

#536

1 IN THE COURT OF COMMON PLEAS

2 CUYAHOGA COUNTY, OHIO

3 40-41

4 KIMBERLY HINKLE,)

5 Plaintiff,)

6 vs.)

Case No. 150993

7 TIMOTHY HOVEN,)

8 Defendant.)

9 - - - -

11 Deposition of DR. DENNIS B. BROOKS, taken
12 on direct examination before William J. Mahan,
13 Registered Professional Reporter and Notary Public
14 within and for the State of Ohio, at 26900 Cedar Road,
15 Beachwood, Ohio, on Monday, July 10, 1999 at 4:00 p. m.,
16 pursuant to notice and/or stipulations of counsel on
17 behalf of the Defendant in this cause.

18 - - - -

1 APPEARANCES :

2 David I. Pomerantz, Esq.
3 Pomerantz and Cichocki
4 1161 Pleasant Valley Road
Parma, Ohio 44134
(216) 845-4888

5 on behalf of the Plaintiff:

6 Reginald P. Trubey, Jr., Esq.
7 Meyers, Hentemann, Schneider & Rea
8 2500 Superior Building
Cleveland, Ohio 44114

9 on behalf of the Defendant.

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12
13 ALSO PRESENT:

14 Mr. Andrews, Videotape Technician.

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16 - - - -

1 DR. DENNIS B. BROOKS, of lawful age,
2 called by the Defendant for the purpose of
3 direct examination, as provided by the Ohio
4 Rules of Civil Procedure, having been first
5 duly sworn, as hereinafter certified,
6 deposed and said as follows:

7 DIRECT EXAMINATION OF DR. DENNIS B. BROOKS

8 BY MR. TRUBEY:

9 Q Doctor, for the record, would you please state your
10 complete name for the record, sir?

11 A Dennis Bruce Brooks.

12 Q Doctor, are you a duly licensed physician and
13 surgeon in the State of Ohio?

14 A Yes.

15 Q And when did you obtain that license, doctor?

16 A 1963.

17 Q Do you maintain an office in this city?

18 A I do.

19 Q And how long have you been practicing your
20 specialty?

21 A Since returning to Cleveland in 1971. Eighteen
22 years.

23 Q Doctor, for the ladies and gentlemen of the jury,
24 would you please explain the history of your
25 medical training?

1 A Yes. I graduated from Western Reserve University
2 School of Medicine in 1963.

3 I then served as a rotating intern at the
4 Mt. Sinai Hospital of Cleveland for one year and
5 then a general. surgery residence for the second
6 year at Mt. Sinai Hospital.

7 My third and fourth years of postgraduate
8 training was an orthopedic surgery resident also
9 at Mt. Sinai.

10 During my fifth year I was a research

14 childrens' orthopedics at the Indiana University
15 Medical Center.

18 A Orthopedic surgery is that branch of medicine
19 that deals with the musculoskeletal system. That
20 is to say, as an orthopedic surgeon, I treat
21 patients who have problems with their bones, joints,
22 the soft tissues that cover those areas, the muscles,
23 ligaments, and tendons, as well as treating
24 patients who have problems with their spine and
25 its contents, the intervertebral disks and the

1 **nerve** roots.

2 **As** an orthopedic surgeon **I** treat a variety
3 of problems. There are those that are present at
4 birth and they are referred to as congenital.

5 There are the problems that arise during
6 the growing years. They are referred to as
7 developmental.

8 **There** are the injuries that arise from
9 vehicular accidents, sports related activities,
10 work related activities, and those are referred
11 to as traumatic.

12 **And** the last large category are the
13 problems that arise as **we** all grow older and they
14 are referred to as degenerative.

15 **As** an orthopedic surgeon, **I** treat patients
16 both with surgery and without surgery depending on
17 their condition.

18 **Q** Doctor, how long have you been engaged as an
19 orthopedic surgeon?

20 **A** Well, as **I** mentioned, **I** completed my formal
21 training in 1969, **I** was then in the United
22 States Air Force for two years where **I** practiced
23 **as** an orthopedic surgeon, **so** this is going to mark
24 **twentieth** anniversary.

25 **Q** Okay. Doctor, are you on the **staff** of any hospital

1 or hospitals in the Cleveland area?

2 A Yes.

3 Q At which hospitals are those, doctor?

4 A Mt. ,Sinai Medical Center of Cleveland; Meridia
5 Suburban Hospital and Meridia Hillcrest Hospital.

6 Q Do you teach at any of the rmedical schools in
7 northeast Ohio?

8 A Yes, I am an assistant clinical professor of
9 orthopedic surgery at the Case Western Reserve
10 University School of Medicine.

11 I also am on the teaching faculty at the
12 Mt. Sinai Medical Center, and I'm on the teaching
13 faculty of the biomechanics laboratory of Case
14 Western Reserve University.

15 Q Doctor, do you belong to any professional
16 societies?

17 A I do.

18 Q Would you please relate a few of these to the
19 ladies and gentlemen of the jury, please.

20 A I'm a member of the American Academy of Ortho-
21 pedic Surgeons: the International Society of
22 Orthopedics and Traumatology; the Orthopedic
23 Research Society; Clinical Orthopedic Society and
24 the state and local orthopedic and medical
25 societies.

1 Q Doctor, are you Board certified?

2 A Yes.

3 Q And what does Board certification mean, doctor?

4 A Board certification means that an individual has
5 acquired the knowledge, the technical skill and
6 the general expertise to practice the specialty,
7 in this case, orthopedic surgery.

8 Q Do you have to take examinations over and above
9 the examinations of medical school to pass and
10 become Board certified?

11 A Yes.

12 Q Is this certification by the American Board of
13 Orthopedic Surgeons something over and above your
14 license to practice medicine?

15 A Yes, it is,

16 Q Doctor, when were you Board certified as a
17 Diplomate in the Board of Orthopedic Surgery?

18 A I became Board certified in 1971.

in the various medical and/or surgical journals?

21 Q And could you relate a few of these for the ladies
22 and gentlemen of the jury?

23 A Yes. I have published articles that have dealt with
24 bone grafting in orthopedic surgery; the biomechanics
25

1 of injuries: congenital dislocation of the knee;
2 biomechanics of torsional fractures, and papers
3 about the devices for the treatment of hip and
4 wrist fractures.

5 Q Okay. Doctor, as far as giving an examination
6 for someone who wanted to become Board certified
7 in orthopedic surgery, I take **it** there are people
8 **who** make up questions in this field?

9 A Yes.

10 Q Doctor, do you have any relationship with the
11 doctors who comprise these examinations for
12 medical students in this community?

13 A I don't think that is the question that you **wanted**
14 to ask.

15 Q Okay. Do you **have** any relationship with the
16 Board of Orthopedic Surgeons **as** far as the
17 examination of doctors?

18 A **Yes**, And I am an examiner for the American
19 Board of Orthopedic Surgery. **We** don't give the
20 examination to medical students, and that was the
21 problem I had with your question.

22 F Okay.

23 A You **have** to **complete** your residency training
24 program. You have to practice only orthopedics
25 **in** one location for one year before **you are** even

1 eligible to take the Boards.

2 Q I see.

4 portion of the Boards.

5 Q Okay. Doctor, on my request did you have an
6 occasion to examine the Plaintiff in this case?

7 A I did examine the Plaintiff in this case at, I
8 think, the request of one of your associates.

9 Q Mr. Brunn?

10 A Yes.

11 Q And when was that?

12 A I believe that was on November 21st, 1988.

13 Q Doctor, do you remember at this time the details
14 of your examination?

15 A Not independently, no.

16 Q Okay. Did you keep a record of that examination?

17 A Yes.

18 Q Would that record refresh your recollection today
19 as far as testifying?

20 A Yes.

21 Q Doctor, would you please refresh your recollection
22 by using that record or report, if you would?

23 A Thank you.

24 Q Okay. Now, again, doctor, for the ladies and
25 gentlemen of the jury, when did you see the

1 Plaintiff in **this** matter?

2 A On November 21st, 1988.

3 Q Did the Plaintiff give you a history?

4 A **Yes.**

5 Q And what **is** the relevancy or importance of a history
6 as far as you are concerned?

7 A A history is the beginning of the diagnostic
8 process. A history is a recitation of a certain
9 **set** of facts by a patient. In a situation such as
10 this, **it** would begin with the incident that Miss
11 Hinkle believed was the onset of her problem or her
12 symptoms.

13 A history **will** include any treatment **she** had
14 in the interval between her accident and the time
15 I examined her.

16 The second part of the history would deal
17 with her complaints or her symptoms at the time
18 of my examination,

19 And the third part of the history would **be**
20 her past medical history, that is, her condition
21 prior to the accident.

22 **Okay.** So you are seeing Miss Hinkle sometime after
23 the **accident** actually happened?

24 A I **saw** her sometime after the **accident** happened, that
25 correct,

1 Q And you were trying to do an evaluation at that
2 time, not treating her?

3 A That's right, I was not a treating physician.

4 Q Would you relate to the ladies and gentlemen of
5 the jury what the history was as given by Miss
6 Hinkle to you?

7 A Yes. She told me that she was injured on May
8 2nd.

9 She indicated that she was sitting as a
10 front passenger in an automobile which was stopped
11 when it was struck from behind.

12 She told me that she was wearing seat belts
13 at the time of the accident, and she recalled that,
14 the seat broke and that she went backwards.

15 Following the accident she was aware of
16 pain in her neck and low back.

17
18 with what she referred to as a neck brace.

19 She told me that sometime after the accident
20 she came under the care of Dr. Yosowitz.

21 She was treated with medication and referred
22 to physical therapy where she received, as she
23 indicated, heating pads, exercises, learned how
24 to sit and walk certain ways.
25

1 She told ne that she attended physical
2 therapy quite often, at least two times a week
3 for a period of time which she did not remember.

4 She told me that she was reexamined by
5 Dr. Yosowitz approximately once a month.

6 She was uncertain as to xhen she was last
7 examined by Dr. Yosowitz but thought it was in the
8 early part of 1988.

9 She also told me that she had been treated
10 in the emergency room of Mt. Sinai Medical Center
11 on two occasions, once while she was under Dr.
12 Yosowitz' care and once after that time.

13 She was treated for symptoms or' low back
14 pain, but was not admitted to the hospital.

15 She told me that she had not been examined
16 or treated by other physicians nor had she Seen
17 hospitalized since her accident.

18 I then inquired as to ner symptoms at the
19 time of my examination in November of 1988 and she
20 indicated that her low back was synptomatic, as
21 she put it, quite often.

22 She experienced what she referred to as
23 a hard pain in her back which radiated into the
24 lateral aspect of her right thigh and into her
25 calf.

1 **She** told me that she developed radiation
2 mainly when the weather is bad.

3 She also experienced numbness in **the**
4 anterior aspect of her ricjht shin with weather
5 changes.

6 When she did, **as** she put **it**, too much
7 walking, seven to eight hours a day, her symptoms
8 were increased.

9 She was unable to bend as she **put it**, too
10 far **down**.

11 **She** told me that coughing, sneezing and
12 bowel movements **did** not produce leg radiation --

13 **Q** Doctor, if I could just interrupt **you**, just right
14 there, what is the significance of **someone** not
15 having coughing or pain on coughing, sneezing and
16 bowel movements as far as leg radiation is
17 concerned?

18 **A** When an individ al coughs, sneezes or moves his
19 or her bowels, they increase their intraabdominal
20 pressure and they **also** increase intraspinal pressure
21 **And we** are talking about a **potential** problem
22 within the spine.

23 **If** an individual has a problem in the
24 **spine**, such as a herniated disk, for **example**, which
25 **is** causing pressure on a **nerve** root by coughing,

1 sneezing or moving their bowels, they will
2 experience pain radiating down their legs because
3 with those maneuvers they have increased
4 intraspinal pressure. They are putting more
5 pressure in that area causing more compression
6 on the nerve. It's a symptom that I inquire
7 about when someone talks about leg radiation to
8 see if in fact they may have a herniated disk. She
9 had no leg radiation with coughing, sneezing or bowe
10 movements.

11 Q Thank you very much, doctor.

12 Would you continue with your examination
13 findings?

14 A Yes. She also told me that she experienced neck
15 pain before or after my back bothers me.

16 She noted that it was hard, as she put it,
17 to bend my head.

18 At times she felt like someone is choking
19 me. She told me that her neck pain radiated
20 down her back. She had no arm radiation or arm
21 pain.

22 Q Again, excuse me, doctor, if I could just
23 interrupt, what is the significance as far as a
24 history is concerned when she has these neck
25 problems and she doesn't have any pain radiating

1 into her arms?

2 A Well, again, it's important in doing a complete
3 history to inquire if someone has pain radiating
4 into their arms or if they have a herniated disk
5 in their cervical spine or a structure that is
6 causing pressure on a nerve root, they would be
7 expected to have pain radiating into their arms

8 Q I see. Thank you very much, doctor. Would you
9 continue on with your examination, sir?

10 A She told me that she was taking Tylenol as often
11 as I needed it.

12 I inquired into her past medical history
13 and she indicated, and I quote, "I really didn't
14 have any problems with respect to her neck or low
15 back before the accident."

16 She had sustained no new injuries since
17 those of May 2nd, 1987.

18 Q Doctor, after you obtained the history from Miss
19 Hinkle, did you then examine Miss Hinkle?

20 A I did.

21 Q Would you please relate to the ladies and gentlemen
22 of the jury the findings of your examination, sir?

23 A Yes. Physical examination revealed that Miss
24 Hinkle was a female of approximately her stated
25 age who was of short stature and somewhat

overweight.

She indicated that her height was five foot, three inches and her weight was 145 pounds.

I noted that she arose from the sitting position without difficulty, and that she walked without limping, and that she was able to climb on to and off of the examining table in a normal fashion.

I examined her cervical spine and noted she had normal cervical lordosis without evidence of pericervical or trapezius spasm.

There was tenderness with the lightest of palpation in the posterior cervical spine and there was no tenderness in the pericervical or trapezius area.

There was a full range of cervical flexion, approximately 25 percent of cervical extension and 75 percent of lateral bending and lateral rotation bilaterally.

Lateral bending and lateral rotation were performed in a ratchet like fashion.

She indicated to me that all maneuvers were kind of uncomfortable.

Q Doctor, for the ladies and gentlemen of the jury, would you explain what flexion is, full range of

1 motion, et cetera, if you would, **please**, as you
2 just discussed?

3 **A** Flexion is moving your **head forward**.

4 **Full** range of flexion would be the **ability**
5 to touch your chin to your chest.

6 **Extension is** moving your head backward.

7 **Lateral rotation is** to one **side or** the other
8 and lateral bending is tipping **your** head **from**
9 **side** to side.

10 **Q** What **is** the significance of having a full range of
11 motion for **these** various tests that you just talked
12 about?

13 **A** **Those** are normal findings.

14 **Q** Okay. Thank you. **Would** you please continue
15 with your examination, **doctor**?

16 **A** Yes. **I** performed a neurologic examination of the
17 upper extremities and **noted** that **it was** normal in
18 that she **had** normal deep tendon reflexes, motor
19 power and sensory perception.

20 **Q** And what is the significance of the finding of
21 these **tests**, doctor.?

22 **A** Again, **those** are normal findings, **There** is nothing
23 **to** indicate that **she** has **any abnormality** in her
24 cervical spine that **is** causing nerve **root**
25 compression to be reflected **by** an **abnormality in**

1 the neurological examination of her upper
2 extremities, or there is nothing to indicate
3 that there is anything wrong with her peripheral
4 nervous system.

5 Q Okay. So what we are really talking about here
6 is the peripheral nervous system, the nerve roots
7 coming off the spine, the spinal cord and the
8 peripheral nervous system?

9 A Yes.

10 Q Thank you. Would you continue on please, doctor?

11 A I examined her low back, her lumbosacral spine,
12 and noted that she had normal lumbar lordosis
13 without evidence of perispinal spasm.

