

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

3  
4 IN THE COURT OF COMMON PLEAS

5  
6 Robert Hanousek, et al., )  
 )  
7 Plaintiffs, )  
 )  
8 vs. ) Case No. 424907  
9 Thomas A. Kravetz, et al., )  
 )  
10 Defendants. )

11  
12 - - - - -

13  
14 --- VIDEOTAPED DEPOSITION---

15  
16 Videotaped Deposition of DR. DURET SMITH,  
17 M.D., F.A.C.S., a witness, taken by the Defendant,  
18 as if under direct examination before Veronica M.  
19 Sudano, a Notary Public within and for the State of  
20 Ohio, at The Lakewood Professional Building, 14601  
21 Detroit Avenue, #700, Lakewood Ohio, at 8:30 a.m.,  
22 Saturday, March 16, 2002, pursuant to notice of  
23 counsel.

24  
25 - - - - -

1     APPEARANCES:

2  
3             Nurenberg, Plevin, Heller & McCarthy, by  
4             Ellen McCarthy, Esq.  
5             1370 Ontario Street  
6             First Floor  
7             Cleveland, Ohio   44113-1792

8  
9                     For the Plaintiffs;

10             Davis & Young, by  
11             Gregory L. Williamson, Esq.  
12             1700 Midland Building  
13             101 Prospect Avenue, West  
14             Cleveland, Ohio   44115-1027

15                     For the Defendants.

16     ALSO PRESENT:

17             Andy Young.

18  
19  
20             DR. DURET SMITH, M.D., F.A.C.S., of  
21     lawful age, called by the Defendant for the purpose  
22     of cross-examination, as provided by the Ohio Rules  
23     of Civil Procedure, being by me first duly sworn,  
24     as hereinafter certified, deposed and said as  
25     follows:

1 - - - -  
2 (Thereupon, Defendant's Exhibit One was  
3 marked for purposes of identification.)  
4 - - - -

5 MR. WILLIAMSON: Good morning,  
6 Dr. Smith.

7 THE WITNESS: Good morning,

8 MR. WILLIAMSON: My name is Greg  
9 Williamson. I'm here on behalf of State  
10 Farm Mutual Automobile Insurance Company.  
11 We have Ellen McCarthy here and Andy Young  
12 on behalf of the Plaintiff.

13 Want to ask you some questions by way  
14 of direct examination.

15 THE WITNESS: Sure.  
16 - - - -

17 DIRECT EXAMINATION OF DR. SMITH

18 BY MR. WILLIAMSON:

- 19 Q. Can you please state your full name for the record?  
20 A. Duret, D-U-R-E-T, Stanford, **S-T-A-N-F-O-R-D**, Smith.  
21 Q. You are a medical doctor licensed to practice in  
22 the state of Ohio; is that correct?  
23 A. I am.  
24 Q. How long have you been so licensed?  
25 A. **This is my 20th year.**

1 Q. Okay. What is your professional address?

2 A. 24723 Detroit Road, Westlake, Ohio.

3 Q. Doctor, I'm going to hand you what's been marked  
4 for identification purposes as Defendant's Exhibit  
5 One; could you please identify that for us?

6 A. This is a copy of my curriculum vitae.

7 Q. I'll ask you some questions about that. You can  
8 please feel free to refer to it as you need.

9 A. Yeah,. I got one.

10 Q. Dr. Smith, can you give us a brief general history  
11 of your educational background beginning with  
12 college?

13 A. I started undergraduate college in 1970; graduated  
14 in 1973 from Syracuse University; went to the State  
15 University of New York School of Medicine in  
16 Buffalo; graduated in '77 from there; and right  
17 after that from '77 to '78 did a general surgery  
18 internship at State University of New York Health  
19 Science Center, Syracuse; and then right after that  
20 four years of orthopaedic residency at the same  
21 institution, State University of New York Upstate  
22 Medical Center; and then did a fellowship in Hand  
23 Surgery at Tucson, Arizona; and then came here.

24 Q. Okay. Doctor, are you board certified?

25 A. I am.

1 Q. In what specialty?

2 A. Orthopaedic surgery.

3 Q. When did you obtain your board certification?

4 A. I think in '86 and recertified in '96.

5 Q. Can you tell court, counsel, and the jury about the  
6 process of board certification and what that  
7 entails?

8 A. Sure. To be eligible for board certification, you  
9 have to have completed several criteria, One is to  
10 graduate from an accredited medical school; another  
11 is complete an accredited residency program. And  
12 the next one is to be recommended to take your  
13 boards by your department chairman.

14 And then when I took the board, you had to be  
15 in the same geographic location for two years in  
16 order to take your boards, And then you go to  
17 Chicago and take oral/written examination, And  
18 when you pass that, you're board certified,

19 Q. Thank you, Doctor. Are you currently a member of  
20 any professional organizations or societies?

21 A. I am.

22 Q. All right. Can you enumerate those for the jury?

23 A. Okay, America Academy of Orthopaedic Surgeons;  
24 America College of Surgeons; American Study for  
25 Surgery of the Hand; National Board of Medical

1       Examiners; International Federation of Societies  
2       for Surgery of the Neck; Association of Military  
3       Surgeons of the United States; Society of Medical  
4       Consultants to the Armed Forces; The Cleveland  
5       Orthopaedic Society; Cleveland Academy of  
6       Medicine. I think that's about it.

7 Q.   Okay. Doctor, do you currently maintain any  
8       privileges in any area hospitals?

9 A.   I do.

10 Q.   Could you tell us what hospitals those are?

11 A.   Lakewood Hospital; Fairview General Hospital; St.  
12       John's West Shore Hospital; and I'm on the teaching

13

14

15       Health Center or health whatever the name is now.

16 Q.   Okay. You mentioned teaching. Have you engaged in  
17       teaching?

18 A.   Yes.

19 Q.   Can you explain a little bit about that for us?

20 A.   Over the years I've taught orthopaedic residence,  
21       general surgery residence, family practice  
22       residence, pediatric residence, emergency room  
23       residence, nurses, other physicians, EMT,  
24       paramedic. A lot of teaching in the Navy with the  
25       corpsmen and physicians there and nurses and

1 medical service corps in the Navy.

2 Q. Thank you, Doctor. You mentioned military  
3 service. I take it you served in the military; is  
4 that correct?

5 A. Yes.

6 Q. Okay. Can you explain to us when you began your  
7 military service and what rank you obtained?

8 A. I started in 1966. I joined the Navy right out of  
9 high school, Went active in '67. Was discharged  
10 in 1970 rank of petty officer, second class, which  
11 is equivalent to a sergeant in the armed services.  
12 And re-affiliated in January of 1981 as a medical  
13 corps officer, as a rank of lieutenant.

14 And four weeks ago, or thereabouts, was  
15 notified that I was advanced to my second star. I  
16 am now an Admiral, One Star Admiral. And then in  
17 October of this year I'm able to earn my second  
18 star. So I'm a Two Star Admiral Select is what the  
19 term is.

