

THE STATE OF OHIO,)
) ss:
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS

— — —

Deposition of DURET M. SMITH, M.D., the witness, taken as if upon examination before Mary E. Dunn, a Notary Public within and for the State of Ohio, at the offices of Duret M. Smith, M.D., 14601 Detroit Avenue, Lakewood, Ohio, at 8:09 a.m., commencing on Wednesday, the 8th day of August, 2001 pursuant to notice and stipulations of counsel, on behalf of the Plaintiffs.

ROBERT J. RUA & ASSOCIATES

1150 THE ILLUMINATING BUILDING • CLEVELAND, OHIO 44113
241-5500

1 APPEARANCES:

2 Robert V. Housel, Esq.
3 Suite 1310
4 55 Public Square Building
5 Cleveland, Ohio 44113

6 on behalf of the Plaintiffs;

7 Perrin I. Sah, Esq.
8 113 St. Clair
9 Suite 525
10 Cleveland, Ohio 44114

11 on behalf of the Defendant.

12 ALSO PRESENT:

13 John M. Seelie.

14 - - -

15 D U E T M. SMITH, M.D., the witness,
16 of lawful age, called by the Plaintiffs
17 for the purpose of examination, as
18 provided by the Ohio Rules of Civil
19 Procedure, being by me first duly sworn,
20 as hereinafter certified, deposed and said
21 as follows:

22 - - -

23 EXAMINATION OF DURET M. SMITH, M.D.
24 BY MR. HOUSEL:

1 A I sent the file to Mr. Sah to copy to send to you.

2 Q Oh. You sent this entire file that you've handed me
3 this morning?

4 A Well, the folder did not go and your business card
5 did not go.

6 Q Okay. But everything else that was inside the file
7 went to him?

8 A I believe so.

9 Q And your understanding was that he was going to send
10 it off to me?

11 A That's correct.

12 Q Okay.

13 MR. HOUSEL: Would you mark
14 these, please?

15 - - -

16 (Plaintiffs' Exhibits 1 through 3
17 marked for identification.)

18 - - -

19 Q Doctor, I'll hand you what's been marked as
20 Plaintiffs' Exhibit 1. Can you identify that,
21 please?

22 A These are the handwritten notes from me taken April
23 11, 2001 from the independent medical examination.

24 Q Is that the history segment that you took of my
25 client?

1 Q Can I see your file, please?

2 A This is the one that was sent to you or copies were
3 sent.

4 Q I know. Doctor, you've just handed me your file.
5 This is your entire file on this matter; is that
6 correct?

7 A To the best of my knowledge.

8 Q Well, did anybody keep this file other than you?

9 A No.

10 Q Okay.

11 A Well, no. I sent -- I mailed a portion of it to
12 Mr. Sah, who was to reproduce and then send it to
13 you. So, in essence, yes, someone else had the file.

14 Q Okay. Did you copy all of your file to send it to
15 me?

16 A I did not copy. We mailed to it Mr. Sah.

17 Q Did you understand from Mr. Sah that I wanted a copy
18 of your entire file?

19 A I believe so.

20 Q Okay. Did you make a copy of your entire file and
21 get it to Mr. Sah so he --

22 A No.

23 Q Let me finish the question.

24 A The answer's no, I did not make a copy of the file.

25 Q Why is that?

1 A History and physical.

2 Q I didn't get that. Do you have any reason why I
3 didn't get that?

4 A No.

5 Q Did you send that to Mr. Sah to provide to me?

6 A That I don't know.

7 Q Well --

8 A I had my secretary send it. I don't know what was
9 sent and what wasn't.

10 Q You just told me a few minutes ago that everything
11 other than the folder and my card was sent; is that
12 correct?

13 A To the best of my knowledge, that's correct.

14 Q Did you instruct your secretary to send the whole
15 file to Mr. Sah?

16 A I believe I did. This was a while ago.

17 Q How come you just didn't send it to me yourself?

18 A Actually send it is -- who put it in the folder and
19 mailed it, that's my definition of sending.

20 Q How come you didn't send it to me?

21 A Pardon me?

22 Q How come you didn't send it to me as I had requested
23 of your secretary when I called her?

24 A I sent to it Mr. Sah, because when they asked for the
25 file I actually thought it was this file here, and

1 I'm not going to bum out my Xerox machine sending a
2 file that big.
3 Q Which file that you just pointed to did you think it
4 was?
5 A I think it was Semenko, Seelie, Semenko.
6 Q You couldn't understand the difference between the
7 two?
8 A I may have confused them. I understand the
9 difference between those two.
10 Q Okay. So is that your answer why you didn't send the
11 file to me yourself?
12 A I don't send files. My secretary sends files. I see
13 patients and do physician things.
14 Q I called your secretary when I set up this
15 deposition.
16 A That's correct.
17 Q I asked your secretary in order to save us some time
18 here at your deposition if she would Xerox a copy of
19 the file and send it to me; is that right?
20 A Right. Oh, I don't know what took place between --
21 Q Do you trust that that's the case?
22 A I would assume so.
23 Q You trust if I tell you that's what I did, that
24 that's what I did?
25 A I trust you.