14 There were no areas of localized tenderness
15 with palpation of the lumbosacral spine, sacroiliac
16 joints or sciatic notches.

17 Forward flexion was restricted such that
18 her fingertips reached the mid tibias.

19 Extension was performed completely.

20 There was approximately 50 percent of
21 lateral bending bilaterally.

22 She indicated that lateral bending was
23 uncomfortable.

24 Heel walking and toe walking were performed
25 without evidence of weakness or pain.

1 The Burns test was considerably positive
2 in that she complained of low Sack pain when she
3 sat back on to her heels.

4 I continued the examination and noted that
5 sitting, straight leg raising could be accomplished
6 to the horizontal bilaterally.

7 The tripod sign was negative.

8 Supine straight leg raising was restricted
9 to 45 degrees bilaterally and accompanied by low
10 back pain,

11 The Lasegue's maneuver was negative.

12 Simultaneous hip and knee flexion increased
13 the low back pain bilaterally,

14 Further neurologic examination of the lower
15 extremities revealed symmetrically active
16 pattellar tendon reflexes, symmetrically depressed
17 Achilles tendon reflexes, a giving way type of
18 weakness of each extensor hallucis longus, and
19 decreased perception of pinprick in the right leg
20 in a non-anatomic pattern.

21 And that concluded the physical examination,

22 Q All right. Doctor, did you have occasion to take
23 any x-rays or have anyone take any x-rays of Miss
24 Hinkle?

25 A Yes, I did.

1 Q Were these x-rays taken at your request?

2 A They were.

3 Q Do you have these x-rays today, doctor?

4 A Yes.

5 MR. TRUBEY: Could we go
6 off the record, please?

7 (Temporarily off the record.)

8 MR. ANDREWS: On the record.

9 Q Doctor, I believe that you have just testified that
10 you had some x-rays taken of Miss Hinkle's cervical
11 and lumbar spine, and would you please for the
12 ladies and gentlemen of the jury review your
13 findings as far as the x-rays that you had taken
14 on the date of your examination of the cervical
15 and lumbar spine, please?

16 A Yes. This is a radiograph of the cervical spine
17 that was taken of Miss Hinkle on November 21st,
18 1988.

19 It's what is referred to as a lateral view.
20 It's as though you are looking at her neck from
21 the side. You can see her chin and her skull and
22 her neck.

23 And this radiograph shows that the
24 cervical spine, as do the other radiographs, is
25 normal. There is no evidence of fracture. There

1 is no evidence of dislocation.

2 There is no narrowing of the disk spaces.

3 There is no spurring so that is normal.

4 a What would be the significance of **having** narrowing
3 of a disk space or spurring?

6 A That is an abnormal condition, so the significance
7 can be one of a number of things. I mean, it could
8 be part of the degenerative process.

9 It could be related to trauma, It could be
10 a congenital abnormality. You don't take one thing
11 in isolation, you have to relate it to everything
12 else that you **know** about the patient.

13 Q So there is no abnormal findings as far as your
14 review of the cervical spine of Miss Hinkle at
15 the date of your examination?

16 A That's correct.

17 Q Doctor, **did** you have an occasion to have x-rays
18 taken of Miss Hinkle's lumbar spine?

19 A **ies.** And this, which is marked Defendant's Exhibit
20 B, is a lateral view of her lumbar spine, again
21 looking at her from the side with her buttocks
22 back here **and** her abdomen here, **and** her lower
23 ribs here, and this is her lumbar spine.

24 This radiograph demonstrates that there
25 is no evidence of fracture and there is no evidence

1 of dislocation.

2 There is disk space narrowing at the L5,
3 S1 interspace. The lumbar vertebrae are numbered.
4 There are five in number, so this is five, four,
5 three, two, one. Here is the first lumbar
6 vertebra and this is the sacrum.

7 Now, I think that you can appreciate the
8 fact that if you look here, the space between this
9 vertebra and this vertebra is less than it is here
10 and there, so there is disk space narrowing.

11 In addition to that there is a condition
12 which is called spondylolisthesis. That is a
13 condition where the majority of the lumbar spine
14 slides forward on the remaining portion of the spine.
15 And if I were to draw a line along the Sack of the
16 spine right here, of L5 and draw a line in the
17 back of S1, I think you can see that L5 is forward
18 of S1. That condition is called spondylolisthesis,
19 It is as a result of a defect, a developmental
20 defect, not-a traumatic defeat. It is not something
21 that occurs after a single isolated event.

22 That defect in the parsintraarticularis,
23 which is an area that I can't demonstrate because
24 Miss Hinkle would not allow all of the usual views
25 to be taken.

1 MR. POMERANTZ : I move to

2 strike the latter part of that answer.

3 Q What do you mean by that, doctor, she did not allow
4 you the examinations as far as x-rays are concerned?

5 MR. POMERANTZ: Objection.

6 A The standard set of radiographs include an A?
7 of the pelvis, an AP of the lumbar spine, a
8 lateral such as this, cone-down which we also
9 have which is an area that focuses on that in
10 both obliques.

11 Now, this is what I ordered. And while the
12 radiographs were being obtained next door at the
13 radiologist's office, the technician informed me
14 that although Miss Hinkle allowed them to take
15 this lateral view, she wouldn't allow them to take
16 the obliques where she is essentially in the same
17 position, turned slightly, because it was
18 apparently too painful and so the technician couldn't
19 get those two views.

20 Q But she was in the position already to take those
21 films?

22 MR. POMERANTZ : Objection.

23 A Yes.

24 Q Doctor, have you had occasion to review Miss
25 Hinkle's CT scan of August 25th, 1987?

1 A Yes.

2 MR. TRUSEY: Could we go
3 off the record?

4 MR. ANDREWS: Off the
5 record.

6 (Temporarily off the record.)

7 MR. ANDREWS: On the record.

8 Q Doctor, would you please explain for the ladies
9 and gentlemen of the jury your findings and the
10 review of Miss Hinkle's CAT scan, her cervical
11 and lumbar sprain of August 25th, 1987?

12 A Yes, When I reviewed the CAT scan of her
13 cervical spine, I agreed with the radiologist that
14 it did not demonstrate a herniated disk; that it
15 did demonstrate a small degree of bulging of the
16 annulus fibrosis, The annulus fibrosis, in case
17 you might ask --

18 Q I think I would.

19 A -- is the covering around the disk. So a bulging
20 annulus is not an abnormality.

21 Q Would you say this-- is within normal limits?

22 A Yes.

23 Q Okay. And how about of the lumbar spine, doctor?

24 A I reviewed the lumbar spine and I did not agree
25 with the radiologist's interpretation of the lumbar

1 spine.

2 Let me **just** refresh my **memory as** to just
3 **exactly** what he said **and** then I will try to
4 explain why I didn't agree with what he said.

5 Okay. The radiologist indicated that there
6 **was** a, and. i quote, "Moderate bulging of the L5, S1
7 disk annulus slightly indenting the adjacent
8 **fecal** sac, The presence of an **associated** focal
9 herniation of L5, S1 disk centrally could not be
10 excluded, **image** No. 25.

11 Okay. i did not believe that this film
12 demonstrates any **degree** of bulging of the **disk**,
13 nor **does it** demonstrate an indentation of **the**
14 **fecal** sac or a focal herniation.

15 Q Can we go over that, doctor, as far as your
16 interpretation is concerned?

17 A Yes, Now, I have on **the** board here that portion
18 of the CT scan that includes images 19 through 27.
19 Image No. 22 which **is** marked up in the corner
20 is marked L5. **so this is** the L5 vertebral body.
21 This is the L5 vertebral **body**, 23 is the L5 vertebral
22 **body**, as is 24, 25, 26 and to **some** degree 27,
23 are images taken through the vertebral **body** and
24 through the disk that **is** between the **fifth lumbar**
25 vertebra **and** the **first** sacral vertebra,

1 Now, there are some arrows on Image 10 2H
2 They were put on there by the radiologist. I didn't
3 put those on there.

4 Okay. And they point to what I believe he
5 was referring to as bulging of the annulus of the
6 disk.

7 The thing that the radiologist did not
8 mention, perhaps did not appreciate, was that this
9 lady has a spondylolisthesis that is, sliding
10 forward of a portion of her spine on another portion
11 of the spine, and as the spine slides forward the
12 disk stays in place, and depending on the way the
13 CAT scan is taken, it appears that the disk is
14 behind the vertebral body, is bulging. In fact,
15 when I put up another section of the CT scan, and
16 this is -- well, it has all of the patient
17 identification right in the middle and over in the
18 corner it says: 741, which is another image. It's
19 the CT representation of the lumbar spine just like
20 the plane radiographs.

21 And again, as you look at that, and this is
22 the image that is on the far upper right hand
23 corner of this array, you can see that the lumbar
24 spine continues here and then is forward on the
25 sacrum.

1 The L5 is forward on the SI. And this
2 little area of decreased density, or something
3 that **appears** lighter, represents the disk but
4 that is **exactly** in line with the back of the
5 sacrum. So that although it **appears** to be behind ~~the~~
6 L5 vertebral body, it's only because the L5
7 vertebral body has **moved** forward rather than
8 the disk moving backwards.

9 Now, what **does** all that mean? Well, let's
10 go back again to image No. 25 **and** in the center of
11 that image is a circular structure **which** is the
12 dura, and the dura contains the nerve roots. And
13 the nerve roots are **those** structures that go out
14 into the **peripheral** nervous system that we talked
15 about earlier.

16 In addition, right above the dura, there
17 are two things which, with **a** little imagination,
18 you could picture **as** two ears. Here is the face
19 **and there** are the two ears, **and those** are the nerve
20 roots that have just left the dura.

21 Now, if this were a real bulge and if it
22 were of any clinical significance, **it** would be
23 **pressing** on those nerve **roots**. It would be
24 displacing them. It would be pushing them out of
25 **the** way.

1 And in addition to doing that the patient
2 would have symptoms that would correspond with
3 that kind of pressure.

4 So to summarize that lengthy explanation,
5 I believe the radiologist's interpretation was
6 incorrect, that what he referred to was a bulging
7 disk is not a bulging disk, it's an artifact of
8 the procedure.

9 Q What do you mean by an artifact, doctor?

10 I'm sorry to interrupt you.

11 A That's all right. I oftentimes use words that are
12 very clear to me but probably to no one else.

13 Let's take a look at this array which begins
14 with No. 28, extends through No. 34 and then is
15 marked zero zero and zero zero.

16 I'm going to rotate it 90 degrees so again
17 you can see a lateral view of the lumbar spine,
18 And on the lateral view of the lumbar spine are
19 a number of lines and those represent the plane
20 of the x-ray beam, and at the LS, S1 interspace,
21 and you can identify No. 25 right here which is
22 that image that we were looking at earlier, the
23 x-ray beam is not tangent to the disk space but
24 it intersects it at a 45 degree angle. So if you
25 pretend that your line of sight is the same line

1 as the x-ray beam, it's as though you were standing
2 in front of the patient and looking, okay, your
3 line of sight would go through the vertebral body
4 and then pick up part of the disk, and when you
5 lag a three dimensional object into one plane,
6 one dimension, it would appear that the disk was
7 sitting behind the vertebral body, but it's not
8 because it's your line of sight, or to put it
9 differently, if the x-ray beam had been angled
10 such that it was tangent with the disk space, it
11 would go right through the disk and there would be
12 no protrusion, so that's what I mean is that it was
13 an artifact of the procedure. In essence, there
14 is no bulge, there is no focal herniation. What
15 we are seeing is the consequence of two things, the
16 patient's spondylolisthesis, and the way that the
17 x-rays or the CAT scan was taken.

18 Q Okay, and this spondylolisthesis, this is something
19 that has been with Miss Hinkle all of her life?

20 MR. POMERANTZ: Objection.

21 A No, spondylolisthesis is not a congenital condition,
22 it is a developmental condition.

23 Q What do you mean by that, doctor, developmental?

3

24 A It's a condition that becomes apparent as one is
25 growing. The condition probably began to develop

1 when she was eight to ten years old in early
2 adolescence.

3 A Doctor, what records have you had an opportunity
4 to review in conducting your independent
5 orthopedic examination of Miss Hinkle?

6 A In addition to the plane radiographs, and the CT
7 scans that we have just referred to, I reviewed
8 the records from St. John's Hospital from May
9 20, 1987, and Dr. Yopowitz' letter of November
10 30, 1987 as well as his letter of February 5th,
11 1988.

12 Q Doctor, having obtained a history from Miss
13 Hinkle after reviewing her medical records, do
14 you have an opinion based upon a reasonable degree
15 of medical certainty as to what injuries Miss
16 Hinkle sustained as a direct and proximate result
17 of the accident?

18 A Yes, I have an opinion.

19 Q Could I have that opinion and the basis for that
20 opinion, doctor?

21 A My opinion, first of all, is that she may have
22 sustained some minor injuries and those injuries
23 were to her chest and upper neck.

24 The basis for that opinion is a review of
25 the records, in particular the St. John's Hospital

1 **records.** In particular **there** is no indication
of any complaints referrable to *her* low **back.**

3 There were no radiographs or x-rays
4 obtained of her low **Sack**, and in addition to that,
5 when **she was** examined by Dr. Yosowitz, **some five**
6 days after the accident, although he made a diagnosis
7 referrable to her **neck** and low back, he did not
8 obtain radiographs of those **areas** either.

9 MR. POMERANTZ: Motion to
10 strike as non-responsive to the question.

11 Q Doctor, based upon the history **as** given to you
12 by Miss Hinkle and, based upon the examination
13 that you conducted, **based.** on the review of the
14 radiographs and the CT scan, do you have an opinion
15 with a **reasonable** degree of medical certainty **as**
16 to whether or not **there is** any objective findings
17 that you found on the date of your examination
18 to support Miss Hinkle's present **day** complaints?

19 A Yes, I have an opinion.

20 Q Could I **have** that opinion and the basis for that
21 opinion, doctor?

22 A **Yes.** My opinion is **that** there were no objective
23 **findings** on physical examination to support her
24 **complaints.**

25 The **basis** for that **opinion is** the history

1 which I took which gave her complaints.

2 The physical examination which I performed,
3 which did not show any objective findings in
4
5 was no anatomic basis.

6 Q Okay. Thank you, doctor. Doctor, one last question.
7 Again, based upon your examination, and based
8 upon the history as given to you by Miss Hinkle,
9 and again based upon the review of the records
10 and the radiograph reports and the CAT scan, do
11 you have an opinion within a reasonable degree
12 of medical certainty as to whether or not Miss
13 Hinkle has a herniated disk in the cervical
14 and/or lumbar spine?

17 for that opinion?

18 A Yes. My opinion is that she does not have a
19 herniated disk in the cervical spine or the lumbar
20 spine.

21 The basis for that opinion is the history
22 which I received in which she gave no indication
23 of any symptoms that are consistent with a herniated
24 disk in the cervical spine; the examination which
25 I performed which did not contain any findings

1 which indicated that she had a herniated disk
2 in the cervical spine; the CT scan that I reviewed
3 which did not demonstrate a herniated disk in the
4 cervical spine.

5 And similarly, the basis for my opinion
6 that she does not have a herniated disk in the
7 lumbar spine is that she does not have symptoms
8 of a herniated disk in the lumbar spine. She has
9 no physical findings to indicate a herniated
10 disk in the lumbar spine.

11 She has a CAT scan which does not
12 demonstrate a herniated disk in the lumbar spine.

13 MR. TRUBEY: Thank you
14 very much doctor. I have no further
15 questions at this time. Thank you.

16 THE WITNESS: You're welcome.

17 MR. POMERANTZ: Doctor, can

18 we go off the record a moment while I review
19 your records?