20 Q. Has your military service taken you overseas,  
21 Doctor?

22 A. Yes.

23 Q. Can you explain to us about that?

24 A. In the time frame '67 to '70 I spent a lot of time  
25 in the Mediterranean, Caribbean, Cuba, as a medical

1 officer, I've been to Honduras, Haiti, Grenada,  
2 all over Europe. Arctic Circle, Desert Storm,  
3 Korea, That's about it.

4 Q. Okay, And this service was in connection with your  
5 profession as a medical doctor; is that correct?

6 A. Yes.

7 Q. Doctor, moving to the matter at hand, at my request  
8 did you have occasion to examine the Plaintiff in  
9 this matter, Robert Hanousek?

10 A. I did.

11 Q. Okay, Doctor, can you tell us when that  
12 examination took place?

13 A. According to my records October 3rd, 2001.

14 Q. And in connection with that examination were you  
15 sent medical records?

16 A. Yes.

17 Q. Okay. Let's go through them if we can. Did you  
18 receive an emergency room record from Mary Mount  
19 South?

20 A. I believe I did, yes.

21 Q. Okay.

22 A. I have a stack of-- over an inch, So I'm not sure  
23 exactly where all of it is. But, yes, I believe  
24 that was in there.

25 Q. Okay. Did you receive office records from Dr.



1 Cracium?

2 A. I have a summary of a treatment by Dr. Cracium, but  
3 I'm not sure I have the exact office note-- copies  
4 of the office notes.

5 Q. Okay. Did you receive reports and records from Dr.  
6 Mann?

7 A. That's correct, yes,

8 Q. And did you receive an operative report and a  
9 medical report from Dr. Furey?

10 A. That's correct.

11 Q. And did you receive imaging reports regarding  
12 MRI's?

13 A. Two.

14 Q. Okay. Thank you, Doctor, In connection-- let's  
15 backup a minute. Did you also receive physical  
16 therapy notes?

17 A. Yes.

18 Q. In connection with your examination of Mr.  
19 Hanousek, did you take a history from him?

20 A. I did.

21 Q. What did you learn from that history?

22 A. According to my report, at that point, Robert  
23 Hanousek is a 50 year old commercial credit  
24 collector. He was involved in a motor vehicle  
25 accident on or about 2/6/99 as the driver. He was

1 seat belted and stopped at a light, which he then  
2 turned to the right to look into his rearview  
3 mirror.- or I'm sorry. Right rear window and was  
4 hit from behind.

5 He denied being knocked out or any loss of  
6 consciousness and denied any head trauma or any  
7 part of his body hitting any parts of the car. He  
8 stated that he had a headache right away and what  
9 he described as cloudy thinking.

10 He went to the emergency room the next day  
11 complaining of headache and soreness in his occiput  
12 area, which is the back of your head where your  
13 head and neck join, and his forehead, and both  
14 shoulders.

15 He did not complain anywhere in the emergency  
16 records, that I could see, of any low back pain.  
17 Denied any tingling or numbness to any of the  
18 extremities and was discharged. Had a work up,  
19 which proved negative for any neurologic deficits.

20 Q. Okay. In fact, Doctor, was there a note in that  
21 emergency room record with respect to tingling and  
22 numbness?

23 A. Yeah. I believe it says-- there was no mention of  
24 tingling and numbness that I could see. And it had  
25 in there extremities are intact with no loss of

1 strength.

2 Q. After taking the history and reviewing the records,  
3 did you conduct a physical examination?

4 A. I did.

5 Q. Can you tell us about your findings from that?

6 A. Okay.

7 Q. And also what the examination consisted of?

8 A. Sure. On physical examination he had full range of  
9 motion of his neck, which means he had no  
10 limitation. He had no tenderness in his trapezius,  
11 which is this area here, And there was no spasm  
12 noted,

13 He had some tenderness in the occiput, which,  
14 again, is this area back here, He had no weakness  
15 of any of the muscle groups to either upper  
16 extremity, which is your arms. He had no atrophy  
17 or what we call wasting of the muscles. He had no  
18 sensory changes in his upper extremity. That means  
19 that he could feel to light touch and pin prick.

20 He did have decrease range of motion of all  
21 spheres. That means each way you can twist or turn  
22 your back, your low back, to his low back, And I  
23 noted that he had not, at his admission, been  
24 faithful with the home exercise program, which  
25 means he was not doing any **exercises of**

1       significance to improve his flexibility or range of  
2       motion of his back.

3               He had a positive straight leg raising with  
4       tingling into his feet. But he stated that it was  
5       better than it was prior to his surgery, He had no  
6       sensory deficits, That means he could tell light  
7       touch and pin prick without any difference between  
8       one leg or the other. He had no weakness of any of  
9       the muscles to either lower extremities as well.

10              His deep tender reflexes were normal for  
11       biceps, triceps, brachioradialis--

12                               - - - -

13                               (Beeper interruption.)

14                               - - - - 3

15 A.   Oh, sorry, Knees and ankle jerks. And that's an  
16       indication that there's a lack of neurologic damage  
17       to that.

18              And that was the physical exam.

19 Q.   Okay. Now, Doctor, in connection with your  
20       examination I think you indicated that you reviewed  
21       physical therapy records; is that correct?

22 A.   That's correct, yes.

23 Q.   Okay. I think the records reveal that he was first  
24       referred to physical therapy on March 31, 1999?

25 A.   I believe so. Can I-- this is an emergency room

1 call.

2 Q. Oh, sure.

3 VIDEOGRAPHER: Off the record.

4 - - - -

5 (Off the record.)

6 - - - -

7 VIDEOGRAPHER: We are back on  
8 the record, You may proceed.

9 MR. WILLIAMSON: Thank you.

10 Q. Doctor, I believe we were talking about physical  
11 therapy notes and Mr. Manousek's first regiment of  
12 physical. therapy --

13 A. Right.

14 Q. -- which began March 31, 1999 --

15 A. Correct.

16 Q. -- is that correct?

17 A. That's correct.

18 Q. Did you review those notes?

19 A. Yes.

20 Q. Okay. What did you glean from them?

21 A. That was-- he complained of low back pain, thoracic  
22 pain, found all motion painless and things like  
23 this, Says date of evaluation 3/31/99.

24 Q. Okay. Now, Doctor, you were kind enough to author  
25 a report for me in connection with your

- 1 examination; is that correct?
- 2 A That's correct.
- 3 Q Okay, There is a note in your report about when
- 4 Mr. Hanousek first complained of Low back pain; is
- 5 that correct?
- 6 A That's correct.
- 7 Q Can you tell us about that?
- 8 A Says I find no evidence of any complaints of low
- 9 back pain in any of the documents that you have
- 10 sent me (in excess of one inch high) that Mr.
- 11 Hanousek had a back pain prior to the 4/16/98, that
- 12 should be 4/16/99, and then that should be 3/31/99,
- 13 which would be six weeks or so after the accident.
- 14 Q. Okay. That was based on the records you received;
- 15 is that correct?
- 16 A. Right.
- 17 Q. Okay. Did you also happen to review Dr.-- physical
- 18 therapy records beginning on July 22, 1993
- 19 A. Yes.
- 20 Q. Okay. And what if anything did you glean from
- 21 those?
- 22 A. Let me just find them first.
- 23 Q. Sure.
- 24 A. What was that date, again?
- 25 Q. July 22nd.

