft tissue injuries without  
10 question that she probably had soft tissue  
11 injuries, abrasions, and contusions as a result  
12 of the accident.

13 Q. Abrasions or a abrasions?

14 A. She said that she hurt her forearm that she  
15 struck her head against the defogger fan, all of  
16 those are contusions, maybe abrasions as well.

17 Q. Okay, I was just wondering. You said  
18 abrasions. I didn't know if **you** ment bruises or  
19 abrasions?

20 A. It could have been abrasions.

21 Q. When you talk of soft tissue injuries to the  
22 spine, does this include muscles, tendons,  
23 ligaments?

24 A. Soft tissues includes all soft tissues except  
25 for bones.

1 a. Does that include the muscles, and the tendons,  
2 and the ligaments?

3 A. Soft finishes includes skin, muscles, tendons,  
4 facia, ligaments.

5 Q. Doctor, is this a sprain or a strain of the soft  
6 tissues?

7 A. If ligaments are involved the diagnosis of a  
8 sprain or a strain can be made and I think it's  
9 fair to say that this bordered on the evidence  
10 of a strain in view of the fact that the  
11 emergency room report was rendered that  
12 conclusion.

13 Q. When you refer to the term sprain you refer to  
14 the stretching the soft tissue, is that correct?

15 A. We talk about not only soft tissues, but  
16 ligamentous structures as well.

17 Q. When there is a stretching of the tissues there  
18 can also be a tearing of the tissues, is that  
19 correct?

20 A. Oh, certainly.

21 Q. And as a tearing of the tissues, there maybe  
22 some degree of bleeding, is that correct?

23 A. Certainly.

24 Q. When tearing occurs that heals by formation of  
25 scar tissue, is that true?

1 Not always.

2 Q. Can it?

3 Certainly if there is a disruption of the  
4 continuity of a ligament or muscles scar tissues  
5 can occur, If there is no disruption there will  
6 be no scar.

7 Q. Scar tissue is different from normal tissue, is  
8 it not?

9 Yes, that's right.

10 Q. And it's not as elastic as normal tissue, is  
11 that right?

12 That's sight.

13 Q. When scar tissue does form it's permanent, is it  
14 not?

15 A. Yes, that's right.

16 Q. As I understand it, doctor, the patient did have  
17 continuing manifestations of the injury of  
18 January of '87 during your examination up -- up  
19 to your examination on June 14th of '89, is that  
20 correct?

21 A. Subjectively, yes.

22 MR. GOLDBERG: Off the record one  
23 minute, please.

24 - - - -

25 (Thereupon, a discussion was had off

1 the record.)

2 - - - -

3 VIDEOTAPE OPERATOR: We're on the  
4 order.

5 MR. GOLDBERG: I have no further  
6 questions. Thank you very much, doctor.

7 THE WITNESS: You're welcome.

8 - - - -

9 REDIRECT EXAMINATION OF MALCOLM A. BRAHMS, M.D.

10 BY MR. BORLAND:

11 Q. Doctor, you were questioned about examinations  
12 that you have done of plaintiffs and the number  
13 approximately six in a week as an average came  
14 up. During the course of your normal week as an  
15 orthopedic surgeon you treat your own patients?

16 A. Yes, that's correct.

17 Q. In an average week can you give us a rough  
18 estimate as to the range of the number of  
19 patients that you would see?

20 A. Yes, I would see anywhere from eight to fifteen  
21 patients a day in the office besides the  
22 patients in the hospital.

23 Q. And the weeks that you are in town practicing  
24 you indicated is approximately **40** weeks in a  
25 year you would work approximately how many days

1 a week?

2 A. I work five days a week, but I don't see any  
3 patients for defense physical examinations on  
4 Friday which is only a half-day in the office  
5 for checkups, postoperative examinations, et  
6 cetera.

7 Q. And I believe you indicated that you do treat  
8 patients who are claimants or plaintiffs who are  
9 claiming personal injuries?

10 A. That's correct.

11 Q. Doctor, is there anything regarding the  
12 questions of Mr. Goldberg during his  
13 cross-examination of you that have caused you to  
14 change any of the opinions that you previously  
15 rendered in the direct examination?

16 A. None whatsoever.

17 MR. BORLAND: Thank you, doctor.

18 VIDEOTAPE OPERATOR: Doctor, you  
19 have the right to review this videotape in its  
20 entirety or do you wish to waive that right?

21 THE WITNESS: I waive it.

22 VIDEOTAPE OPERATOR: Do we also  
23 have the stipulation between counsel that Multi  
24 Video remains custodian of the tape until  
25 trial?

1 MR. BORLAND: Sure.

2 MR. GOLDBERG: Yes.

3 (Signature waived.)

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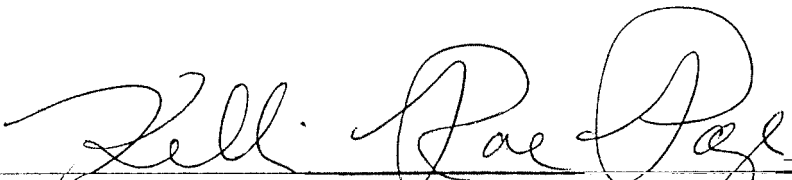


C E R T I F I C A T E

The State of Ohio, ) SS:  
County of Cuyahoga.)

I, Kelli Rae Page, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named MALCOLM A. BRAHMS, M.D. Was by me, before the giving of his deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness, and the reading and signing of the deposition was expressly waived by the witness and by stipulation of counsel; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulation of counsel; and that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney, or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 21st day of July A.D. 1989.

  
Kelli Rae Page, Notary Public, State of Ohio  
1750 Midland Building, Cleveland, Ohio 44115  
My commission expires October 30, 1990