20 THE WITNESS: Certainly.

21 MR. ANDREWS: Off the record.
22 (Temporarily off the record.)

23 CROSS-EXAMINATION OF DR. DENNIS B. BROOKS

24 BY MR. POMERANTZ:

25 Q Doctor, my name is David Pomerantz and I represent

1 Kimberly Hinkle in this case. As you know I now
2 have a chance to ask you questions.

3 So that the jury will understand your role
4 in this case, would you tell me when you first saw
5 Miss Hinkle?

6 A On November 21st, 1988.

7 Q You had never examined her before that date, is
8 that correct?

9 A Yes.

10 Q And you have not seen her since that date, have
11 you?

12 A No.

13 Q So, doctor, you have only examined Miss Hinkle one
14 time ever, is that correct?

15 A Yes.

16 Q Doctor, you were hired by Mr. Trubey's law firm
17 to conduct that single examination of Miss
18 Hinkle, would that be a fair statement?

19 A Yes, I was asked by their law firm to do that,

20 Q And the purpose of that examination was not to
21 provide treatment to Miss Hinkle, was it?

22 A That's correct.

23 Q The purpose of that examination was to write a
24 report to Mr. Trubey's office regarding your
25 findings, correct?

MR. TRUBEY: Objection.

That is pursuant to Rule 35 that are

Rules of Civil Procedure.

Q Now, this examination is what is commonly called a defense medical examination, would you agree with me if I used that terminology?

MR. TRUBEY: Again I would object. It is an independent medical examination by Mr. Brooks at my request.

Q Will you agree with me doctor that in the common vernacular these are called defense medical examinations?

A You can call it whatever you want, Mr. Pomerantz. It's an independent medical examination.

Q Okay. We're here to determine how independent it is.

Now, in fact you never have rendered any treatment to Miss Hinkle, have you?

A You have asked me the question five times. I'm under oath and I'm not going to change my answer. The answer is I have not rendered any treatment to Mrs. Hinkle.

Q All right. Your involvement in this case was not to help Miss Hinkle medically in any way, is that correct?

1 That is incorrect. If Miss Hinkle had a condition
2 that required medical treatment, I would have so
3 noted it in my report so she could have received
4 the treatment if necessary.

5 Q But that treatment would not have 'seen from you?

6 A That is correct.

7 Q You have also reviewed records regarding Miss
8 Hinkle, is that correct?

9 A Yes.

10 Q And you also wrote a report regarding your opinions?

11 A It should be obvious by now

12 Q You provided a copy of that report to Mr. Trubey?

13 A Yes.

14 Q You did not send me a copy of that report?

15 MR. TRUBEY: Objection.

16 A copy was sent to you by myself and/or
17 Mr. Brunn.

18 THE WITNESS: It is not my
19 place to send you a copy. You are perfectly
20 aware of that.

21 Q All right. So, then, the answer is no?

22 A Then the answer is no.

23 Q And, of course, doctor, you charge for your time
24 in reviewing records, conducting what I call
25 defense medical examination or an independent

1 medical examination and in writing a report to
2 Mr. Trubey's office, do you not?

3 A That is correct.

4 Q In order to do a thorough job, how much time
5 would it take for you to -- in this case, how
6 long did it take for you to review the records,
7 conduct the examination and write a report to Mr.
8 Trubey's office?

9 A I have no recollection of that.

10 Q In general, how long does it take you to do these
11 things regarding an independent medical examination?

12 MR. TRUBEY: Objection.

13 A There is no standard time, just like there is no
14 standard time in examining and reviewing the
15 patients that I treat. I do a complete examination
16 and I take as much time as necessary

17 Q All right. Would it be a fair statement that the
18 taking of the history and the examination of Miss
19 Xinkle in November of 1988 took somewhere in the
20 neighborhood of an hour?

21 A That would be a fair statement.

22 Q And you wrote a three page medical report that you
23 sent to Mr. Trubey's office, is that correct?

24 A Yes.

25 MR. TRUBEY: Objection. It

is four pages.

Q Four pages.

Would you say that the writing of that report took -- the actual writing of the report itself took a half an hour or more than half an hour or less than half an hour?

A Well, I had to dictate this. i would say that dictating of the report, which included the history and physical examination, probably took an hour.

Q All right. And then in addition, before examining Miss Hinkle, you reviewed some records regarding her?

A That is incorrect. I don't review the records until after i examine Miss Hinkle.

Q All right. And that took additional time, correct?

A That is correct.

Q All right. Would you say that that took an additional half hour?

A I'm sorry. When we talked about the report, I included in that hour the review of the records and the report.

Q All right. So roughly speaking the examination of Miss Hinkle, the reviewing of the records and the conducting of the exam and the writing of the

1 report took roughly two hours, would that be a
2 fair statement?

3 A That is the best estimate I can make.

4 Q All right. And in this case your bill is being
5 paid by Mr. Trubey's office, is that correct?

6 A I believe so.

7 Q My office isn't paying you for any of your
8 services in this case, correct?

9 MR. TRUBEY: Objection.

10 I move that that question be stricken from
11 the record.

12 A That is correct.

13 Q And the Court is not paying you either?

14 MR. TRUBEY: Objection

15 again. Move it be stricken.

16 A That is correct.

17 Q Now, doctor, it is my understanding that your fee
18 for reviewing records, conducting a defense
19 medical examination, and writing your report is
20 \$250 an hour, is it not?

21 MR. TRUBEY: Objection.

22 Move that it be stricken. The Court of

23 Appeals for Cuyahoga County has held that

24 a question be asked if someone is paying

25 a fee of a physician but not the amount of

1 that fee being paid by the attorney or the
2 attorney's office.

3 A In 1988 I don't believe it was \$250 an hour, I
4 believe it was \$225 an hour.

5 Q All right. And at present your fee for doing the
6 same work is \$250 an hour, is that correct?

7 A That is correct.

8 MR. TRUBEY: Objection.

9 Q Doctor, this is not the first case in which you
10 have performed a defense medical examination or
11 an independent medical examination, as you call it,
12 is it?

13 A That is correct.

14 Q You have been hired by defense attorneys like Mr.
15 Trubey on numerous occasions to examine an
16 injured person who has made claim, is that correct?

17 A Yes.

18 Q And in those cases you also charged for your time,
19 is that correct?

20 A That is correct.

21 Q In 1988, the year that you examined Miss Hinkle,
22 how many defense medical examinations or

23 independent medical examinations did you perform?

24 A I don't have a specific recollection of the number.

25 Q All right. Doctor, if I represented you that

1 actually conductea 277 defense medical examinations
2 in the year 1988, would you agree with that figure?

3 A I would not agree with that figure and I would ask
4 you how you could possibly represent that.

5 Q All right, doctor. I have before me a copy of
6 your calendar for the year 1988 beginning with
7 Monday, January 4th, the first business day of
that year.

9 MR. TRUBEY: Objection as
10 far as the calendar of Dr. Srooks is
11 concerned. That contains patient-doctor
12 relationship. I would ask that any question
13 as far as Dr. Brooks' calendar is concerned
14 be stricken from the record and that counsel
15 be sanczioned as far as using that calendar.

16 MR. POMERANTZ: All right, your
17 objection is noted and we can deem that a
18 continuing objection.

19 THE WITUESS: I would like
20 to make a statement for the record, and the
21 statement for the record is that Mr.
22 Pomerantz -- the manner in which Mr.
23 Pomerantz obtainecl that record is highly
24 questionable.

25 That record was released on the

1 subpoena in a particular case.

2 The subpoena and various motions
3 that were filed after that subpoena
4 indicated that the record would be used only
5 in that case.

6 There is presently a motion in the
7 Court of Common Pleas to recover all
8 previous copies and I believe that is not
9 in your best interests to be using that
10 because I believe that that is a violation
11 of physician-patient privilege as well as
12 a violation of patient privacy and that you
13 may well be acting outside the confines
14 of the Court's order.

15 MR. POMERANTZ: Motion to
16 strike that commentary by the doctor.

17 Q Doctor continuing --

18 A It wasn't a commentary. It was an explanation, sir.
19 MR. POMERANTZ: Okay. Motion
20 to strike that as well.

21 BY MR. POMERANTZ:

22 Q Now, doctor, as I was saying in my previous
23 question, I have before me the calendar which
24 purports to be, and I believe to be your calendar
25 for the year of 1988 beginning with Monday, January

1 4th which is the first business day of that year
2 and finishing Friday, December 30, 1988, which was
3 the last business day of that year.

4 MR. TRUEBY: Objection as
5 to foundation.

6 Q Now, doctor, I represent to you that I have gone
7 through this calendar page by page and counted
8 the number of defense or independent medical
9 examinations that you have conducted and I came
10 up with a total of 277. Do you still wish to
11 disagree with that figure?

12 A Absolutely, sir. I can tell you in the hopes that
13 we can get through this and maybe get to some
14 substance that I limit the number of independent
15 medical evaluations to three a week now.
16 Generally there are 52 weeks in a year so that
17 would seem to be that the maximum would be about

18 156

19 I do take vacations from time to time.

20 So how now came up with the number 280 or whatever,
21 is beyond me.

22 Q So, doctor, you are representing to this Court
23 and to this jury under oath that you never
24 scheduled more than three defense medical
25 examinations in a week?

1 A Sir, I'm representing to this Court, under oath,
2 that on the average I do three a week. And I'm
3 representing to this Court that I believe that
4 your number of 297 is absolutely ludicrous in terms
5 of what you refer to as defense medicals.

6 Q Okay. Then, doctor, when won't we go through
7 this beginning on January 4th, 1988, and if you
8 have a copy of your calendar, you can follow
9 along with me. Would that be fair enough?

10 A What makes you think I would copy my calendar?

11 Q Well, I would assume that you have your calendar
12 in your office now.

13 MR. TRUBEY: Well, if you
14 want the doctor to talk about his calendar,
15 and he doesn't have his calendar, then you
16 give the doctor that calendar.

17 Q Okay, doctor I'll tell you what we'll do I'll
18 ask you the questions and I'll show you the
19 calendar on a page by page basis beginning on
20 January 4th -- well, first of all, doctor, I assume
21 that you do keep a calendar of your appointments as
22 a professional?

23 A My secretary keeps my appointment book, if that's
24 what you are referring to.

25 Q All right. I mean, I take it that it would be

1 and would you explain there is a notation on that
2 page that at 10:00 on that date, you had
3 scheduled an appointment with a Cynthia Dean, is
4 that correct?

5 A I explain with you.

6 Q And there are the letters "ref." I assume that
7 stands for referred?

8 A Yes.

9 Q And beside that is the name Steven Albert, attorney,
10 correct?

11 A Yes.

12 Q And also to the side there are the letters "def."
13 is that correct?

14 A Correct.

15 Q Okay. And that term, what does that represent?

16 A Well, that, to my secretary, apparently represents
17 "defense."

18 Q Okay. So, in other words, a defense medical or
19 an independent medical examination?

20 A Right.

21 Q All right. Thank you.

22 And also, doctor, is it your secretary's
23 regular practice when an appointment is canceled
24 before it's appointed time that she draws a line
25 a curvy line through the notation on your

1 appointment book, would that be a fair statement?

2 A I believe that is how she does it. I don't

3 generally look at my appointment book so you might
4 ask her.

5 Q All right. Now, Tuesday, January 5th, 1988, --

6 A We are going to go through the whole year?

7 Q Doctor, if you disagree with my figures, we will
8 go through the whole year.

9 Will you agree that at 1:30 p.m. that day
10 you had an appointment scheduled with a William
11 Allen?

12 A You'll have to show me the book my friend. I have
13 no independent recollection of what occurred 12
14 months ago.

15 Q Okay.

16 Nineteen months ago So we don't know whether that
17 one counts or not

18 So, so far we have established that I have
19 done one independent medical or defense medical
20 in 1988.

21 Q All right. Doctor, on Friday, January 8, 1988,
22 do you recall evaluating a Cynthia Likes?

23 A No.

24 Q Okay. I will show you what is marked at the top
25 as Friday, January 8, 1988 from your calendar. Is

1 there an appointment there scheduled at 1:30 for
2 Cynthia Likes?

3 A No, sir, there is not.

4 Q All right. Let **ne** see that. I'm sorry. 9:00.

5 A Yes, Cynthia Likes at 9:00.

6 Q And next to that there is also the letters "ref"
7 which means referred, is that correct?

8 A Yes, I see the referred.

9 Q And next to that is the word Stouffers, is that
10 correct?

11 A Very possibly. There's a lot of things on there
12 but I believe that that is Stouffers.

13 Q So would it be fair to say that on that date you
14 evaluated Cynthia Likes at the request of her
15 employer regarding an employment matter?

16 A It is certainly possible. I have no recollection
17 of that, but that would possibly be an evaluation
18 on behalf of Stouffers, although there is another
19 name after that here but --

20 Q Which I believe is an attorney for Stouffers, is
21 that correct?

22 A I don't know. I believe that is not correct.

23 But in order to try to answer your question, I
24 would believe that that would be an examination
25 that I did on behalf of Stouffers for the purpose

1 of determining **somebody's** employability, totally
2 unrelated to what **we** are talking about today.

3 Q Well, doctor, you have no independent recollection
4 of that examination, is that correct?

5 A That's correct.

6 Q So it's also possible that that was a defense or
7 independent evaluation for the purposes of a
8 **Workers'** Compensation claim, is that correct?

9 MR. TRUBEY: Objection.

10 I move that that be stricken.

11 A In terms of her employability. Okay?

12 Q Okay. Now, doctor, on Sunday, January 10th, am
13 I correct that you had an appointment to examine,
14 I believe it's a Mr. Calvin Burgess?

15 A Do you really think that I work on Sunday and came
16 into the office and examined people?

17 Q Doctor, you have already testified that you keep
18 an appointment book to keep track of your
19 appointments --

20 A That's right.

21 Q -- so when you have an appointment written in on
22 Sunday, I can only assume that you came in on a
23 Sunday.

24 A Is it possible that you made a wrong assumption?

25 I mean, is it possible that perhaps if this page --

1 well, I don't **need** to explain. I'll tell you under
2 **oath** that I did not examine this **man** on January
3 **loth**, 1988, on a Sunday.

4 Q Can you tell me when you did examine him?

5 A If you give me the rest of the appointment **books**,
6 I'll try to explain to **you** why that occurred.

7 I mean, I have a --

8 Q But you do agree that in 1988 you examined a Mr.
9 **Calvin** Burgess?

10 A Well, you know, you're really funny. You **know**,
11 you don't let me answer a question, or when I don't
12 give you your answer, you **see**, you go on to another
13 question. Why don't you give me the pages for the
14 couple of days before and the couple of days after
15 and I'll give you a logical explanation of why his
16 name appeared on that date,

17 Q Doctor, I'm not concerned with the exact date that
18 you examined this patient.

19 A Isn't that interesting that you are not concerned
20 with that.

21 MR. POMERANTZ: Motion to strike

22 Q **Doctor**, please, I **know** that this **is** maybe
23 embarrassing for you --

24 A It is **not** the slightest **Sit** embarrassing sir. I
25 think **if anybody should be** embarrassed, it should be

1 you who doesn't **have the courage** to discuss the
2 medical issues and **has** to go through all of **this**
3 nonsense.

4 Q Doctor, we are here to ascertain **what** your
5 interest or Sias in this case **may be**.

6 A I have no bias in this case. I was asked to examine
7 **this lady medically**.

8 If you want to discuss medicine, I will **be**
9 happy to do **so**. I don't believe that you have
10 the courage to do that.

11 Q Doctor, you have not answered my question.

12 Did you examine a Mr. Calvin Burgess in your
13 office in 1988?

14 A I have no independent recollection. If Mr. Calvin
15 **Burgess'** name was not **crossed out**, then I suspect

16 Q
17 **Carolyn Cappel?**

18 A If that's the **name** that was on there, then that **is**
19 correct.

20 Q All right. Now --

21 A So we have **got** two now.

22 Q On Monday, January the 11th, 1988, did you **examine**,
23 and I have **same problems** reading the handwriting,
24 but it **looks** like an Alan Slezak or Slecake, at **the**
25

request of the Twinsburg Claims Insurance
Company.