- 1 A. 7/22/99?
- 2 Q. Yes.
- 3 A. Make sure I get them all here, Yeah, I think this  
4 is all of them.
- 5 Q. Okay, What was the focus of that referral for  
6 physical therapy, Doctor, if you will?
- 7 A. Says, "Patient evaluated," I'll try and read it as  
8 best I can, "At this time patient," um, I can't  
9 read it, "don't seem appropriate at two," the  
10 number two, "diagnosis, Patient complain of  
11 positive balance last two weeks walking down a  
12 hallway and onset of apparent O-A-H-A during  
13 watching basketball game. Frequent rotation of  
14 head. Small amplitude, Such a complaint suggests  
15 questionable instability in upper cervical.  
16 Evaluation did suggest mal-position C-2 with right  
17 not expertise of an osteopathic or chiropractic may  
18 be caused or considered to rule out this finding."
- 19 Q. Okay, So was the focus--
- 20 A. So was the cervical spine; his neck, basically.
- 21 Q. Okay. You also had occasion, Doctor, did you not,  
22 to review records from Dr. Mann; is that correct?
- 23 A. That's correct,
- 24 Q. And Dr. Mann I believe is a neurologist?
- 25 A. That's my understanding, yes,

1 Q. Okay. And what did you glean from review of those  
2 records?

3 A. Um, let me just review those for completeness  
4 here. This is his summary. You talking about his  
5 treatment records?

6 S. Well, we can do with his summary. When did the  
7 summary indicate that he first saw the patient, Mr.  
8 Hanousek?

9 A. July 21st, 2000.

10 Q. Okay. And did Dr. Mann order an MRI?

11 A. That's correct. Dated August 1, 2000.

12 Q. Okay. Doctor, in your review of the records did  
13 you note that there was a previous MRI that had  
14 been ordered?

15 A. That's correct.

16 Q. Okay. And that would have been by Dr. Cracium?

17 A. That's correct.

18 Q. Okay. Just for purpose of brevity, was that MRI  
19 November of 1999?

20 A. Yeah, I believe. 11/5/99, that's correct.

21 Q. Okay. And the one that was ordered by Dr. Mann,  
22 when was that performed?

23 A. According to the report 8/1/00.

24 Q. Okay. Doctor can you describe for us what the  
25 findings were with respect to L3-4 where Mr.



1 Hanousek had his surgery ultimately in the November  
2 1999 MRI report?

3 A. It says, "Impression, right posterior lateral L5-S1  
4 asymmetric disk bulging/focal disk protrusion, mild  
5 L3-L4 and L4-L5 developmental spinal canal  
6 stenosis." So there's no mention of any disk  
7 problem at L3-4.

8 Q. Okay. Doctor, the term has been used throughout  
9 this case spinal canal stenosis, Can you define  
10 that for the jury?

11 A. Sure, The best way to envision that is the spinal  
12 cord is a tube, if you will, it goes from the neck  
13 all the way down to the tailbone of nerves and  
14 nerve tissue, And it's very soft and vulnerable to  
15 injury from all kinds of trauma.

16 Around it is the spine and one of the jobs of  
17 the spine is to protect the spinal cord, There is  
18 bone that surrounds the spinal cord basically 360  
19 degrees and through various processes, the bone  
20 starts to encroach; that means, the space or the  
21 hole, if you will, in the bone for the tube of the  
22 spinal cord gets smaller and smaller and smaller  
23 and smaller and encroaches on the spinal cord and  
24 can in fact pinch it if it gets bad enough.

25 Q. Okay, What were the findings in the August 1st,

1 2000, report relative to L3-4 when the surgery  
2 occurred?

3 A. I've got at L2-3 there's a small mild annular  
4 bulge, which is a bulging disc but not herniation.  
5 At L3-4 there is a bulging disc with small focal  
6 central herniation with mild to moderate central  
7 canal stenosis and mild bilateral, bilateral means  
8 both sides, foraminal stenosis worse on the left  
9 than on the right. Ant that's specifically dealing

10

11 Q Okay. Doctor, was Mr. Hanousek discharged from his  
12 two regiments of cervical physical therapy?

13 A Yes. I'm not sure of the exact dates. I have one  
14 5/22/99, reason for discharge, goal is met. And I  
15 don't have the exact date of the second session.

16

17 operative report of Dr. Furey regarding his  
18 operation on Mr. Hanousek of February 26, 2001?

19 A. I did.

20 Q. What did you glean from that operative report?

21 A. According to the operative report dated 2/26/01,  
22 which was, as best I can tell, dictated by the

23

24 herniated disc. He has down here, but there  
25 certainly was what he calls moderate central canal

1        stenosis, which is where the spine creeps in on the  
2        spinal cord and where, where the-- on the sides of  
3        where the spinal cord is, we call those the  
4        recesses if the spinal cord is here the recesses  
5        are on the sides and near where the spinal cord  
6        roots come out, There was some stenosis there  
7        secondary to hypertrophied or thickened, call it a  
8        ligament, they call ligamentum flavum, but it's a  
9        ligament, which takes up space and compresses the  
10       spinal cord and roots or can.

11                In his own words Dr. Furey says, and I'm  
12        quoting, "A moderate contained disc bulge was  
13        noted." The term herniation, free fragment, or  
14        pressure on the nerve root or anything of that  
15        nature, which goes along with a herniated or  
16        ruptured disc, was never mentioned. Those words  
17        are not in this document whatsoever; therefore, he  
18        did not have a herniated disc, Even though he puts  
19        down pre-operative diagnosis, herniated nucleus  
20        pulposus, it's not there,

21                And people are very-- surgeons are very  
22        accurate in their description of what they see and  
23        what they do in surgery for medical legal reasons.  
24        And again, he did not say anything about a  
25        rupture. Did not say anything about a **free**

1 fragment, which is what happens after a rupture.  
2 And did not say anything about pressure on the  
3 nerve root from a disc whatsoever.

4 Q. Okay. He did in fact though perform a discectomy?

5 A. He did, that's correct,

6 Q. And a laminectomy as well?

7 A. Yes.

8 Q. Can you tell us what a laminectomy is?

9 A. Again, the back side of the spine, which is  
10 covering the spinal cord, has two structures each  
11  
12  
13  
14  
15  
16  
17

18 lamina. And in order to get in to do the disc you  
19 have to take the lamina out to get in to see and to  
20 do your surgery. And that's called a laminectomy.  
21 You remove a portion of the lamina,

22 Q. Okay. Doctor, did the various imaging studies done  
23 on Mr. Hanousek's lumbar spine show any  
24 degenerative conditions?

25 A. Spinal stenosis is a degenerative condition.

1 Q, And--

2 A. And hyertrophied ligamentum flavum that he saw in  
3 surgery is a degenerative condition,

4 Q. Okay. Was there any notation of degenerative disc  
5 disease that you saw?

6 A, I believe there was-- let me see. Degenerative  
7 intervertebral disc disease at L4-5. And this is  
8 on the 8/1/00. And L4-L5 on the 11/5 it did not  
9 mention, that I can see, degenerative disc disease,

10 Q. Can the spinal canal stenosis that you've mentioned  
11 also be congenital?

12 A. Yes, Or developmental, that's correct,

13 Q. Okay. Doctor, can you explain for the benefit of  
14 the jury, because we have talked about MRI's, what  
15 an MRI is?

16 A. Okay, It's a very complex brand of physics. But  
17 basically, rather than using x-ray beams to create  
18 a picture, they use nuclear magnetic resonance  
19 where they have magnets. And this produces a  
20 picture, if you will, of the spine, the spinal  
21 cord, and whatever soft tissues are around,

22 So it's like an x-ray in that it gives you a  
23 picture to look at. It looks all the world like an  
24 x-ray, but it's done with a different type of  
25 physics rather **than** x-ray,

1 Q. Okay, Thank you, Doctor,

2 Doctor, I'm going to ask you a series of  
3 question now, if you would, would you give us your  
4 answer based upon a reasonable degree of medical  
5 certainty and probability?

6 A. I will.

7 Q. Okay. Doctor, do you have an opinion based upon  
8 your training, education, your review of the  
9 medical records received, and your physical  
10 examination of the Plaintiff, do you have an  
11 opinion to a reasonable degree of medical certainty  
12 and probability as to whether or not Mr. Hanousek  
13 suffered an injury of the automobile accident of  
14 February 6, 1999?

15 A. Yes, I do.

16 Q. Okay. What is that opinion, Doctor?

17 A. My opinion based on report is that he suffered an  
18 exacerbation of his previous cervical spine strain  
19 and sprain of his motor vehicle accidents of 1987  
20 and 1970. And although it's out of my area of  
21 expertise, the headaches appear to have been  
22 related to the motor vehicle accident of 2/6/99,  
23 which is the one we're talking about now. And that  
24 was it.

25 Q. Okay. Doctor, do you have an opinion to a

1 reasonable degree of medical certainty and  
2 probability as to whether Mr. Hanousek suffered any  
3 injury to his lower back?

4 A. I do.

5 Q. And what is that opinion, Doctor?

6 A. He did not.

7 Q. Okay, Do you have an opinion based upon a  
8 reasonable degree of medical certainty and  
9 probability as to whether the accident of 2/6/99  
10 made necessary the surgery Mr. Hanousek underwent  
11 on February 26, 2001?

12 A. I do.

13 Q. And what is that opinion, Doctor?

14 A. It did not.

15 Q. Do you have an opinion based upon a reasonable  
16 degree of medical certainty and probability as to  
17 whether he recovered from his cervical injury?

18 A. Yes.

19 Q. And what is that opinion, Doctor?

20 A. He did.

21 Q. And do you have an opinion based upon a reasonable  
22 degree of medical certainty and probability as to  
23 whether he suffered any permanent injury caused by  
24 the accident of February 6, 1992

25 A. I do.

1 Q. And what is that opinion, Doctor?

2 A. He did not.

3 Q. And finally, doctor, do you have an opinion as to  
4 whether or not Mr. Hanousek currently suffers from  
5 any residual impairment or pain as a result of the  
6 accident of 2/6/1999?

7 A. I do.

8 Q. And what is that opinion, Doctor?

9 A. He does note

10 MR. WILLIAMSON: Thank you,  
11 Doctor. I don't have any other questions.

12 THE WITNESS: Before — can I  
13 make-- I got to make another phone call.

14 VIDEOGRAPHER: Off the record,

15 - - - -

16 (Thereupon, Plaintiff's Exhibit One and Two  
17 were marked for purposes of identification.)

18 - - - -

19 VIDEOGRAPHER: We're back on  
20 the record.

21 MS. MCCARTHY: Doctor, my name  
22 is Ellen McCarthy. And along with Leon  
23 Plevin and Andy Young I represent Mre  
24 Hanousek. I have some questions for you  
25 about- the **work you've** done and the kind of



1 work that you do.

2 - - - -

3 CROSS-EXAMINATION OF DR. DURET SMITH

4 BY MS. MCCARTHY:

5 Q. Could you tell us what an IME is, please?

6 A. IME is independent medical evaluation,

7 Q. And IME in-- for your purposes is not for the  
8 treatment of the patient; is that correct?

9 A. That's correct.

10 Q. You had no intention when you saw Mr. Hanousek of  
11 providing him with any medical advice or otherwise  
12 providing him with medical treatment options,  
13 correct?

14 A. That's correct.

15 Q. Okay. You do not communicate your conclusions to  
16 Mr. Hanousek, true?

17 A. That's correct.

18 Q. Why do you do these?

19 A. I got interested in doing them several years ago.  
20 Our group was asked to do these by the Bureau of  
21 Workman's Compensation. And I started doing some  
22 for them, And then other attorneys asked me to do  
23 them and the State of Ohio and Attorney General  
24 office. Fairly interesting.

25 Q. Am I correct that you set aside four appointments

1 on Wednesdays in order to do IME's?

2 A I used to. It's three now.

3 Q For whom do you do these independent medical  
4 examinations?

5 A Whoever calls my secretary and schedules them.

6 Q Okay. So it would be people like State **Farm**?

7 A There are some.

8 Q All state?

9 A I believe so, yes.

10 Q Progressive insurance?

11 A I believe they're there. I don't get a call from  
12 an insurance company per se. We get a call **from** a  
13 secretary from a law firm.

14 Q Okay.

15 E/ Generally.

16 Q You recall being deposed by Bob Howsel, I would  
17 imagine?

18 A Sure.

19 Q Mr. Howsel caused your appointment book to be  
20 produced for purposes of a deposition, correct?

21 A Well, I don't know if caused it to be-- he asked  
22 for it. We gave it to him.

23 Q Right. It was subpoenaed, true?

24 A I don't know if it was subpoenaed. He asked **for**  
25 it. We gave **hit to him**.

1 Q. Okay. And in that appointment book it indicated  
2 that you had taken calls from not only a number of  
3 insurance defense law firms but from Progressive  
4 Insurance representatives, as well as people from  
5 All State, Cincinnati Insurance, and Nationwide,  
6 true?