MR. TRUBEY: Objection as
to insurance

Could we go off the record a minute?

MR. POMERANTZ: No.

MR. TRUBEY: Yes, we are.

MR. POMERANTZ: If you want

to do it, put it on the record because we
may have to go in front of the Judge on this

MR. TRUBEY: Take it off
that and put it on that.

MR. ANDREWS: Off the
videotape record.

MR. TRUBEY: There is
absolutely no reason for you to go page
my page by page the only thing you would
do is, as far as Court of Appeals is
concerned, is to create so much prejudice
and bias on behalf of your client with the
questions that you are asking, you have
ask the question, has he done 285 defense
medicals, and he has said no. You have
it right there. And you can make it part
of the record that he has done X amount of

1 defense medical examinations. Jut there is
2 no reason to **make** the doctor go through his
3 calendar because there is going to be a
4 very great problem with that I think in the
5 final analysis. 3ut I am not a judge and
6 I'm not an Appellate Judge. But there is
7 no reason to do that. That can become part
8 of the record. I have no problem with that.
9 I'm not going to have Dr. **Brooks** sit here
10 for the **next** three hours going page by page
11 through his calendar. Now, if you want to
12 make that part of the record, that's fine,
13 I have no problem with that.

14 MR. POMERANTZ : Okay. Let's
15 do that then.

16 MR. TRUBEY: That is
17 ridiculous.

18 MR. POMERANTZ : I understand
19 what your statement to be *is*, that you're
20 going to stipulate for the record that this
21 is admissible into evidence and that I can
22 enter this as **an** exhibit **for** the Plaintiff.
23 Anything **less** than that **and** we are going to
24 go through this **page by page**. Okay?

25 MR. TRUBEY: Introduce it for

1 what purpose?

2 MR. POMERANTZ: I'm going to
3 introduce it because it is relevant. It
4 shows interest and it shows bias. And I will
5 say that as to any other appointments, other
6 than defense or independent medical
7 evaluations, we can block out the names of
8 the persons to protect the doctor-patient
9 privilege if you or the doctor so desires
10 because that is privileged. However, any
11 references to defense medicals is not
12 privileged, and --

13 MR. TRUBEY: I have no
14 problem with that. You can introduce what.
15 you have right there, Okay. You are not
16 crossing out any names?

17 MR. POMERANTZ: Oh, no.

18 MR. TRUBEY: Would that be
19 okay?

20 THE WITNESS: Well, you're
21 the attorney.

22 MR. TRUSEY: Well, I think
23 what I would want -- no, I will take that
24 back. To protect the doctor-patient
25 privilege and privacy, I will.

MR. POMERANTZ: Well, let me do it this way. You can certainly keep in there that he **Sad** appointments at 1:00 on such and such date to examine a person for treatment and you can block out the name of that treatment so it will not be in there for that purpose, is that fair enough?

THE WITNESS: Not block out the treatment, block out the patient.

MR. POMERANTZ: Exactly. The fact that there was treatment will stay on there.

MR. TRUBEY: Do you have any objections with that as far as that goes?

THE WITNESS: I don't have any objection if you block out the names -- well, if you block out the names of all of those people whom you do not consider to be independent medical examinees, defense medical examinees, In other words, all of the people who are patients should be blocked out.

MR. POMERANTZ: Okay.

THE WITNESS: And on the other hand, if you don't block it out --

1 MR. TRUBEY: Okay. Would
2 you agree with that? So you and I can go
3 over this, I mean, as far as patients that
have Seen treated by Dr. Brooks, you and I
can cross that out, correct?

6 ICIR POMERAXTZ: Their names.

MR. TRUBEY: I want to
protect the doctor-patient privilege as far
as Dr. Srooks is concerned.

10 MR. POMERANTZ: I have no
11 objection to that.

12 MR. TRUBEY: We can do that,

13 THE WITNESS: I am just the
14 witness. I have no control over anything.

15 Can we go back on the record?

16 MR. POMERANTZ: Well, part of
17 this agreement is to give me the parge back
18 so --

19 THE: WITNESS: Well, then,
20 keep it off the videotape record, but on
21 this record, okay?

22 I'm holding in my hand a page marked
23 January 11, Monday, and right below the mark
24 10:00, there is an arrow pointing to the left
25 Now, if you put the appointment books

1 together, the day that generally comes
21 before Hunday is Sunday, and you will.
3 see that the appointment at 10:00 was
4 cancelled on that day and the page
5 preceding that had the notation of
6 Carolyn Cappel.

7 MR. ANDREWS:

On the record,

8 BY MR. POMERANTZ:

9 Q Now, doctor, you have disagreed with my count of
10 277 defense or independent medical examinations
11 & for the year of 1988 --

12 MR. TRUBEY:

I think actually

13 what you said was 285.

14 MR. POMERANTZ:

No, my count

15 was 277, 277 defense medical. examinations
16 in the year 1988.

17 Q Would you agree that you conducted numerous defense
18 medical examinations in the year 19883

19 A I would only agree with you, sir, that a small
20 proportion of my practice dealt with defense
21 medicals in matters such as this. And I would
22 point out to you, such as I mentioned earlier,
23 that on the average I examine three patients
24 a week on behalf of the defense in a personal. injury
25 or malpractice matter.

I \$ Now --

2 A And I would like to finish that.

3 And I see more than one patient a day.

4 You probably can tell me how many patients I saw
5 in 1988. I didn't keep track. But I would suspect
6 that it is about 10 to 15 percent of what I do.

7 Q Doctor, would you agree with me that the number of
8 defense medical examinations that you did in that
9 year numbers in the hundreds, is that correct?

10 A I would say it is more than a hundred and it was
11 less than 200.

12 Q Now, doctor, would you say that you did a thorough
13 job in each one of those defense medical
14 examinations?

15 A I do a thorough job in everything that I do.

16 Q All right. So it would be fair to say that in
17 reviewing the records, conducting examinations and
18 writing reports, you spent roughly two hours on
19 each one of those, would that be correct?

20 A That wouldn't be correct, sir. Some of them
21 obviously take much longer than others do. Some
22 of them take much less. No, I can't calculate that.

23 Q Okay. Can you give us an estimate? I know there
24 are a lot of them, but can you give us an estimate
25 as to what the average amount of time you spent per

1 defense medical examination was?

2 A I cannot.

3 Q Now, of course, you charge for your time on all
4 those defense medicals at your normal rate,
5 correct?

6 A Yes.

7 MR. TRUBZY: So does a
8 treating physician.

9 MR. POMERANTZ: Motion to.
10 strike.

11 Q Now, doctor, 1988 was not the first year in which
12 you performed defense medical examinations was it?

13 A That's correct.

14 Q Doctor, based on your testimony in a previous case,
15 it's my understanding that for the years 1984,
16 1985, 1986 and 1987 you conservatively conducted
17 150 to 200 defense medicals a year, would that
18 be accurate?

19 A That's inaccurate, sir. I would also like to
20 know what case you are referring to.

21 Q Doctor, do you recall being deposed for the
22 purposes of testimony at trial on Thursday,
23 April 10, 1986 in the case of James L. McKnight
24 versus David A Smith?

25 A I don't recall but since, you know? of the

! thousands of depositions that I have given, the
1 poor plaintiff's bar can only find one, it's
2 made very easy for me to have a copy of the
3 same depositions so at least we'll read the same
4 pages.
5

6 Q So, doctor, you admit that you have done thousands
7 of depositions?

8 A Of course I haven't done them. I'm using the same
9 degree of hyperbole that you are using, the same
10 degree of exaggeration that you are using. Okay?

11 Q Doctor, do you have a copy of that deposition
12 with you?

13 A I have a copy of that deposition with me.

14 Q Okay. Fair enough. Let me -- do you remember --

15 A No, I don't remember being deposed on April 10,
16 1986. You know, I'm a busy orthopedic surgeon,
17 I've done a couple of things in terms of
18 orthopedic surgery between then and now, three
19 and a half years later.

20 Q All right. Doctor, I would refer you to Pages
21 54 and 55 of that deposition since you have a copy.
22 And would it be correct that in that deposition
23 you testified on behalf of a defendant against
24 an injured person similar to what you
25 are doing in this case?

1 A Yes.

2 Q All right. Doctor, on the last line, line 25 of
3 Page 54, am I correct that a question was posed
4 to you by the plaintiff's attorney, Mr. Paris,
5 "At least, doctor, between yourself and I we can
6 agree that you do between three and four defense
7 medical examinations a week?"

8 Answer: "Yes."

9 Was that the answer you gave?

10 That's the answer I gave in 1986.

11 Q All right. And there was a question, the following
12 question was: "Okay, that would be somewhere
13 shy of about 200 a year taking into consideration
14 that you take some time off from your practice?"

15 And your answer was: "It would be closer
16 to 150 than it would be to 200."

17 A

18 Q

19 A That's what I said two hours ago.

20 Q And you also, am I correct, that you performed
21 defense medicals prior to 1984 as well?

22 A Yes. I also treated patients before 1984.

23 Doctor, I understand that. Doctor, in addition
24 to the defense medical examinations that you
25 actually perform each year, you schedule a number

1 of defense medical exams which are cancelled for
2 one reason or another, isn't that so?

3 A There are some that are cancelled. I don't
4 schedule then so they will be cancelled.

5 Q I understand. But for want of a number of reasons
6 there are some that are cancelled, isn't that
7 correct?

8 MR. TRUBEY: What are those
9 reasons?

10 A Yes.

11 MR. POMERANTZ: Motion to strike.
12 You will have your chance.

13 BY MR. POMERANTZ:

14 Q In fact, in the year 1988, according to my
15 calculations, 105 appointments for defense medical
16 exams were scheduled in your office were cancelled,
17 correct?

18 A I can't answer that. I didn't go over the book.
19 I don't believe it to be true.

20 Q Well, then, the jury can decide that. They will
21 have a copy of it.

21 A Right.

22 MR. TRUBEY: Objection is the
23 foundation.

24 Q Doctor, your normal policy is to nevertheless
25 charge for the defense medical examination even if

1 it is cancelled, if it is cancelled less than
2 48 hours before it is scheduled to take place,
3 is that correct?

4 MR. TRUBEY:

Objection.

5 Hove that that be stricken.

6 A That statement also isn't correct.

7 Q Okay. What is your normal policy, doctor?

8 A My normal policy is to charge \$100 for the time
9 reserved for the examination.

10 Q And that is whether or not it is cancelled, is that
11 correct?

12 A That is whether or not it is cancelled, that is,
13 when it is cancellad or when the person fails to
14 appear.

15 Q All right. So, then, there is a standard \$100
16 fee for the time that you have reserved?

17 A For that examination, that is correct,

18 Q And that is regardless of when it is cancelled,
19 once it has been put on your book, is that a fair
20 statement?

21 MR. TRUBEY:

Objection.

22 Move to strike.

23 A No, that is not a fair statement. If it has been
24 cancelled within 48 or 72 hours, I don't even know
25 what the policy is.

1 Q All right. So, then, in addition to the noney
that you make for defense medical examinations
that you actually perform each year, you also
4 derive some income each year for defense medical
5 examinations which are cancelled, would that be
6 a fair statement?

7 A That would be a fair statement.

8 MR. TRUBEY; Objection.

9 A Some income.

10 Q Doctor, you met with Mr. Trubey prior to
11 testifying here today to confer with him regarding
12 this case, is that correct?

13 A Yes.

14 Q How long did that take?

15 A I have no recollection. I suspect that it took
16 -- he came in 3:30. We started-at 4:00. well,
17 it took a half an hour.

18 Q So you do have a recollection?

19 A It took a while to get me back on track to talk
20 about important things.

21 Q And doctor you are charging Mr. Trubey for that
22 time as well, correct?

23 A That's correct.

24 Q And you are also charging Mr. Trubey for the time
25 you spent in this deposition, are you not?

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1 **have been** called as a witness, either live or by
2 deposition, **by** a defendant in a **case** against **an**
3 injured person, is it?

4 A That is correct, **counselor**, it is not.

5 Q I understand that you don't **end** up testifying in
6 every case that you **are** hired to do a defense
7 medical examination, do you?

8 MR. TRUBEY: Objection,

9 That includes plaintiffs **as** well.

10 A That is correct, I am not required to testify in
11 every case that I do a defense medical or **an**
12 independent evaluation, I would have no time to
13 practice medicine if that occurred.

14 Q Based on your testimony in a prior case, it is
15 **say** understanding that you testified or you hac! ;
16 your deposition taken somewhat slightly **more** than
17 once a **month** on *the average*, would that be a fair
18 statement?

19 MR. TRUBEY: Objection as
20 to foundation.

21 A I **don't know** based on my prior testimony. It would
22 be nice again if you told me **what** you are referring
23 to .

24 But I would say that I probably testify
25 on the average of **once** a month. That is a fair

1 statement.

2 Q So then in addition to the income that you derive
3 from conducting defense medical examinations that
4 are performed and that are cancelled, you also
5 derive yearly income from giving testimony against
6 injured persons, would that be a fair statement?

7 A Against injured persons: for injured persons. I'm
8 not biased. I will testify to the truth any time.

9 Q Doctor, would you agree that a substantial amount
10 of your time working is spent conducting defense
11 medical examinations and to testifying in cases
12 against injured persons?

13 A No, I would not agree that a substantial amount of
14 my time is used in those circumstances.

15 Q Well, doctor, in 1988, according to your own
16 calendar, which will be admitted into evidence,
17 after vacation time you worked approximately
18 48 weeks, does that sound correct?

19 A I don't know. I'm not going to answer any of those
20 questions. I haven't sat down and poured through
21 my calendar the way you have so I can't tell you
22 yes or no how many weeks vacation I took.

23 Doctor, if I represented that you were off from
24 February 4 to February 10, August 12 through
25 August 17 and September 7 through September 18,

1 **would you have any reason to disagree with that?**

2 **MR. TRUBEY:** **Objection. Xove**

3 **that it be stricken?**

4 **A** **Yes, I would have a reason to disagree with that**
5 **because I'm not sure where you're getting those**
6 **figures. So --**

7 **Q** **Doctor, in that 48 weeks, or the time that you were**
8 **in active practice in 1988, according to my**
9 **calculations, forgetting about the cancelled**
10 **appointments, you did 277 defense medical exams.**
11 **Now, if that were correct, would you agree with**
12 **me that that comes to an average of nearly six**
13 **defense medical examinations each week that you**
14 **actually performed?**

15 **A** **I can't agree with you about the six defense**
16 **medicals a week in the terms that we have defined**
17 **them so I can't answer the rest of the question.**

18 **Q** **Doctor, isn't it a fact that on numerous dates**
19 **the only appointments that you had for the whole**
20 **day were defense examinations?**

21 **A** **No, sir, that is not true.**

22 **Q** **Doctor, I'll show you part of the exhibit which**
23 **will be your calendar. On Wednesday, January**
24 **6th, 1988, although that appointment was cancelled,**
25 **would you agree with me that there was only one**

1 appointment scheduled for that day?

2 That's correct. I generally do not work on
3 Wednesdays.

4 Q Okay. But on that day you did schedule one

6 a person who was referred to you by Mr. Gerald
7 Jeppe, is that correct?

8 A That's correct. And that appointment was cancelled.

9 Q All right. Now, Mr. Jeppe, for the jury, is a

12
14 occasions? That is one time.

13 Q Doctor, we'll continue going through it if you
16 want to disagree with me.

17 Now, the Eollowing Wednesday, January 13,
18 1988, I'm showing you that page of your calendar,
would you agree with me on that day you had one
appointment scheduled?