7 A. I don't know. Mr. Howsel made those statements,  
8 Whether or not those phone numbers belong to those  
9 people I don't know. I did not look up whose phone  
10 numbers they were. Mr. Howsel or his staff **did**.

11 Q. Okay. Well, you wouldn't dispute that when the  
12 phone numbers listed in your appointment book and  
13 somebody answers the phone Progressive Insurance  
14 that it's a Progressive Insurance call made to your  
15 office made to schedule an appointment, true?

16 A. I would assume so. Although the implication that I  
17 don't do any plaintiff work-- I can see where we're  
18 **going**.

19 Q. I'm just talking about what you do on independent  
20 medical exams,

21 A. Believe me I understand what you're talking about,  
22 okay? But those are not the only phone numbers in  
23 there,

24 Q. You also do them for The Bureau of Worker's  
25 Compensation on behalf of the employer, correct?

1 A. I do them for The Bureau of Worker's Compensation  
2 when they send me a patient that comes from The  
3 Bureau of Worker's Compensation. I don't know who  
4 they're representing.

5 Q. Well, you're not-- when The Bureau of Worker's  
6 Compensation sends you somebody to examine, you're  
7 not there to treat them are you, you're just there  
8 to do an independent exam?

9 A. That's correct.

10 Q. They've already got their own treating doctor most  
11 times?

12 A. Most times, yes.

13 Q. According to a letter that was generated by your  
14 accountant and provided to Mr. Howsel, who is an  
15 attorney who represents injured workers, in 1997  
16 your income, separate from your practice of  
17 medicine, for doing independent medical exams from  
18 law firms only, not from The Bureau of Worker's  
19 Compensation or insurance companies, law firms  
20 only, was \$20,166; is that correct?

21 A. I believe so.

22 Q. I'm going to hand you what's been marked as Exhibit  
23 Number Two. Could you identify that for us?

24 A. This is a letter from Lynch, Anselmo & Ott to Mr.  
25 Howsel, "At the request of Dr. Duret Smith, I have

1 summarized the income received from law firms over  
2 the past five years. The following incomes was  
3 reported as part of Federal Schedule C.

4 Q. Okay,

5 A. "Federal Form Schedule C."

6 Q. It indicates that in 1998 from law firms for doing  
7 independent medical exams you received \$24,873,  
8 correct?

9 A, That's correct.

10 Q. And it indicates that in 1999 from law firms you  
11 earned \$27,693, correct?

12 A. That's correct.

13 Q. And in 2000 for doing independent medical exams for  
14 law firms you earned \$33,1563

15 A. That's correct. I don't know the-- I'm sure some  
16 of those figures involved depositions as well.

17 Q. Either way.

18 A. There's no way to separate the IME from a  
19 deposition.

20 Q. Understood. How much do you charge by the hour for  
21 reviewing records and preparing a report?

22 A. Between 350, \$375.

23 Q. What is the basis for that charge?

24 A. What is the basis for that charge? I don't  
25 understand that question.

1 Q. Well, how did you arrive at a figure of 350 to \$375  
2 as being a reasonable fee?

3 A. My impression is the going rate for this area.

4 Q. Where did you get that impression?

5 A. I don't have a specific reference of where that  
6 was. I believe I talked to some lawyers and some

7

8 have an exact recollection where they came **from**.

9 Q. So you can't tell me what lawyers or what

10

11 A. Absolutely not.

12 Q. -- you spoke to who told you that this was a

13

14

15 A. That's correct.

16 Q. How much do you charge by the hour for the taking  
17 of your deposition?

18 A. Seven hundred fifty dollars,

19 Q. What is the basis for that charge?

20 A. Same answer.

21 Q. Okay. Again, you can't tell me who advised you  
22 that \$750 an hour to sit around and talk about the

23

24

25 A. Well, the sitting around, if you will, is not an

1 exact characterization of what's taking place here,  
2 I don't believe, I don't believe you're sitting  
3 around here.

4 That also includes the review of the  
5 materials for the deposition,

6 Q. Why is there a difference between the hourly rate  
7 for reading records, reviewing items, meeting with  
8 the patient, and writing a report different than  
9 sitting here talking to us?

10 A. That's a good question. Like I said that was the  
11 figure I came to based on speaking with lawyers and  
12 other physicians that do this, Why? I don't know.

13 Q. Has the court ever reduced your fee?

14 A. I believe Mr. Howsel got the court to reduce my  
15 fee,

16 Q. So the answer is 'yes'?

17 A. That's correct.

18 Q. Have you ever had a situation in the past where a  
19 family physician referred his patient to you for an  
20 orthopedic evaluation and review of some records  
21 and films?

22 A. Family-- I don't know. A family practitioner send  
23 me an IME?

24 Q. No.

25 A. Okay.

- 1 Q. Have you ever had a situation in the past where  
2 let's say a family doctor or some other doctor who  
3 doesn't do orthopaedic work, referred his patient  
4 to you for an orthopaedic evaluation?
- 5 A. I don't know what an orthopaedic -- as a patient you  
6 mean?
- 7 Q. Sure, Somebody who doesn't do your line of work  
8 refers a patient,
- 9 A. So somebody referred a patient to me --
- 10 Q. Sure.
- 11 A. -- for patient care?
- 12 Q. Right.
- 13 A. I believe so, yeah.
- 14 Q. Okay. And there's been instances in the past where  
15 this patient has had some form of medical treatment  
16 before seeing you, comes to you and tell you,  
17 "Before I got to your office here's what happened  
18 to me," right?
- 19 A. Yes.
- 20 Q. Okay. Under those circumstances where a doctor  
21 refers a patient to you for orthopaedic care, have  
22 you sent the doctor a letter advising the doctor I  
23 saw your patient today, here's what we discussed,  
24 and here's what I think we ought to do with him?
- 25 A. Yes.



- 1 Q. Okay. What is the cost for that type of an  
2 evaluation?
- 3 A. I don't know.
- 4 Q. Give me a range.
- 5 A. I don't know what the figures are. We have a level  
6 one, two, three, four office examination, And I  
7 don't know what the reimbursement for those are.
- 8 Q. So you can't tell me what a level one would cost?
- 9 A. I can not.
- 10 Q. Okay. If you wanted to know the answer to that  
11 question, who would you ask?
- 12 A. Probably my billing girl.
- 13 Q. Who is that?
- 14 A. First name is Kim. I don't know her last name.
- 15 Q. Where is Kim located?
- 16 A. At the address of our office in Westlake.
- 17 Q. She's at the Westlake office?
- 18 A. Yes.
- 19 Q. Regardless of whether it's a level one, two, three,  
20 or four, under these circumstances where there's a  
21 referral from the family doctor and you write a  
22 letter to the family doctor, and that person had  
23 health insurance, you would bill the health  
24 insurance, wouldn't you?
- 25 A. I'm assuming so, yes.

1 Q. Okay. Do you-- if the patient has health insurance  
2 that only pays a portion of the care, do you then  
3 bill the patient for that portion that is unpaid by  
4 insurance?

5 A. Up to the agreed upon rate, I believe, yes.

6 Q. And the agreed upon rate means what?

7 A. Whatever the insurance companies tells me they'll  
8 pay me for that service,

9 Q. I'm going to hand you what's been marked as Exhibit  
10 Number One, which is, I believe, your services for  
11 reviewing Mr. Hanousek's medical records, examining  
12 him, and writing a report, correct?

13 A. Correct.

14 Q. Could you tell us what that fee is?

15 A. One thousand three hundred twenty-five dollars.

16 Q. Have you ever billed an insurance company, a health  
17 insurance company, for a patient who is referred to  
18 you for medical care for an initial visit \$1325?

19 A. No. Not to my knowledge,

20 Q. Okay. How long have you been performing IME's?

21 A. I would say since '95, maybe '94. I don't know.

22 Q. You understood that it was part of your job when  
23 doing an IME to review the medical records and  
24 interview and examine the patient or the person,  
25 not the patient, and write a report that addresses,

1       among other things, the medical care that that  
2       person received prior to seeing you?

3 A.   Not necessarily. That's generally what takes  
4       place. Sometimes I'm asked to review and answer  
5       specific questions, Sometimes I'm asked to do the  
6       independent medical examination evaluation and not  
7       write a report, Sometimes I'm asked to do those  
8       things and call someone and give them a verbal  
9       opinion but not to write a report,

10 Q.   Well, in this case were you asked to do two  
11       things: Determine what injuries Mr. Hanousek  
12       sustained by virtue of this accident and put it in  
13       writing?

14 A.   I believe I was asked 17 things or thereabouts,  
15       Sixteen things.

16 Q.   Do those include writing a report and giving an  
17       opinion as to what injuries you think were caused  
18       by this accident?

19 A.   I believe so.

20 Q.   Okay.

21 A.   In part, yes.

22 Q.   Okay, And in part you rely on the contents of  
23       medical records in formulating your opinions in  
24       terms of what injuries were related or caused by  
25       the accident?

1 A. That's correct,

2 Q. And you recognize that the report you write, which  
3 sets forth your opinions and you have those  
4 opinions, will be provided to opposing counsel?

5 A. My impression is yes.

6 Q. Okay, And you also recognize that you might be  
7 cross-examined on the contents of that report at  
8 some point in time?

9 A. Sure.

10 Q. Okay6 And you would also acknowledge that in terms  
11 of writing your report it's important to be  
12 thorough and accurate, right?

13 A. That's correct.

14 Q. Okay6 Now you've got a whole slew of records in  
15 front of you that are in no particular order, and I  
16 don't want to waste a lot of time going through the  
17 records,

18 But I'd like to talk to you specifically  
19 about what records you received regarding Dr.  
20 Cracium's care. Can you tell me that?

21 A. Well, I'd have to look and see exactly what I've  
22 had.

23 MS. MCCARTHY: Why don't we go  
24 off the record so you can do that.

25 VIDEOGRAPHER: Off the record.

- - - -  
(Off the record,)

- - - -.  
VIDEOGRAPHER: We're back on  
the record,

Q. Doctor, while we were off the record we had some  
conversation, And it's agreed to among counsel.  
that you were not provided by counsel the records  
of Dr. Cracium; is that right?

A. I believe that's correct,

Q. Okay. And I did give you a copy of Dr. Cracium's  
records, which are marked Exhibit Number Two, as  
well as a copy of the Peak Physical Therapy records  
from Mary Mount Hospital, which is marked as  
Exhibit Number Four,

Currently, Doctor, do you perform surgeries  
on the low back?

A. I do not,

Q. When was the last time you performed surgery on the  
low back?

A. I would think maybe 1985,

Q. Under what circumstances?

A. I either assisted one of my partners or did a  
laminectomy,

Q. Where did this take place?

- 1 A. I believe it was Lakewood Hospital.
- 2 Q. Do you know Dr. Furey?
- 3 A. I do not. Not that I'm aware of. Let me answer it  
4 this way. He may be a member of The Cleveland  
5 Orthopaedic Society, and I may have met him if he  
6 was introduced to me. I would not know him if he  
7 walked in the office today.
- 8 Q. Okay. You understood from talking to the patient  
9 and from the review of what records you were  
10 actually provided that the first visit with the  
11 physician that Mr. Hanousek had following the  
12 emergency room was with Dr. Gracium, true?
- 13 A. I'd have to review. The first-- what was the  
14 question? The first what?
- 15 Q. First visit with the physician following the  
16 emergency room?
- 17 A. Oh, following the emergency room. I've got down  
18 here, from what Mr. Hanousek told me, he followed  
19 up with a neurologist. So I believe that-- he did  
20 not use Dr. Cracium's name, but I believe that's  
21 correct.
- 22 Q. Now, on page one of your report, which is dated  
23 October 3rd, 2001, and incidentally this is the  
24 only report that you've written, correct?
- 25 A. I believe so. That's the only one I have. So I'm

1 assuming that's the only one I've written.

2 Q. On page one of your report you indicate, "I find no  
3 evidence of any complaints of low back pain in any  
4 of the documents that you have sent me (in excess  
5 of one inch high) that Mr. Hanousek complained of  
6 any low back pain prior to April 16th, 1998," which  
7 is supposed to be 1999.

8 A. Correct.

9 Q. "Almost two and-a-half months following the motor  
10 vehicle accident," Did I read that correctly?

11 A. That's correct.

12 Q. And on page three of your report, about five lines  
13 down.

14 A. First paragraph?

15 Q. First section, not full paragraph. "To try and  
16 attribute the low back he developed almost two  
17 and-a-half months later to the motor vehicle  
18 accident really stretches ones imagination." Did I  
19 read that correctly?

20 A. Yes. There-- it should read low back pain, I  
21 believe.

22 Q. Understood. Twice in your report that you mention  
23 that Mr. Hanousek did not complain of low back pain  
24 until April 16th. That was significant to you in  
25 terms of your analysis, correct?

- 1 A. Correct.
- 2 Q. All right. Was it your intention at that time this  
3 report was generated to give the impression that  
4 you did not think the back complaints were related  
5 to this accident because they did not surface until  
6 April 16th?
- 7 A. They did not surface until later. The fact that he  
8 did not mention any low back pain when he went to  
9 the emergency room is also significant.
- 10 Q. Okay. But what is significant to you is the April  
11 16th date, correct?
- 12 A. What's significant to me is a delay in onset of  
13 back pain.
- 14 Q. Right. And that's what you tried to convey in your  
15 report that nothing surfaces in the records until  
16 nine weeks following the accident?
- 17 A. I don't know the time frame.
- 18 Q. Well, the accident happened on February 6th--
- 19 A. Well, I know-- if you say February 6th to April  
20 16th is nine weeks, I trust you. But there's a  
21 significant delay there.
- 22 Q. Okay. I'd like you to take a look at Exhibit  
23 Number Two, which is Dr. Cracium's records.
- 24 A. Okay.
- 25 Q. Now, you didn't ask Mr. Williamson or anybody else



1       for a copy of the records of Dr. Cracium; am I  
2       correct about that?