21 A That's correct.

22 Q And that appointment was not cancelled as far as I
23 can see, is that correct?

24 A That is the way it appears to me.

25 Q And that appointment was to conduct a defense

1 medical examination on a person that was referred
2 to you by a Joseph Wantz, is that correct?

3 A That's correct.

4 Q Mr. Wantz is a partner in Mr. Trubey's law firm,
5 is that correct?

6 A I don't know whether he's a partner or an associate

7 Q But he's a member of that law firm, is he not?

8 A That's correct.

9 Q All right. So that was the second occasion in
10 which you only had one appointment scheduled and
11 that was to conduct a defense medical?

13 A Correct.

13 Q IS that correct?

14 A That is twice now. Okay?

15 Q Okay.

16 A Do you think we'll ever discuss the medicine in
17 this case?

18 MR. POMERANTZ : Motion to
19 strike.

20 Q Now, doctor, on the following, or the two following
21 Wednesdays, January 27, 1988, you had only one
22 appointment scheduled for that date, is that
23 correct?

24 A That's correct.

25 Q And that was also -- and that appointment was to

1 conduct a deposition, was that correct?

2 A That's correct.

3 Q Okay.

4 a So that is not an examination.

5 Q You are right, doctor.

6 A Thank you.

7 Q Now, doctor, on March 2nd, 1988, another Wednesday,
8 would you agree with me that according to your
9 calendar you only had one appointment scheduled?

10 A That's correct, counselor, on March 2nd the page
11 is blank except for one appointment.

12 Q That appointment was ultimately cancelled but that
13 was the only appointment that you scheduled that
14 day?

15 A That's correct.

16 Q And that was also to evaluate a person at the request
17 of an attorney, is that correct?

18 A We do see the word attorney. That is about the
19 only thing that is clear there. That's correct.
20 It might even have been a plaintiff's attorney.

21 Q Doctor, the fact is that there are on more than
22 one occasion you examined, you had only one
23 appointment for the day and that was a legal-
24 medical matter?

25 MR. TRUBEY:

 On Wednesdays.

1 A On wednesdays.

2 Q Okay. Let's go --

3 A The point of the matter is we have identified
4 four days out of the whole year, right --

5 Q Doctor, if you want me to go through the whole
6 book --

7 A No, the point is that, again, you know, the
8 implication that you are making, I disagree with
9 and on numerous occasions --

10 Q I know you do, doctor. Why don't we continue
11 on to a question.

12 MR. TRUBEY: Let him finish
13 the answer.

14 A Sure, any time you want to discuss the issues in
15 this case, I will be happy to.

16 Q Now, doctor, I would like to ascertain how my
17 client, Kimberly Hinkle, came to be seen by you.

18 I take it that you were contacted by Mr.
19 Trubey's office and asked to examine her, isn't
20 that correct?

21 MR. TRUBEY: Objection.

22 Asked and answered three times.

23 A Correct.

24 Q And you are aware, are you not, that Mr. Trubey
25 works for the law firm of Meyers, Hentemann,

1 Stevens & Rae?

2 MR. TRUBEY:

Objection.

3 Asked and answered before.

4 A Yes.

5 Q Now, I think we have established that this is not
6 the first time that you were hired by Mr. Trubey's
7 law firm to examine an injured person in a case
8 where his firm represented the defendant, was it?

9 MR. TRUBEY:

Objection.

10 Asked and answered.

11 A Correct.

12 Q In your career, how many times have you been hired
13 by Mr. Trubey's firm to conduct a defense medical
14 examination?

15 A I don't know.

16 Q All right. Doctor, according to your calendar in
17 1988 alone, you performed 79 defense medical
18 examinations for Mr. Trubey's law firm, Meyers,
19 Hentemann, Stevens & Rae, would you agree with
20 that figure?

21 A I can't --

22 MR. TRUBEY:

That is not the
23 correct name of the firm, it is Meyers,
24 Hentemann, Schneider & Rae.

25 A I can't agree or disagree. I don't keep track of

1 those things.

2 Q So you can't disagree with it, you can't show
3 me any evidence that counters with that statement?

4 A R. Pomerantz, if there is some reason to believe
5 that you are an honest young man, and if you
6 accurately counted those numbers, then I would
7 have to agree with it. I'm sure that after this
8 is over, we will sit down and count.

9 Q All right. So then in 1938 you conducted more
10 than one defense medical examination a week for Mr.
11 Trubey's law firm alone, is that correct? On the
12 average?

13 A If those are the numbers that are true.

14 Q All right. Now, doctor, we have ascertained how
15 much of your practice is devoted to doing defense
16 medical examinations and to testifying.

17 I would like to go into some other aspects
18 of your practice.

19 You testified that you were an assistant
20 professor at Case Western Reserve University, is
21 that correct?

22 A You know, we really haven't ascertained how much
23 of my time is devoted to this. We haven't talked
24 at all about the patient time. But, yes, I am
25 an assistant clinical professor.

1 Q So the jury understands, you don't actually teach
2 regular classes of students, in classrooms at the
3 medical school, do you?

4 A At the medical -- I teach over at the engineering
5 laboratory.

6 Q Okay. But you don't teach medical students at the
7 medical school?

8 A I don't teach medical students at the medical
9 school. I teach medical students at Mt. Sinai
10 Hospital. That's why I'm assistant clinical
11 professor and not an assistant professor.

12 Q So, in other words -- but you see the students in
13 a clinical setting, you do not teach formal
14 classes to them?

15 A That is also not true. From time to time I lecture
16 in a formal setting.

17 Q But you don't do that on a regular basis?

18 A Not on a daily basis, no.

19 Q Now, doctor, you testified earlier that you have
20 an area of specialty and that area is orthopedic
21 surgery, correct?

22 A Yes.

23 Q Doctor, you obviously don't perform surgery on all
24 of your patients, do you?

25 A That's correct.

Q And of course you don't perform surgery on any of

7-
1 the people that you examine for defense medicals
2 either, correct?

3 A That's correct.

4 Q All right. Of the people that you saw to treat,
5 you do not perform surgery on the great majority
6 of them, do you?

7 A If a majority is over 50 percent, that is also
8 correct. I only operate on those people who need
9 an operation.

10 Q Doctor, the^w truth is that you virtually do no
11 surgery, isn't that a fact?

12 A No, I don't believe that is a fact, sir.

13 Q Doctor, you previously testified that your
14 appointments are kept in your calendar, correct?

15 A That is correct.

16 Q Doctor, isn't it a fact that in your calendar,
17 for the last full year 1988, not a single surgery
18 was listed?

19 A That is correct, sir. But you need to know that
20 is the appointment book for the office. Okay?

21 It's really funny, you should have talked
22 to Mr. Howell because when his associate was out
23 here, he asked me the same question.

24 Q All right. Now --

25 A Now, let me make it perfectly clear, young man --

1 Q Now, wait a second, doctor. There's no question
2 before you.

3 MR. TRUBEY: Objection.

4 Q And we are going to perform this by the legal
5 standards. I know that you're older than I am
6 but --

7 A I don't care whether you're going to perform it by
8 the legal standards or not.

9 MR. TRUSEY: David, David,
10 you don't determine what the rules of
11 procedures are.

12 You asked him a question. You asked
13 him: Isn't it a fact that you don't
14 virtually do any surgery? That doctor is
15 going to answer that question.

16 MR. POMERANTZ: He answered that
17 question and we were on to the next question.

18 MR. TRUBEY: No, he did not
finish.

21 David, David, let the doctor finish
22 the answer. Don't. You don't -- I'm going
23 to get a judge on the phone right now. What
24 you are doing right now is the most abusive
25 thing and it's going right to the bar
association. You and your father --

1 That doctor is going to finish that
2 question. Okay?

3 MR. POMERANTZ: All right. I
4 don't take that shit. Okay?

5 MR. TRUBEY: Let him finish
6 his question. Now, let him.

7 MR. POMERANTZ: No, this is
8 how we are going to proceed with my cross-
9 examination --

10 MR. TRUBEY: No, no. Let
11 him finish the question. He's going to
12 answer the question.

13 MR. POMERANTZ: That is a yes
14 or no question and you can --

15 MR. TRUBEY: It's not a yes
16 or no question.

17 MR. POMERANTZ: -- and I'll move
18 on to something else.

19 MR. TRUBEY: Let him answer
20 the question. That's all I want.

21 MR. POMERANTZ: All right.
22 Now we are going to move on to the next
23 question.

24 MR. TRUBEY: No, he's going
25 to answer the question.

1 MR. POMERANTZ: The question
2 was answered.

3 MR. TRUBEY: No, it was not.
4 Doctor, would you answer the question?

5 MR. POMERANTZ: I'm going to
6 move to strike that.

7 MR. TRUBEY: Fine, fine.
8 Do whatever you want. I want the Judge
9 to see everything.

10 Doctor, would you please finish the
11 question?

12 A My surgery schedule is not kept in the appointment
13 book which you obtained through devious means, period.

14 MR. POMERANTZ: Motion to strike

15 BY MR. POMERANTZ:

16 Q Doctor, when you testified in a legal matter that
17 is part of a public record. You are aware that
18 court cases are public records, are you not?

19 A Yes, sir. And I have not testified in the case
20 through which you obtained the appointment book.
21 Therefore, that appointment book is not part of the
22 public record.

23 Q Doctor, that appointment book has been deemed to
24 be admissible evidence in this case, so we are not
25 here to discuss the admissibility of it. If not,

1 we would go through it page by page.

2 A You can do whatever you want. I will terminate
3 the deposition.

4 Q Go ahead and terminate it, but your testimony
5 will not be used in this case, I can assure you
6 of that.

7 A I'll bet that it will be.

8 Q All right. Now, doctor, do you expect Miss Hinkle
9 to return to your office in the future for
10 treatment?

11 A No, counselor.

12 Q In fact, doctor, if Miss Hinkle needs further
13 treatment, you would not expect to be consulted
14 by her treating doctor, would you?

15 A I would not expect to be consulted. I would be
16 happy to treat her if she needed further treatment.

17 Q Doctor, you have reviewed the report of Dr. Gerald
18 Yosowitz, the doctor who actually did treat Miss
19 Hinkle, have you not?

20 A Yes.

21 Q All right. I gather that you are familiar with
22 Dr. Yosowitz?

23 A Yes.

24 Q And he like yourself is an orthopedic surgeon?

25 A Yes.

1 Ani he's a doctor in good standing in the medical
2 community?

3 A I'm unaware of his standing.

4 Q All right. Do you have any reason to doubt that
5 he enjoys a good reputation in this community?

6 A I have no reason to doubt that.

7 Q Dr. Yosowitz first examined Miss Hinkle on May 7th,
8 1987, or five days after the motor vehicle accident,
9 correct?

10 A Yes.

11 Q By contrast your one and only examination of Miss
12 Hinkle was over a year and a half after the accident
13 is that right?

14 A Correct.

15 Q All right. Unlike you, Dr. Yosowitz has examined
16 her as recently as two months ago, is that correct?

17 A I have no information about that, sir.

18 Q So, then, you have not reviewed any records from
19 Dr. Yosowitz' latest treatment of Miss Hinkle,
20 is that correct?

21 A I would be happy to do so at the present time if
22 you would like to show them to me.

23 MR. TRUBEI:

Just let the

24 record show that the documents that the

25 doctor has reviewed were those documents

as provided by yourself.

Q Doctor, **have** you reviewed the transcript of the testimony of Dr. **Yosowitz** in this matter **which** has already **been** taken?

A I have not, but I **would** be happy to if you **would** like me to.

Q **So** you are unaware that Miss Hinkle **is** back treating with and has been back **to see** Dr. **Yosowitz** since the time you examined **Xiss** Hinkle?

A That's correct.

Q All right. Would that fact change your opinions in any way?

A **It** probably **would** not **change** my opinions **as** to the injuries **she** sustained.

However, **if it** were important I would be happy to review any information you would like me to.

Q **Okay.** Dr. **Yosowitz'** **report** indicates that Dr. **Yosowitz** found muscle spasm in both trapezius muscles on her first visit, is that correct?

A Excuse me, sir, Dr. **Yosowitz** authored at **least** two reports that I **am** aware of. What report are you referring to?

Q I'm **talking** about **his** first report.

A **Yes.**

1 Q All right. Now, the trapezius muscles would be the
2 large muscles in the shoulder area, would that be
3 correct?

4 A Yes.

5 Q And, doctor, muscle spasm is felt by a doctor
6 palpating or touching the patient's back, correct?

7 A Yes.

8 Q Spasm would be considered an objective finding?

9 A Not necessarily. It's a finding that can be
10 fignow or taken by the patient.

11 Q In other words, it's your testimony that a patient
12 can fake a muscle spasm, Doctor?

13 A It's my testimony. Counselor, that a patient can
14 tighten up their muscle and give the appearance of
15 having a muscle spasm, yes, sir.

16 Q And do you believe that opinion is shared by the greater
17 majority of orthopedic surgeons in this community?

18 A Absolutely.

19 Q Okay. Doctor, so, then, you do not believe that
20 it is an objective finding?

21 A That's correct.

22 Q Dr. Yosowitz also found positive straight leg
23 raising bilaterally at 75 degrees, is that correct?

24 A That's what his report indicates, yes.

25 Q That means that when both of her legs were raised to

1 75 degrees it elicited pain from the patient, is
2 that correct?

3 A Do you want to read back the question? The answer
4 to that question is no.

5 Q Do you want the question read back?

6 A No.

7 Q I'm not trying to --

8 A No. My answer to the question that you asked is no,

9 Q So, in other words, she did not feel pain when her
10 leg was lifted 75 degrees?

11 A That wasn't the question you asked me.

12 If Dr. Yosowitz wrote that she had positive
13 straight leg raising bilaterally at 75 degrees, I
14 don't know what kind of complaints she had,

15 All he said was that it was positive.

16 Q Well, doctor, in your examination, you had several.
17 indications that certain tests were positive?

18 A Yes, sir.

19 Q And by that you meant that it elicited pain, is
20 that correct?

21 A Not necessarily. We can go over the tests that I
22 did and I will attempt to explain them.

23 Generally when doing a test caused the
24 patient to have some complaints, I included it.

25 Q Well, now, doctor, in your own examination you

1 conducted a straight **leg** raising test of Miss
2 Hinkle, isn't that **so**?

3 A That's correct, counselor.

4 Q All, right. And the supine straight **leg** raising
5 **was** restricted to **45** degrees bilaterally and
6 **it** was accompanied **by** low Sack pain?

7 A And you noticed, sir, that I said accompanied **by**
8 low back pain, I didn't **say it was** positive, but
9 I gave the patient's response.

10 Q Okay. Doctor, supine means **lying** down, is that
11 correct?

12 A That's correct.

13 Q In other words, this test **was** conducted **by** having
14 the client or the patient lie down on the **table** and
15 the legs **were** lifted in an upward notion **with** the
16 **knees straight**, would that be a fair statement?

17 A Correct.

18 Q All right. And you -- the pa-ient said that **she**
19 felt low back **pain** when her **legs** were lifted to
20 **45** degrees?-

21 A Yes.

22 MR. TRUBEY: She said what?

23 MR. POKE-RANT2: He can read it

24 back later. Do you want the question read
25 back Mr. Trubey?

MR TRUBEY:

No, I just want

to know what **she said.**

Q Now, so that would mean that the **test** was positive at that level, would that be correct?

A Yes.

Q So in fact when you saw Miss Hinkle a year and a half after this accident, she indicated to you that she felt pain when her **legs** were lifted even less than they were when they were lifted in Dr. Yosowitz' office?

A No, because when she was sitting upright we could do it to 90 Degrees and she had no complaints.

Q But, doctor, when we -- now, that would be the sitting straight legged test, right?

A That is correct.

Q Now, that is performed differently, that is performed by the patient sitting at the edge of the table With her legs hanging down at the knee as a person normally **sits**, correct, that is how the test is begun?