      That's correct,

4 Q.   Okay, I'd like you to take a look at the records,  
5       the first one dated March 16th, 1999, Second  
6       paragraph, fourth line up from the bottom. Please  
7       read the sentence that begins with, "He has pain in  
8       the low back."

9 A.   You want me to read it?

10 Q.   Yes, I do.

11 A.   Aloud?

12 Q.   Yes.

13 A.   Okay. "He has pain in the low back area with  
14       radiation to both thighs and hips and reports no  
15       history of weakness in the upper and lower  
16       extremities."

17 Q.   On the very first page Dr. Cracium documents his  
18       complaint of low back pain contrary to the  
19       statement that you make in your report that there  
20       were no complaints before April 16th, correct?

21 A.   That's correct,

22 Q.   Okay, Like you take a look at page two of Dr.  
23       Cracium's records of his first visit under general  
24       examination, fifth line from the bottom of that  
25       paragraph. Would you please read the sentence that

- 1 starts with, "there is also moderate tenderness."
- 2 A. "There is also moderate tenderness at palpation in
- 3 the mid and low lumbar paraspinals as well as
- 4 sacroiliac joints."
- 5 Q. Under impression, what is Dr. Cracium's third
- 6 diagnosis?
- 7 A. Post traumatic lumbar strain.
- 8 Q. What does that mean?
- 9 A. He had some trauma and Dr. Cracium feels that his
- 10 lumbar strain was due to the trauma.
- 11 Q. And his lumbar strain is his low back strain,
- 12 correct?
- 13 A. That's correct.
- 14 Q. Under plan, the sixth line down, the sentence that
- 15
- 16
- 17 A. Yes.
- 18 Q. Could you read that for us, please?
- 19 A. "The patient has started on a trial of physical
- 20 therapy to include heat pads and massage,
- 21 ultrasound, as well as eventually cervical and
- 22 lumbar traction if deemed necessary."
- 23 Q. Dr. Cracium's office note documents at the very
- 24 first visit following the emergency room, four
- 25 separate instances of low back injury and

1 treatment, correct?

2 A. Four instances of low back injury or treatment --

3 Q. 'Yeah.

4 A. -- yes. Yes.

5 Q. And you never had these notes prior to writing your  
6 report?

7 A. That's correct,

8 Q. Why would you write a report when you don't have a  
9 complete picture of medical care?

10 A. I got what I felt was a significant, I guess,  
11 explanation of his medical care from Mr. Banousek  
12 and the reviews of the summaries.

13 Like I say, whether it's between the time of  
14 the injury, which was 2/6/99, and April whatever or  
15 March 16th, which is still six weeks after the  
16 fact, and the fact that he did not mention anything  
17 to any of the treating physicians right away is  
18 enough.

19 I mean, that's too much of a delay to try and  
20 pin it back on the motor vehicle accident.

21 Q. Can you envision a situation where Mr. Hanousek  
22 goes to the emergency room and has to follow-up  
23 with a doctor and can't get an appointment until  
24 March 16th?

25 A. Can I envision that situation?

1 Q. Yeah.

2 A. That would be difficult for me to envision that you  
3 can't get in to see someone for six weeks. Whether  
4 Dr. Cracium's appointment book is at full or when  
5 someone calls up and says, "I was in a car  
6 accident, I have low back pain." And his secretary  
7 says, "Okay. This is what you get."

8 Q. Right.

9 A. Can I envision it? I can envision the sun not  
10 coming up tomorrow, but it's not likely.

11 Q. So when Dr. Furey says it can happen in a **busy**  
12 practice, you would disbelieve him?

13 A. Anything can happen in a busy practice. But when  
14 someone tells you the soonest I can get you in is  
15 six weeks, they're sending you a message. There  
16 are plenty of other physicians around. The  
17 emergency room is there. There's urgent cares on  
18 every block. If things were bothering him enough,  
19 and he's an intelligent person, I can't see waiting  
20 six weeks.

21 Q. Okay. You understood that Dr. Cracium had treated  
22 him before, right?

23 A. I believe he did.

24 Q. Okay, So *you* could probably understand that a  
25 patient would like to go back to the doctor that

1       treated him before with a great deal of success, by  
2       the way, true?

3 A.   That's possible. My patient's won't wait six  
4       weeks. They'll go elsewhere.

5 Q.   Okay. Let's look at the peek records from Mount  
6       Sinai Sports Medicine and Injury Rehabilitation,  
7       and specifically those records generated before

8 A.   This what you call Exhibit Number four?

9 Q.   -- April 16th. Yes, Exhibit Number Four. The box  
10      at the top on the left side where it's dated March  
11      31st, 1999. Above it says, "Diagnosis/onset."  
12      What does it say?

13 A.   "Diagnosis/onset, cervical strain, LS strain,  
14      headache," H-A, which I'm assuming is headache.

15 Q.   And LS strain means what?

16 A.   Lumbosacral strain.

17 Q.   And that is the low back, true?

18 A.   That's correct,

19 Q.   So on the very first day of physical therapy we see  
20      a diagnosis indicating this man has been  
21      experiencing problems with his low back, correct?

22 A.   That's what his diagnosis from his treating  
23      physician was, yes.

24 Q.   And if we look at the Peak Physical Therapy notes  
25      dated April 1st, at the bottom of the page is a

- 1 quote, "Work in the LS spine evaluation next week,"  
2 correct?
- 3 A Yes.
- 4 Q Okay. At the April 6th visit, it's documented that  
5 the patient has low back strain. Correct?
- 6 A Yes.
- 7 Q Three times in the Peak Physical Therapy records  
8 reference is made to low back pain. How did you  
9 miss that?
- 10 A I have that. I believe I have it highlighted on my  
11 thing.
- 12 Q Well, if you have it highlighted on your set of  
13 records, how is it that your report indicates he  
14 made no such complaints?
- 15 A Well, I believe the date should have been 3/31  
16 rather than 4/16-- whatever I had 4/16.
- 17 Q So you would amend your statement that it really  
18 stretches ones imagination?
- 19 A No. From 2/6 to 3/31 is almost two months. It's a  
20 week shy of two months. I wouldn't amend it.
- 21 Q Okay. Were you provided with any evidence that  
22 this man was complaining of problems with his low  
23 back prior to the accident?
- 24 A I don't believe I saw any.
- 25 Q Okay. Did Mr. Hanousek need to have physical

1 therapy, nerve blocks, and surgery to his low back  
2 because of the symptoms he was having in his low  
3 back?