A That is how it's begun, yes.

Q And then the person is asked to lift the leg from the knee downward until it's parallel with the floor, correct?

A Correct. And she forms a 90 degree angle with her

1 body which is the same thing as supine straight
2 leg raising except she is sitting up and not lying
3 down, so the two tests are comparable or they
4 should be.

5 Q Now, doctor, when you examined Miss Hinkle, one of
6 the first things you did was to take a history from
7 her, is that correct?

8 A We are back to my report now? We have left Dr.
9 iosowitz and we are back to my report? I just
10 want to be able to keep up with you so we can finish

11 Q I'm just asking you that when you examined her,
12 when you examined her, one of the first things you
13 did was to take a history from her?

14 A That's correct.

15 Q And that history was taken by you asking a
16 series of questions which she was instructed to
17 answer, is that correct?

18 A It was accomplished by my asking a series of questions.

19 a What I'm trying to make clear for the jury is that
20 you didn't sit Miss Sinkle down and just ask her
21 to tell you everything that she thinks is relevant
22 to her injury, you asked her questions which she
23 responded to, correct?

24 A At times, I asked her questions like that. At
2 other times I asked her if there were any other

things that were bothering her. So I asked her both direct and open ended questions. I didn't prohibit her from answering anything or giving me any information as you did.

Q All right. Now, I was present in your office with my client at the time of the taking of the history, is that correct?

A Yes.

Q Now, you agree that a history is an important part of an examination?

A It's an important part of an examination. That is correct.

Q All right. In answering her questions, Miss Hinkle told you that she had been a passenger in a car on May 2nd, 1987, correct?

A Incorrect.

Q Why is that incorrect?

A You were in my office. You don't recall -- excuse me. You're asking the questions.

I asked Miss Hinkle the date of the accident. She said May 2nd. She didn't tell me the year, you told me the year.

Q All right. Doctor, do you have any reason to doubt that this accident occurred May 2nd, 1987?

A I have no reason to doubt that it occurred May 2nd,

1 1987, but you're just jumping all over me so I'm
2 just trying to answer your questions truthfully.
3 You've accused me of lying and a bunch of things
4 today.

5 Q Now, doctor, you obviously take some significance
6 to the fact that in the interest of time I said
7 to you that it happened. Was the taking of the
8 history some sort of test that Miss Hinkle had to
9 pass by remembering specific dates?

10 MR. TRUBEY: Objection.

11 Mowe is to be stricken.

12 A No.

13 Q All right. So, then, the important point was not
14 who gave you the exact year that it happened,
15 or the date that it happened, but the important
16 point is when the accident happened, would that
17 be correct?

18 A No, the important point was both. The important
19 point was, as you pointed out, and I have agreed,
20 I have done more than one of these before, and the
21 important point is that sometimes plaintiffs are
22 accompanied by their attorneys. Sometimes they are
23 not. But when clients are accompanied by their
24 attorneys, the client gives the history, just like
25 my patient gives the history, not the attorney.

1 Q Doctor, if you had a patient, either for treatment
2 or in a defense medical examination, who was unable
3 to answer questions, because of their age or
4 mental disability, would you accept that history
5 from some other person who had knowledge?

6 A Of course I would do that.

7 Q Okay. Thank you.

8 A You're implying- that both because of Miss Hinkle's
9 age and her mental condition she was unable to
10 give a history.

11 Q Doctor, you are the one that is saying that, not me.

12 A Well, you asked the question.

13 Q Now, doctor, further she gave a history that while
14 the vehicle was stopped, she was struck in the rear,
15 is that correct?

16 A Yes.

17 Q And she also told you that she was thrown backwards
18 and that the car seat broke as a result of that
19 collision?

20 h Yes.

21
22 with medication by Dr. Yosowitz, is that right?

23 A Yes.

24 Q And Dr. Yosowitz' first report verifies that he
25 has prescribed various medications to treat Miss

1 Hinkle, is that correct?

2 A Yes.

3 Q Miss Hinkle also gave a history of being
4 prescribed physical therapy by Dr. Yosowitz, is
5 that correct?

6 A Yes.

7 Q All right. And Dr. Yosowitz' report verifies
8 that she did in fact receive physical therapy
9 treatment from Mt. Sinai Hospital, does it not?

10 A For the sake of time, if you would show me where
11 in Dr. Yosowitz' report it said he referred her to
12 physical therapy, I will be able to answer your
13 question.

14 MR. POMERANTZ: Off the record.

15 MR. ANDREWS: Off the record.

16 (Temporarily off the record.)

17 MR. ANDREWS: On the record.

18 Q Doctor, turning your attention to the
19 third page of Dr. Yosowitz' first report, the second
20 complete paragraph, would you agree that it says:
21 "That on her visit of July 9, 1987, she was
22 advised to continue heat at home and was sent to
23 physical therapy at Mt. Sinai Hospital for hot
24 packs and ultrasound to the cervical and lumbosacral
25 area"?

1 A Yes.

2 Q All right.

3 A Thank you.

4 Q Miss Hinkle also gave a history to you of never
5 having injured her back or suffering from Sack
6 pain before this motor vehicle accident, is that
7 correct?

8 A Would you repeat the question, please?

9 (Last question read.)

10 A Miss Hinkle said: I didn't really have any problem: .

11 Q All right. Did you, as we sit here today, do you
12 have knowledge of Miss Sinkle ever having injured
13 her Sack prior to this motor vehicle accident?

14 A No.

15 Q Did you inquire any further into that area when
16 you took the history?

17 A I asked her a very specific question and that was
18 the rather non-specific answer I got.

19 Q All right. Did you pursue it any further?

20 A No reason to pursue it.

21 Q Was there any reason why you couldn't ask her any
22 more questions regarding prior motor vehicle
23 accidents or other injuries?

24 A There is no -- unlike you, there is no reason to
25 repeat a question. I ask a question, I get an

1 answer, I move on to something else.

2 Q Do you know, have you seen any records, any
3 hospital records or any doctors' reports regarding
4 any prior injuries to Miss Hinkle's back before
5 this motor vehicle accident?

6 A I have not.

7 Q All right. Now, did Miss Hinkle also give you a
8 history that she missed, quote, quite a bit of
9 time from work as a result of her accident?

10 A Yes.

11 Q All right. You didn't mention that in your direct
12 testimony. Was there a reason for that or was that
13 just an oversight on your part?

14 A There was no reason not to mention it. Mr. Trubey
15 didn't inquire about that.

16 Q By the way, you agree with me that Miss Hinkle
17 was 27 years of age when this motor vehicle
18 accident occurred?

19 A If you tell me she was 24, I will believe it.

20 Q And Miss Hinkle also gave a history of no other
21 injuries to her back since this motor vehicle accident,
22 is that correct?

23 A That's correct.

24 Q And as we sit here today, you have no knowledge of
25 any injuries to her back suffered since the motor

vehicle accident of May 2nd, 1987, correct?

A That also is correct.

Q Miss Hinkle also told you in the history that she still has pain in her low back, quote, quite often, especially after being on her feet for a long period of time and when the weather is bad would that be a fair statement?

A Yes.

Q All right. And she also told you that she had at times experienced this pain and numbness radiating into her legs, is that correct?

A No, that is not correct. Well, you have summarized things Okay. I'll say that is correct She has pain and numbness in her legs.

Q Now, following the taking of the history of Miss Hinkle you proceeded to conduct your examination of Miss Hinkle, correct?

A Yes.

Q All right. And, doctor, is your report a complete and accurate description of your findings upon examination?

A Yes.

Q I just want to make clear that there are things that aren't included in here that may have some relevance to us.

1 In your examination did you measure Miss
2 Hinkle's weight, for example?

3 A I did not measure it, I asked her her weight.

4 Q All right. And then you took her word for what
5 she said her weight was?

6 A That's correct

7 Q And similarly you did not measure her height,
8 correct?

9 A That's correct

10 Q Did you take her blood pressure?

11 A Sir, I did not take her blood pressure I'm an
12 orthopedic surgeon. Taking of her blood pressure
13 is not part of an orthopedic examination.

14 Q Did you take her temperature?

15 A No.

16 Q All right. Did you determine whether she was on any
17 medication at the time of the examination?

18 A Yes.

19 Q All right. Can you tell me where that is mentioned
20 in your report which you have indicated is
21 complete?

22 A I asked in terms of the medication she was taking and
23 she told me she was taking the Tylenol as often
24 as I needed it I got no response to whether she
25 was taking Tylenol on the day of the examination or

1 not.

2 Q So, in other words, you do not know as we sit here
3 today whether she was on any medication at the time
4 that you examined her?

5 A That's right because I have no response from her
6 about it.

7 Q And so, then, you don't know if she was on any
8 pain pills, for example, at the time she was
9 examined?

10 A I would not believe that she would be on any other
11 pain pills than Tylenol on the day that she was
12 examined because Tylenol was the only medication
13 that she indicated she was taking.

14 Q All right. But you don't know whether she had
15 taken any anti-inflammatory medication on the day
16 of the examination either, do you?

17 A Yes, sir, I do. Because is she took anti-
18 inflammatory medication on the day of the examination,
19 then she was lying to me because she told me that
20 the only medication that she took was Tylenol.
21 Tylenol is not an anti-inflammatory medication.

22 Q Now wait a second, doctor. You asked her a question
23 which elicited an answer that she took Tylenol while
24 she was having problems as often as she needed it,
25 correct?

1 A You were in the room. Don't you recall the
2 question I asked her?

3 Q Doctor, I recall that you didn't ask her if she
4 was on any medication and it doesn't say it in your
5 report, so/I can take from that is that you did
6 not ask her if she was at that present time --

7 MR. TRUSEY: Objection.

8 The report --

9 A The question that I asked her is what medication ar
10 you taking? She told me she was taking Tylenol.

11 Q Well, Doctor, let's move on

12 In your examination you found tenderness on
13 light palpation of the posterior cervical spine,
14 is that correct?

15 A That's correct.

16 Q And you found extension of her neck limited to 25
17 percent of expected normal, is that correct?

18 A I'm sorry, sir, I found -- she complained of
19 tenderness not with light palpation, but she
20 lightest of palpation. Not just light, but the
21 lightest of palpation.

22 Q And you also found that the extension of her neck
23 was limited to 25 percent of normal, correct?

24 A Correct.

25 Q Extension would be bending her head backwards?

1 A That's correct.

2 Q You also found lateral bending and rotation of her
3 neck to both sides limited to 75 percent of normal,
4 is that correct?

5 A That's correct.

6 Q So, in other words, that would be bending her
7 head from side to side and turning her head as if
8 to shake "No"?

9 A That's correct.

10 Q When you examined her low back you found forward
11 bending or flexion restricted, is that correct?

12 A That's correct.

13 Q And I take it that those -- oh, and bending from
14 side to side or lateral bending was limited to
15 50 percent of normal range, is that correct?

16 A That's correct.

17 Q These tests were conducted while Miss Hinkle was in
18 a standing position, I take it?

19 A That is correct.

20 Q And you already testified -- well, so, then, you
21 found -- let me strike that.

22 Doctor, you also performed what you called
23 the Burns' test, is that right?

24 A That's right.

25 Q All right. I'm having, I've read the report --

1 A My previous depositions and I've described it
2 and you fust don't understand it.

3 Q I'm having a little trouble visualizing it, is my
4 problem.' This test is --

5 A I mean, is's right there in McKnight. I mean, it
6 ought to be clear.

7 Q It's performed in a chair, with a chair, is that
8 correct?

9 A Yes.

10 Q All right. You have the patient kneel on the
11 chair and the chair has no arms, is that correct?

12 A That's correct.

13 Q And the patient then sits Sack on his heels?

14 A Or her heels.

15 Q Or her heels, and then the patient has to lean.
16 over and touch the floor?

17 A Bend over, yes.

18 Q All right. Doctor, if you don't have any
19 objection, could we demonstrate this test, could
20 you perform it on me? Do you have any problem
21 doing that?

22 MR. TRUBEY: I would have
23 an objection in that you are not the same
24 physical characteristics as your client and
25 it wouldn't be a test that would be admissib e

under the rules of evidence.

Q Doctor, do you have any problem with that, the objection aside, do you have any problem with demonstrating having me show it? I just want to see how it's done and have the jury see how this test is performed.

A I have no objection with your doing it. I have no objection with my doing it because I know that if I do it, at least it will be done correctly.

Q Okay. Well, why don't we do that then? If we could just go off the record for a second so we need to get a chair or can -- we can't use these chairs because they have arms?

A That's right.

Q All right. Let's go off the record and get a chair and do this.

MR. ANDREWS: Off the record

(Temporarily off the record.)

MR. ANDREWS: On the record.

BY MR. POMERANTZ:

Q Doctor, while we were off camera, we had a discussion and you have decided -- I would like you to perform the test on me and you would rather not do that, is that correct?

A I would like to demonstrate the test for the jury

so that I'm sure it is done properly. You would rather not let me do it.

Q Well -- but, doctor, I would assume the position of the patient, you would assume the position of the doctor and then you can show me how it's one Do you want to assume the position of the patient, and as long as you do exactly what I say, then that is fair enough.

Q Okay. Well, then, you have brought a chair in here. Is this the chair that you do all of the Burns' test with?

A Yes.

Q Okay. This would be the same chair or an exact duplicate of the chair that you used for Miss Hinkle, for example?

A Right. The only difference may be that I put a pillow on there because it's a wood chair and I didn't want her to be uncomfortable with respect to her knees.

Q Doctor, why don't you -- I'm not going to have a microphone attached to me, so why don't you show me how the test is conducted and you can explain it as you do it.

A I want you to stand over here, please. And I merely want you to kneel on the chair facing the

camera. Okay.

Now, I want you to sit back on to your heels. Okay. And from that position, I just want you to bend forward and touch the floor, and you will notice, the jury can't see it, but you have got your palms actually on the floor. Okay, That is a negative Burns' test. That is normal.

Q All right. Thank you, doctor.

MR. POMERANTZ: Can we go
off the record a second?

MR. ANDREWS: Off the record.

(Temporarily off the record.)

Q Let me see if I understand the significance of this test.

If a person cannot perform the Burns' test, then in your opinion that person is not performing up to capacity, would that be a fair statement?

A Providing there are no anatomic reasons for that person not to be able to perform the test just as you did.

Q Would a herniated lumbar disk be a reason that you would, an anatomical reason, why you cannot perform that test?

A Only if the herniated disk occurred within 48 hours of the exam. That is to say, I have had

patients of my own on whom I have operated who have had herniated disks that can perform that test.

4 Q Have you had persons, patients, who have herniated
5 disks who cannot perform that test because of their
6 herniated disk?

7 A That's right. And those are the patients who have
8 become symptomatic within a day or two, not 18
9 months before, but within a day or two of my

14 A As the patient is able to touch the floor, it
15 does not indicate that he does not have Sack
16 problems.

17 Q All right. So in other words, the Burns' test
18 doesn't really have anything to do with Sack pain
19 per se, it's inore designed to show whether the
20 person -- well, let me just ask you that, it doesn't
21 really have anything to do with back pain, it's
22 not designed to show whether or not a person is
23 experiencing back pain?

24 A No, that is not correct either. The test is
25 designed to show whether the person is credible or

not, whether that maneuver coincides with their other parts of the physical examination. If is a test of reliability.

MR. ANDREWS: We are off the record.

{Temporarily off the record.}

MR. ANDREWS: We are on the record.

Q Then the Burns' test is more of a psychological test, one designed to see if in your opinion there is a psychological component to the injury or that the patient is being unreliable in your words, would that be a fair statement?

A well, I wouldn't call it a psychological test but, yes, it is a test to determine whether the patient is reliable or not.

Q In other words, you use this to determine whether a person is, in your opinion, lying?

A That's correct.

Q Now, doctor, I was able to perform the test, correct?

A That's correct.

Q I would have had a negative Burns test?

A That's correct.

Q Now, doctor, I have never had any back injuries, I

1 will tell you that, but my performance on the
2 test --

3 MR. TRUBEY: Objection.

4 Move that it be stricken.

5 Q My performance on the test doesn't have any Searing
6 whatsoever on whether I had a Sack injury or not,
7 isn't that a fair statement?

8 A We **Save** already discusse~~c~~! that. If you had a Sack
9 injury or herniated disk two days ago you would
10 not be able to perform. **the test**. Okay. I've
11 had numerous back injuries. I can still perform
12 **the test**.

13 Q Now, you testified that this is the sane size
14 chair that you used with **Xiss Hinkle**, correct?

15 A That's correct.

16 Q Now, doctor, I'm considerably over **six feet tall**
17 and Miss Hinkle is, according to your report,
18 **five foot three**.

19 MR. TRUBEY: abjection.

20 That is why I wanted this exam not to go
21 forward. You don't have the **same set** of
22 circumstances and visuals, **et cetera**.

23 Therefore, **as far as this exam**, as far
24 **as the Burns' test** is concerned, you **have**
25 answered. My objection **stands**. It should

be stricken.

2 Q Doctor, was Miss Hinkle, who is five foot three,
3 according to your records, was her height taken
4 into consideration when performing this test?

5 A You indicated to me a moment ago that you are
6 considerably over six foot tall. How much over
7 six foot tall are you?

8 Q Well, doctor, I am six foot one.

9 A That is not considerably.

10 Q All right. Doctor --

11 A I'm six foot two and i don't consider myself
12 considerably so.

13 Q All right.

14 A Just so we have --

15 Q I have the vanity to consider myself considerably
16 over six foot tall

17 A Well, i don't know whether it's --

18 Q The point is, did you consider Miss Hinkle's
19 height?

20 A I did not consider her height because height is not
21 a consideration in performing the Burns' test.
22 She did not even begin to do the Burns' test.
23 That's the key issue.

24 C All right. Now, I take it, then, similarly the
25 length of her arms is not taken into consideration,

is that correct?

A That's correct because of the degree, the manner in which she performed the Burns test, okay, set back on to her heels, period. Didn't even attempt to bend forward.

Q All right. Doctor, on the film I have done the test and I cooperated with your instructions, would you agree with me on that?

A Yes.

Q Now, wouldn't you admit that in performing the Burns' test, even with a fully cooperative patient, as I was, the patient is clearly placed in a somewhat awkward or precarious position, would you agree with that?

A I don't believe that it is precarious. If you consider it awkward, then you can consider it awkward.

Q It's not a normal way in which a person maneuvers around in a chair, you would agree with that?

A I would agree with that.

Q Isn't it possible that Miss Hinkle was somewhat afraid to do the test in the way that you described?

A No, it was not. Miss Hinkle refused to do the test because she complained of back pain as she sat back on to her heels. There is no anatomic

1 basis to complain of back pain as you sit back
2 on to your heels while doing the Burns' test.

3 Q In general, isn't it possible that a person with
4 a low back pain for a period of time would be
5 protective of their back?

6 A In general yes.

7 Q And isn't it possible that persons with low back
8 injuries would tend not to put themselves in
9 positions of instability where perhaps they could
10 reinjure or aggravate their low back?

11 A In general, that is correct.

13 Q Now, doctor, I take it that from your testimony
13 that you feel that there is a mental component
14 to Miss Hinkle's injuries, would that be a fair
15 statement?

16 A I don't believe I have testified to that effect.

17 Q Do you believe that she -- you have testified that
18 she suffered some physical injuries, correct?

19 A I testified that as a result of the accident, she
20 may have suffered some physical injury, yes.

21 Q Do you believe that she also -- some of her
22 complaints do not generate from physical injuries?

23 A That's correct.

24 Q So that there is a mental aspect to this claim?

25 A If you are referring -- it's non-anatomic, so

whether it is conscious or unconscious, is something that has to be determined. I don't believe she has mental illness.

Q Right. Now, doctor, your area of expertise in orthopedics involves the musculoskeletal system, is that correct, the bones and muscles?

A Yes

Q And it does not involve the mental processes.

either conscious or unconscious, is that correct?

A That is incorrect. As an orthopedic surgeon I have to be aware of the mental processes, both conscious or unconscious.

Q All right But you are not, for example, a Board certified psychiatrist, would that be a fair statement?

A Yes, that is a fair statement.

Q And you are not a licensed psychologist either?

A That's also correct.

Q In your report you stated that Miss Hinkle was, quote, a poor historian and quite evasive. Now, that is not a medical orthopedic opinion, is it?

A Yes, it is a medical orthopedic opinion. It's a medical opinion. It's a medical orthopedic opinion.

Q Now, in your opinion, do you think that Miss Hinkle was lying to you in any way?

MR. TRUBEY: Objection.

That's not what the report says.

MR. POMERANTZ: I'm asking

his opinion.

A Yes, i believe that there was an attempt on Miss Hinkle's part to fabricate, that is to say, there was an attempt to present certain physical findings which were untrue.

Q All right. Sow, that opinion of yours is not a medical orthopedic opinion either is it, doctor?

A That is a medical orthopedic opinion, an educated opinion.

Q That is only your opinion, correct?

A Well, we have gsne from "it's not my opinion" to "It is my opinion." You're asking me my opinion. I don't know what the rest of the world's opinion is. That is my opinion.

Q But it is an opinion that you don't nave any special training to.nake, do you, doctor?

A I disagree with you, sir. I have considerable training in terms of making that opinion. I have Seen prscticians; as an orthopedic surgeon, as we have determined, for almost 20 years and I'm qualified to make those opinions. I can tell when somebody is faking and when they are not.

1 Q And, for example, you're saying to this jury that
2 you can tell better than they are, for example,
3 a group of lay persons --

4 MR. TRUEBEY: Objection.

5 Q -- that you are better at making determinations
6 of who is telling the truth and who is lying than
7 they are?

8 A I can tell this jury at this particular moment that
9 in examining the patient, I can tell which patients
10 were faking and which patients were not And I
11 believe with all due respect to the jury, as an
12 orthopedic surgeon, I can make that judgment better
13 than they can.

14 Q Okay. Now, doctor, I was not present for the
15 actual physical examination of Miss Hinkle, I
16 excused myself and I went into the waiting room,
17 is that correct?

18 A Even though you were invited to stay, that's
19 correct.

20 Q Immediately following the physical examination of
21 Miss Hinkle, you directed her to your x-ray machine
22 which is located in another room of your offices,
23 is that correct?

24 A That is incorrect.

25 Q Right. Where were the x-rays taken?

1 A I do not own an x-ray machine, unlike Dr.
2 Yosowitz, for example.

3 I referred her to the radiologist next door
4 and he obtained the x-rays. I derive no monetary
5 gain from that.

6 Q Now, so the jury understands, to go from the
7 examining room to the x-ray, the room where the
8 x-ray machine is, the patient does not have to
9 go through the waiting room, is that correct?

10 A That's correct.

11 Q There is a door, an inner door which connects your
12 offices with the radiologist's office, is that
13 correct?

14 A That's correct.

15 Q So, then, when you sent Mrs. Finkle from your
16 office to the radiologist's office, she did not
17 pass through the waiting room, and I did not see
18 her?

19 A That's very logical. That's correct.

20 Q And at no time did you ever inform me of your
21 intention to take x-rays of my client. Did you?

22 A That's correct. I have no duty to do that.

23 Q Okay. That's your opinion.

24 And you never received authorization from
25 the Court to take x-rays of my client either, did

you?

MR. TRUBEY: Objection.

A That's correct I don't have to get that authorization from the Court.

Q You testified that your office and the radiologist's office are inter-connected. Is there a business relationship between you and the radiologist?

A I pointed out there is no business relationship.

I receive no monetary gain from the radiologist or the x-rays that are obtained.

Q But in essence you share office space, would that be a fair statement?

A No, sir, that is not correct either.

There is a door that joins the two offices for the convenience of our patients, the convenience of those people whom I evaluate and for the convenience of the physicians and to allow interchange between the physicians and the radiologist.

Q Now, prior to subjecting Miss Hinkle to these x-rays, you didn't inquire as to how many times she had been x-rayed in her life, did you?

A Sir, I did not. I asked Miss Hinkle -- I informed Miss Hinkle that I would like to have her take x-rays. She readily agreed. There was no duress.

If she had said: I don't want any more x-rays, that would have Seen the end of it.

Q All right. But the fact is that you really had no idea how often she has Seen exposed to x-ray radiation in her life, do you?

A That's correct, I do not.

All right. And the x-rays themselves were performed by an x-ray technician?

That's correct.

And you were not present when the x-rays were taken?

A Physically present, that is correct, I was not.

Q So you cannot say from personal observation what occurred during the taking of the x-rays, could you?

A From personal observation, no.

Q All right. Now, I believe you state? on direct examination that Miss Hinkle did not allow the technician to take certain x-rays because the position that she had to assume was too painful even though she was in the proper position to do so, is that correct?

A That's correct.

Q All right. But since you were not present you do not know from personal observation whether she was in the proper position or not, do you?

A Asked and answered.

1 Q I take it then that your answer is that you don't --

2 A You asked me the question a couple of minutes ago.

3 I told you that from my personal observation, I
4 do not know. The radiology technician came out and
5 specifically told me.

6 Q Okay. Then I'm going to move to strike that as
7 hearsay and all of the questions asked on direct
8 on the same issue.

9 Now, you also --

10 MR T WEBER: Just for the
11 record, you opened the door. The doctor can
12 answer it.

13 Q Now, is it your testimony that Miss Hinkle left
14 without having all of the x-rays taken that you
15 wanted to have taken?

16 A That's correct. Well, I haven't testified to that
17 but if you ask me that question, the answer is yes.

18 Q All right. And I believe in your report you stated
19 that she left without instructions before a
20 cross-table could be obtained, is that correct?

21 A Yes.

22 Q All right. When you say she left without
23 instructions, I take it that she wasn't told to
24 leave yet, is that what you're saying?

25 A That's correct.

1 All right. By the same token she wasn't specific-
2 ally told to remain for further tests, was she?

3 A She was by the x-ray technician, but that is
4 hearsay.

5 Q Now, doctor, were you aware thzt before we left
6 your offices, both Miss Hinkle and myself' asked
7 your secrecary if the exam was complete and we
8 were told that it was:

9 A No, i wasn't aware of that. That also would have
10 been hearszy.

11 Q Nowmar, total x-rays did. you take or did the
12 radiologist take of Miss Hinkle on that day?

13 A How many --

14 Q now many x-rays ~ ~ taken?

15 A How many x-rays were taken? No x-rzys were taken.

16 A number of radiographs xere generated.

17 Q I believe you have then with you. You can count
18 them if you want, if that would be easier.

19 A Do you think I'm capable of doing that? Ten.

20 Q All right. And, doctor, you have reviewed the
21 x-ray films after they were taken?

22 A ies.

23 a Now, doctor, would you agree with me that
24 Intervertebral disks do not show up on a normal
25 x-ray, the disks themselves?

- 1 A Yes.
- 2 Q But the spaces where they are located between the
- 3 vertebra can be measured from the x-ray?
- 4 A Yes.
- 5 Q And when you receive the x-rays you could visualize
- 6 the lumbosacral interspace?
- 7 A Yes.
- 8 Q And that would be where the L5, S1 disk is located?
- 9 A Yes.
- 10 Q And you found narrowing of that interspace, didn't
- 11 you?
- 12 A Yes.
- 13 Q And doctor, would you agree with me that a
- 14 herniated disk can cause a narrowing of the
- 15 interspace?
- 16 A Yes.
- 17 Q Doctor, you also mentioned that in your opinion
- 18 Miss Hinkley's x-rays showed Grade 1
- 19 spondylolisthesis, is that -- of the L5, S1
- 20 interspace, is that correct?
- 21 A Yes.
- 22 Q Spondylolisthesis means a displacement of one
- 23 vertebral body on another, doesn't it not?
- 24 A Yes.
- 25 Q Grade 1 or Stage 1 would be the mildest form of

1 this condizion, would that be correct?

2 A Yes.

3 Q And Stage 4 would be the other extreme, I take it
4 or perhaps Stage 5?

5 A Yes.

6 Q Persons with this condition get it as they are
7 growing up, in other words, it is a **developnental**
8 condition?

9 A Yes.

10 Q Would that be a fair statement?

11 A Right.

12 Q And the condition can be asymptomatic, that is,
13 without pain or other symptoms, isn't that a fact?

14 A Yes.

15 Q And in fact people can and do walk around all their
16 lives with spondylolisthesis and are pain free,
17 theyare not even aware that they have the
18 condition, wouldn't that be a fair statement?

19 A I can't answer that with a yes or no.

20 Q Why is that, doctor?

21 A Because it's not a simple question to answer.

22 If they are asyaptomatic, then **who** is
23 going to find out that they have it? The only
24 way it is determined is by a radiograph and
25 radiographs are obtained when **somebody has symptoms**

1 MR. ANDREWS : Off the record.
2 (Temporarily off the record.)

3 MR. ANDREWS : On the record.

4 Q Doctor, I take it that it is possible that a person
5 would have asymptomatic spondylolisthesis and it
6 would be diagnosed **because** they were x-rayed for
7 a different reason, is that possible?

8 A Anything is possible.

9 MR. ANDREWS : Can we go off
10 the record a moment?

11 (Temporarily off the record.)

12 MR. ANDREWS : On the record.

13 Q Doctor, I just had an opportunity to ask you a
14 question and you gave me a response. Unfortunately,
15 due to a technical problem it was not recorded.
16 I am just going to ask the Court Reporter to read
17 back the question and the response, and we will
18 pick it up from there. Fair enough?

19 A Fair enough.

20 MR. POMERANTZ : Would you be
21 so kind?

22 THE NOTARY : "Doctor, I
23 take it that it is possible that a person
24 would have asymptomatic spondylolisthesis
25 and it would be diagnosed because they were

1 x-rayed for a different reason, is that
2 possible?"

3 Answer: "Anything is possible."

4 Q Doctor, in your practice you have examined people,
5 ordered x-rays to be taken, and reviewed those
6 films and found them to have asymptomatic condition
7 skeletal conditions, is that correct?

8 A I don't understand the question.

9 Q All right. When you took the history from Miss
10 Hinkle, she told you that she had had basically
11 no back injuries prior -- or pain in her low
12 back prior to this accident, is that correct?

13 A Yes, I believe I answered that about an hour ago.

14 Q So, then, if Miss Hinkle did in fact have
15 spondylolisthesis prior to this accident, it was
16 asymptomatic, correct?

17 A According to her testimony, correct.

18 Q And you have reviewed no hospital records or
19 anything else to suggest otherwise, have you?

20 A That is correct.

21 Q Doctor, you have reviewed the report of Dr.
22 Schamr of MW Yosowitz' office; correct, a
23 radiology report?

24 A Oh, yes.

25 Q All right. And would I be correct that neither

Dr. Schaar nor Dr. Yosowitz, after reviewing both
x-ray films and the CAT scan films, mentioned
anything about spondylolisthesis, is that correct?

A I believe that is correct. They missed it.

Q Now, doctor, if I understand your testimony
correctly, you agree with Dr. Schaar and Dr.
Yosowitz that the x-rays and CAT scans indicate
a narrowing of the L5, S1 disk interspace, correct?

A Yes.

Q But you disagree with Dr. Schaar's reading of the
films that Miss Hinkle has a moderate bulging of
the L5, S1 disk annulus slightly indenting the
fecal sac, correct?

A Correct.

Q And your opinion is based on your reading of the
radiology films correct?

A That's correct.

Q And you're aware, are you not that Dr. Schaar is
a radiologist?

A No, I'm not aware that Dr. Schaar is a radiologist.

Q If I represent to you that he is a radiologist,
do you have any reason to disagree with me?