4 A. He had surgery for his low back, He had the  
5 blocks. I'm assuming he needed them. I did not  
6 treat him. I did not operate on him. The symptoms  
7 that were found in surgery were due to spinal  
8 stenosis, not a herniated disc,

9 You know, when you say did he need it? I  
10 don't know. Did he get it, yes.

11 Q. I'm simply interested in whether you believe that  
12 this man needed the care for his low back because  
13 of the symptoms he was having in his low back; yes  
14 or no?

15 A. Well, he got the care for his low back. Whether or  
16 not he needed surgery, I don't know.

17 Q. Why not?

18 A. I didn't examine him at that time. I am very  
19 conservative as far as referring people for back  
20 surgery. So I'm not sure I would have recommended  
21 surgery at that time for him.

22 But the treatment he got was consistent with  
23 his complaints to his low back.

24 Q. Since it's not the kind of surgery that you  
25 perform, would you defer to somebody who does

1 perform that kind of surgery?

2 A. As far as what?

3 Q. Whether it was necessary for him, given his  
4 symptomatology?

5 A. Sure. But everyone's definition of necessary is  
6 different. Could he live without it? Absolutely,  
7 Was he better after it. It seems so, yes.

8 Q. Okay. And that's a choice for the patient, isn't  
9 it?

10 A. Absolutely, yeah.

11 Q. Did you review the EMG that was done?

12 A. Yes.

13 Q. Do you agree with Dr. Furey when he states that the  
14 EMG was objective evidence of compression of a  
15 neurologic structure in the low back?

16 A. Let me just review the EMG because I believe the  
17 EMG said that there was a component of metabolic  
18 disease as well. And I'm trying to find it. Do  
19 you have a copy of it handy?

20 Q. Should be in Dr. Mann's records.

21 I'm going to hand you what's been marked as  
22 Exhibit Number Nine, which are Dr. Mann's records.  
23 Maybe that can help you.

24 A. And the question was?

25 Q. Do you agree with Dr. Furey when he states that the



1 EMG was objective evidence of compression of a  
2 neurologic structure in the low back?

3 A. It may have been due to that,

4 Q. Do you agree with Dr. Furey that the MRI of August  
5 2000 suggested compression of the nerves in the mid  
6 portion of the lumbar spine?

7 A. I see nothing in the report that states that there  
8 was compression on any of the neural elements.

9 Usually if there's compression on the nerve  
10 roots or spinal cord itself, they'll mention that,

11 Q. So you would disagree with Dr. Furey's  
12 interpretation of the actual MRI film?

13 A. I don't see any evidence of there being pressure on  
14 the nerve root or the spinal cord based on what is  
15 written here. If that disagree, then that's  
16 correct.

17 Q. Have you reviewed the actual film?

18 A. No.

19 Q. Okay. Does complaint of numbness in the lower  
20 extremities suggest compression of a neurologic  
21 structure in the low back?

22 A. Not always. If you cross your legs like you're  
23 doing long enough, you'll get tingling and numbness  
24 in your leg, too. So that's too broad of a  
25 question. It can be, yes.

1 Q. Thank you, You took issue with the contents of Dr.  
2 Furey's operative note indicating that the  
3 operative note does not talk about a disc  
4 herniation?

5 A. It does not.

6 Q. Okay .

7 A. Other than to say-- well, he did not--

8 Q. Under diagnosis, pre-operative and post operative,  
9 right?

10 A. That's correct.

11 Q. He says, "herniated disc," right?

12 A. Right. But he did not see a herniated disc in  
13 there according to what he wrote.

14 Q. I'd like to read you Dr. Furey's testimony. At  
15 page 16, lines 11 through 22:

16 Q. And you mentioned that the disc  
17 was herniated. Did you actually visualize  
18 during the surgical procedure the fact  
19 that it was indeed herniated?

20 A. Yes,

21 Q. And when it was herniated, was it  
22 then protruding upon the nerve roots or  
23 something?

24 A. The portion of the disc that had  
25 herniated was pressing on the nerve root,

1                   that's correct,

2                   Q. So that would be the cause of his  
3                   problems in your medical opinion?

4                   A. Yes,

5 Q. Do you disagree with that statement?

6 A. I can state within a reasonable degree of medical  
7           certainty that what that statement says is not  
8           consistent with what he wrote in his op report,  
9           Where the incongruity comes in, I don't know.

10                  But what he says there is not in his op  
11                  report, And when was that deposition taken?

12 Q. The other day,

13 A. The other day? Which is-- 2/26/2001, So it's over  
14           a year after the surgery, correct? And he  
15           remembers all that and didn't write it down.  
16           That's kind of curious.

17 Q. So you don't believe his testimony; is that what  
18           you're saying?

19 A. No, I'm saying what he's saying in his testimony  
20           is not what he says in his op report,

21 Q. Do you believe him when he says he saw a herniated  
22           disc when he operated on his patient?

23 A. I think it's curious that a year later what he says  
24           there with a lot of description is not what he has  
25           in his op report, unless there's another op report.

1 Q. I'm not asking you if you think it's curious. I'm  
2 asking you if you believe his testimony?

3 A. I have no opinion.

4 Q. Okay, You indicate that Mr. Hanousek suffered a  
5 neck injury in this accident?

6 A. Yes.

7 Q. Okay. When did he recover from that neck injury?

8 A. When did he exactly recover? I don't know.. You  
9 could state that he recovered when he was  
10 discharged from physical therapy at Peak, as the  
11 goals were met. And I believe that was 3/31 goals  
12 met. 3/31/99, goals met.

13 Q. The first day of therapy?

14 A. Well, it says-- I guess that was when-- date of  
15 discharge 5/25/99. Sorry.

16 So I guess date of initial evaluation is  
17 3/31. But on here discharge date, "5/29/99, goals  
18 were met."

19 MS. MCCARTHY: I don't have  
20 anymore questions for you, Thanks.

21 MR. WILLIAMSON: I don't have any  
22 either.

23 VIDEOGRAPHER: Doctor, have you  
24 decided in waiving signature or reviewing  
25 the videotape and the transcript?

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THE WITNESS:

I'll waive.

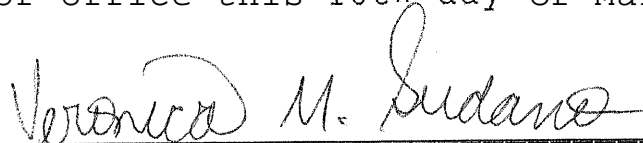
(Signature waived.)

## CERTIFICATE

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

I, Veronica M. Sudano, Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the above-named DR. DURET SMITH, M.D., F.A.C.S., 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 computer aided transcript under my direction, and is a true record of the testimony given by the witness; that said deposition was taken on the 16th day of March, A.D. 2002, in the City of Lakewood, State of Ohio, and County of Cuyahoga and was completed without adjournment; that I am not a relative or attorney or otherwise interested in the event of this action,.

IN WITNESS WHEREOF, I hereunto set my hand and seal of office this 18th day of March, 2002.



Veronica M. Sudano, Notary Public  
My commission expires March 1, 2006