A No.

Q Now, doctor, you yourself have never undertaken
a residency program in radiology, have you?

1 A No.

2 Q All right. You do not partake in the yearly
3 continuing education program in radiology?

4 A No, just in orthopedics where we have continuing
5 education in reading and interpreting CAT scans.

6 Q All right. And you are not Board certified in
7 radiology, are you?

8 A No.

9 Q And you are not a member of any radiological
10 associations or societies?

11 A No.

12 Q And you do not have any staff privileges or
13 courtesy privileges in the radiology department
14 of any hospital?

15 A No.

16 Q And you don't hold yourself out to the public as
17 having a specialty in radiology, do you?

18 A No.

19 Q All right. But you would have the jury believe
20 your opinion in reading the films over that of
21 a radiologist, correct?

22 A Absolutely. In this particular case it is as clear
23 as it can be.

24 Q All right.

25 A And there is no question about it.

1 And as an orthopedic surgeon I review
2 films on a daily basis. I have had training
3 in radiology. But or' course, I am not a Board
4 certified radiologist.

5 Q You would also have the jury believe your opinion
6 regarding the extent of Mrs. Hinkle's injuries even
7 though you have seen her on only one occasion, over
8 the opinion of Dr. Losowitz, her treating physician,
9 who has followed her for a long period or" time both
10 before and after your single examination, is that
11 correct,?

12 A Yes.

13 Q Doctor, in your own practice you make a diagnosis
14 or' a patient's condition after examining him or her,
15 is that correct?

16 A Yes.

17 Q And on occasion you later change or modify your
18 initial diagnosis?

19 A Yes.

20 Q That is not all that uncommon of an occurrence,
21 I would take it?

22 A I don't know what's uncommon. It doesn't happen
23 often, but it does happen.

24 Q You have in the past ordered x-rays and/or CAT
25 Scan films of patients after your first examination?

1 A Yes.

2 Q And I take it that you later changed your diagnosis
3 after getting the results of those tests?

4 A That also can happen.

5 Q And you are aware that in this case, after
6 reviewing the results of CAT scans, Dr. Yosowitz
7 amended his diagnosis to include a herniated disk at
8 the L5, S1 level in his second report?

9 A I'm sorry, I don't see the word "Diagnosis" in
10 Dr. Yosowitz' second report.

11 Q Well, the fact is that he says that that is what
12 she is suffering from, correct?

13 A From what, sir? What is she suffering from?

14 Q From a herniated disk at the L5, S1 level?

15 A No, I don't believe that is what Dr. Yosowitz says.

16 He says: It is my opinion that this bulging
17 disk, he doesn't call it a herniated disk.

18 Q Well, doctor, are you aware that in his testimony
19 for trial under oath that he has stated that
20 this is in fact a herniated disk, were you aware
21 of that?

22 A Sir, you asked me now about two hours ago whether
23 I read his deposition. I told you that I didn't,
24 so how could I possibly be aware of what his
25 testimony for trial is?

1 Q If I represent to you that that was his testimony
2 in his deposition which he has already given,
3 you would, disagree with that, - am I correct?

4 A I would disagree with that, that's correct.

5 Q Doctor, when you perform one of these defense
6 medical examinations as you have done in this case,
7 you are usually asked to do two things, maybe more,
8 but usually two things in every case, and that
9 would be to determine what injuries were sustained
10 in an accident, and what the residual problems
11 that person has, if any, would that be a fair
12 statement?

13 A It's just like the same two things I do when I
14 examine my own patients, that's correct. In fact,
15 that is a direct quote.

16 Q And in this case, it is your opinion that Miss
17 Hinkle has no residual problems resulting from her
18 car accident of May 2nd, 1987, no permanent disability
19 directly related to her accident, is that correct?

20 A That's correct.

21 Q Doctor, isn't it a fact that you write basically
22 the same thing in all the defense medical reports
23 that you write?

24 A No, it is not a fact that I write basically the
25 same thing.

The fact of the matter is there is only so many ways to explain the truth, and so therefore if the verbiage of the next eight reports that you are going to produce are the same from time to time, that is simple to understand.

Q So, in other words -- well, let me ask you this.

Do you recall writing a defense medical report to attorney John Rae who is Mr. Mrubey's partner dated --

MR MRUBEY: Objection. owe
that it be stricken.

Q -- dated December 17, 1987 regarding a Mary Ann James?

A Well, let me pull out the record that the Cleveland Academy of Trial Attorneys are circulating.

You know, it's interesting, there are eight reports. We owe established that I do how many defense medicals a year, right? I mean, how come you only have eight out of the millions that you calculated?

But in answer to your question, no, I don't doing that report. But I'll look up here and see if that is the same one that was circulated in your news letter. Do you want to ask me some questions about it?

Q Doctor, isn't it a fact that in that case you examined an injured person and your opinion in that case was that there was nothing to substantiate that the injured person had any permanent disability; directly attributable to her accident?

A I don't have any independent recollection. I see so many patients and I do so many defense medicals, how do you expect me to remember one?

Q Doctor --

A This one I will remember forever, though, I can promise you,

Q Doctor, as you are aware, I have a rather large briefcase here full of defense medicals that were written by you,

A How many do you have?

Q And on every single one of them you said the same thing: No permanent disability. All right?

Would you --

A I don't know that I am aware of them. I will be happy to go over them with you. Okay?

Q If you like I'll go through every one.

I also have testimony in depositions where on countless other -- on several occasions you came to the same conclusion.

MR. TRUBEY:

Objection.

Okay. u where --

2 Q Rather than go through all of them, in the
3 interest of time, would you agree with me that on
4 many, many defense medical examinations, you came
5 up with the conclusion that the person had no
6 permanent disability?

7 A I will agree with you that on many occasions I have
8 found people who have no disability as a result of
9 the accident

10 u also --

11 Q In defense medical examinations?

12 A Defense medical examinations and Plaintiff's
13 medical examinations.

14 Q I'm limiting it to defense medical examinations.

15 A You can limit it to whatever you want.

16 Q Okay.

17 A I will also point out to you that I have also found
18 people who have been significantly injured who have
19 disability, and I would be willing to bet you don't
20 have those reports.

21 Q And, doctor, would you give us the name of one such
22 person?

23 A I think that is privileged, isn't it, Mr. Trubey?

24 MR. TRUBEY: Yes, it is.

25 Q Now, doctor, I'm going to instruct you that that

is not an answer. I'm talking about in a defense medical examination, can you tell me as we sit here right now, out of the hundreds perhaps -- I think as you have testified, thousands of defense medicals --

A No, that wasn't the testimony.

Can I relate that to him or is that privileged?

MR. TRUBEY: Doctor, I think it's up to you.

A Okay. As a matter of fact the -- here it is, the report dictated -- an examination performed on July 5th, 1989 on an Andrew Tessler in which the man has considerable disability as a result of an accident.

Q Okay. And that person was -- you were asked to examine by who?

A By Mr. Biro, a defense attorney on behalf of the defendant.

Q Okay. And what percentage of permanent disability did you find directly related to the accident?

A I don't calculate a percentage of permanent partial disability or permanent total disability. He was disabled. Okay?

Q Okay. And you found permanent disability but you

did not give a **percentage**?

2 A I wasn't asked to give a percentage, **that's** correct..

3 Q Now, doctor, **there** are just a **couple** of **other**
4 **areas** that I would like to ask you about.

5 So that the jury understands medicine a
6 little bit, the vertebrae --

7 A I'll bet they've been waiting for hours **here**
8 **about** the medicine.

9 Q The vertebrae -- through the vertebrae **passes** the
10 spinal cord which connects with the brain, would
11 that be correct?

12 A That **is** incorrect.

13 Q **How is** that incorrect, doctor?

14 A You don't even **know** **basic** anatomy. Okay?

15 Q Motion to strike, doctor,

16 MR. TRUBEY: You asked the
17 question. He answered it,

18 Q That was not an answer to the quastion.

19 I **have** asked you a question. Limit your
20 answer to that **question**.

21 A Do you want to answer **the** question again? **Ask** the
22 question **again** and I will answer it.

23 MR. POMERANTZ: Read the
24 question back, please.

25 THE NOTARY: I missed

something there.

THE WITNESS:

No, you didn't.

THE NOTARY:

I missed a

couple of words.

Q Okay. Let me rephrase the question then.

Doctor, would you agree with me that through

the vertebrae, an op

passes the spinal co

A No.

Q Why do you disagree

A Because that's not

Q Where does the spi

A The spinal cord pa

column.

Q Which is comprise

A No. One wall of

of the vertebral

structures that

through which the

the spinal cord passes.

Q Now, I know you're going to quibble with me on

terminology, but the fact is that out of the spinal

cord emerges nerve roots, is that correct?

A I'm not going to quibble with you. That's correct.

Q All right. And would you --

25

u/week

doctor?

surprised

other

column

h which

A Why don't you close the door. It is so late. The cleaning people are here and they are going to start making some noise.

Q Would you agree, doctor,, that pressure on those nerve roots can produce gain?

A Yes.

Q Would you agree with me that a herniated disk can put pressure an a nerve root?

A Yes.

Q Doctor, you are familiar with the terms remissions and exacerbations, are you not?

A Yes.

Q All right. Remissions would be a period of time when a person is symptom free or relatively symptom free?

A Yes.

Q And exacerbations would be a period. when a person's symptoms act up or are worse, would that be correct?

A Yes.

Q Would it be fair to say that a person with neck and back injuries frequently go through periods of remissions and exacerbations, that is, that they have good days followed by bad days?

A I can't answer that with a yes or no.

Q And why is that?

A Because it depends upon where they are with respect to their injury. Certainly early after the injury it is possible they will have good days and bad days.

Past the injury, past a specific period of time, it is unlikely that they are going to have remissions and exacerbations, Once they are cured, they are cured.

Q So, in other words, your testimony is that persons with back injuries all are, quote, cured?

A My testimony is that in medicine there is never a never and never an always. And you're asking such a general question that of course I wouldn't say all people are cured.

Q All right. So some people do have exacerbations, then followed by remissions?

A Some people, depending on the nature of their injury, can have permanent disability and can have permanent pain. Whether it exacerbates or remits is something I can't answer,

Q All right. And would you agree that a person who has muscle spasms can go through remissions and exacerbations, periods when they don't have spasms and followed by periods when they do have spasms?

A That is true in cerebral palsy, for example.

It is generally not true in -- in fact, it is not true with respect to the usual soft tissue injury that we are talking about.

Q Doctor, am I correct that even though you found --you did find restrictions of movement in your examination of Miss Hinkle?

A Miss Hinkle restricted the movement of her neck when I examined her, that is correct.

Q And she also indicated to you that certain tests and movements elicited pain, is that correct?

A That's correct.

Q But you did not find spasms upon examination?

A That's correct.

Q It is possible, is it not, that at the time of your examination Miss Hinkle was in a period of remission?

A Anything is possible.

I believe that at the time I examined Miss Hinkle she had no affects from the accident that had occurred 18 months before, not that she was in a remission,

Q Okay. But the fact of the matter is that she could have had a muscle spasm later that day or the next day after you examined her, isn't that possible?

A Anything is possible.

Q Now, doctor, you indicated to us that you had some questions as to what Miss Hinkle was -- whether the statements that she made to you during the examination were accurate or not. Would it be true that an important source of information regarding a person's condition comes from that person themselves what they tell the doctor?

A That is a source, yes.

Q Okay. In fact, that is the most important source that you have when you examine a person, is it not?

A It depends upon what information I'm looking for.

To be perfectly clear, certainly on the day that Miss Hinkle was here, the most important source of now she believed she felt was Miss Hinkle.

In terms of Miss Hinkle's condition three months before I saw her or six months before I saw her, it seemed to me that the most important source would be the records of the physicians who treated her, if they were accurate observers.

Q Now, the fact that you conducted the Burns' test, for example, and you conducted both the seated and lying down straight leg raising tests, that indicates that you were looking to see whether Mrs. Hinkle -- when you went into this exam you were looking to see whether Miss Hinkle was lying or not, is

that correct?

A That is incorrect, sir. I didn't do anything differently with Miss Hinkle than I do in the patients that I treat.

The patient -- if you were to come to me and you had complaints of back pain, I would ask you to do sitting straight leg raising. I would ask you to do supine straight leg raising.

If you demonstrate a restriction of forward flexion when you were standing, I would ask you to do the Burns' test also.

Q So, in other words, in all of the examinations that you do for treatments or for legal matters, you do look to see whether that person is lying or not, that is part of the exam?

MR. TRUBEY: Objection as to the word "Lying."

A In all the patients that I examine, be it my own patients or patients that I examine for legal medical, medical, legal matters, do the tests to try to help me determine the validity on an anatomic basis. Okay. Lying implies a conscious effort. You know, it would be very improper for me to treat a patient who was hysterical, for example, so I need to know whether there is an

anatomic basis for their symptoms.

MR. POMERANTZ : Okay. I have
no further questions, doctor.

MR. TRUBEV: Okay. Off
the record a minute.

MR. ANDREWS: Off the record.
(Temporarily off the record.)

MR. ANDREWS: On the record.

REDIRECT EXAMINATION OF DR. DENNIS B. BROOKS

BY MR. TRUBEY:

Q Doctor, you testified. on direct examination that
you are one of the examiners for the Board of
Orthopedic Surgery?

A Yes.

Q What does an Examiner look for in examining
someone who has just finished residency?

MR. POMERANTZ: Objection.

That was not gone into on cross.

The questions that we pose to the candidates are
typical clinical situations.

The things that we are interested in are
their completeness, their treatment, not necessarily
a specific treatment.

The rationale for treatment, the things
that we examine them on, the types of questions

will deal with the physical examination. We actually show them radiographs and ask them to interpret radiographs, CAT scans, MRI's, so they are tested! on that as well, trying to understand the individual's general competence, his ability to relate to patients and his ability to understand people, to realize that orthopedic surgery is not just a cutting specialty but that you have to treat the patients' emotional needs as well as their physical needs.

MR. TRUBEY: Thank you very much, doctor. I have nothing further.

MR. POMERANTZ: No recross.

MR. ANDREWS: Doctor, you have the right to review these tapes in their entirety or you can waive that right,

THE WITNESS: I will waive that right.

MR. ANDREWS: Can we have the same' stipulation between counsel?

MR. TRUBEY: Yes.

MR. POMERANTZ: Yes.

MR. ANDREWS: You also have the right to read the transcript.

THE WITNESS: I will waive

that as well.

MR. POMERANTZ: I will also waive the one day filing notice, Rex.

Oh, before we go off the record, I want to have these marked as Plaintiff's Exhibit 1.

MR. ANDREWS: I also want to stipulate that I keep possession of the videotapes for trial in Court.

MR. TRUBEY: Fine.

MR. POMERANTZ: Well, let me just say the document that is being marked as Plaintiff's Exhibit No. 1 are what I represent to be the true and accurate photocopies of Dr. Dennis Brooks' appointment book for the year 1988, and that by stipulation during the course of the deposition, they will be admissible at trial.

MR. TRUBEY: So stipulated.

As far as the effects of any breach that you are concerned about with regard to any doctor-patient privilege and what you have done, that is up to you. I have no problem with that.

Just note for the record it is
irrelevant and immaterial and it should
not be presented in evidence. Just note
that for the record.

(Signature waived.)

- - - -

Whereupon, *the* referred to 1988 Calender
of Dr. Brooks, appointment calender, was
marked for purposes of identification as
Plaintiff's Exhibit I.

- - - -

C E R T I F I C A T E

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

I, William J. Mahan, 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 DR. DENNIS B. BROOKS 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 that 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 and stipulations 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 17th day of

July, A.D. 1989.

William J. Mahan, Notary Public, State of Ohio
1750 Midland Building, Cleveland, Ohio 44115
My commission expires January 18, 1990.

[illegible]