1 Q Okay, thank you. And did your secretary then come to
2 you and say, Mr. HouseI called, he'd like a copy of
3 the Seelie file, can I send it to him?
4 A Something like that.
5 Q What did you tell her?
6 A I told her we're not in the business of copying files
7 and sending them to people.
8 Q But you had it copied or you sent your file in its
9 entirety to Mr. Sah so he could send it to me?
10 A I believe so.
11 Q You don't have any idea why I never got Plaintiffs'
12 Exhibit 1, do you?
13 A I don't.
14 Q Read that into the record for me, please.
15 A Sure. There's a stamp says April 11, 2001, Seelie,
16 John, 42 -- do you want me to read what's here?
17 Q I want -- Doctor, I can't read your writing
18 as well as you can, so to simplify matters, read
19 everything that's on Plaintiffs Exhibit 1.
20 A "42, sales, arrow going up, traveling, 711199, driver
21 belted, misty day, 5:30 to 6:00 p.m., stopped
22 secondary to car in front, turning, saw a car coming
23 at him and hit in rear, pushed into car in front, 0
24 head trauma, LBP when he got out of car, 0 radicular,
25 in quotations "chest" no medical attention, quote,

1 "few days later", K. Stearns, right leg, more than
2 left leg, questionable onset to heel with tingling, 0
3 PT, HEP, x-ray, MRI, Vicodin, 0 previous injury, cc
4 number 1, LBP, right L, R greater than L. Number 2,
5 R greater than L leg pain, 0 T, N 0 weakness, B/B,
6 SX, PMH 0, PSH, 0, R leg, meds: 0, all: 0, fractured
7 nose, big line, L greater than right, SIJ men notch,
8 L greater than right 50 degrees, and arrow right and
9 left, bend NLHE minus twelve inches fingers/floor,
10 rest 0. X pars defect 4-5, GR Roman numeral I,
11 listhesis in quotations, "old," arrow going down, 5-1
12 space."
13 Q Can you interpret the L and the other items in there?
14 A Which L?
15 Q Any of the segments of Plaintiffs' Exhibit 1, that
16 you've just been kind enough to read for me. That's
17 your abbreviations.
18 A L is generally left or it could be lumbar.
19 Q What is it in that instance there?
20 A Well, which instance?
21 Q Well, start at the top and anything that's not easily
22 understandable from what you explained, that's your
23 interpretation of the physical examination or what
24 you were told that's abbreviated. I'd like you to
25 tell me what those abbreviations mean so I can

1 understand it.
2 A For the physical examination?
3 Q Yes, and then if there's anything above the physical
4 examination and the history part.
5 A That you wouldn't understand?
6 Q Yeah, is the abbreviations part of it, Doctor,
7 obviously when you do these things, you abbreviate,
8 so that a jury could easily understand what your
9 thoughts were about when you examined Mr. Seelie?
10 A You asked me a question, do I abbreviate, yes.
11 Q I didn't ask you if you abbreviate. You obviously
12 abbreviate from what you just read. Tell me what the
13 abbreviations mean.
14 A Okay. Arrow going up means a lot or increased. L is
15 left, R is right. 0 is 0. PT is generally physical
16 therapy. T is tingling. N is numbness. B/B is
17 bowel/bladder symptoms. LBP is low back pain. PMH
18 is past medical history. PSH is past surgical
19 history. Meds is medication. All is allergies. SI
20 joint is sacroiliac joint. X is x-ray. Arrow going
21 down is decreased. I think those were -- MRI is
22 magnetic resonance imaging. And I think those are
23 all the abbreviations I have.
24 Q Okay. Let me see that, please. Just do it this way.
25 You can either make me a copy or I'll come around.

1 A Xerox will take a while.
 2 Q Okay. Thanks, Doctor. Right here, 0/ --
 3 A No head trauma.
 4 Q Okay. LBP?
 5 A Low back pain.
 6 Q When got out of car?
 7 A Yeah.
 8 Q And?
 9 A No radicular symptoms.
 10 Q Okay.
 11 A No medical attention.
 12 Q Dash few days later?
 13 A Right.
 14 Q All right. So as far as you understood, he told you
 15 he had medical attention a few days later with Kim
 16 Steams?
 17 A That's who he saw eventually.
 18 Q Doctor, what's this?
 19 A He was having right more so than left leg pain. He
 20 doesn't know when the onset was. Question onset to
 21 heel with tingling. So the pain going in the left
 22 leg with tingling not sure when it came about.
 23 Q And x-rays - MRI - Vicodin?
 24 A He had his x-rays taken and he's referred for MRI and
 25 placed on Vicodin. No physical therapy, he's doing a

1 home exercise program.
 2 Q Here?
 3 A No previous injury.
 4 Q No previous injury to his back?
 5 A Correct.
 6 Q CC means what?
 7 A Chief complaint.
 8 Q Okay.
 9 A Low back pain going right more so than left leg,
 10 second was the right more so than left leg pain, no
 11 tingling, numbness or weakness, no bowel or bladder
 12 symptoms.
 13 Q This is what you say he told you?
 14 A That's correct. Past medical history, fractured nose
 15 was his only past.
 16 Q And this?
 17 A Past surgical history, surgery to his right leg, I
 18 would assume.
 19 Q And meds?
 20 A No meds.
 21 Q No meds?
 22 A No allergies.
 23 Q And this?
 24 A Which? This?
 25 Q Yes, sir.

1 A He had a fractured nose.
 2 Q Fractured nose?
 3 A Yeah.
 4 Q Thanks, Doctor. Here's Plaintiffs' Exhibit 2. For
 5 the record, can you identify that?
 6 A That's a letter dated April 10, 2001 from Perrin Sah
 7 to you regarding John Seelie.
 8 Q So you got a copy of that letter?
 9 A I have this letter.
 10 Q It was in your file when you handed it to me this
 11 morning, correct?
 12 A That's correct.
 13 Q All right. Is there a paragraph in that letter that
 14 indicates that the examination is going to be tape
 15 recorded and that I'm going to be present?
 16 A This letter confirms agreement of March, 2001 that
 17 you will be present for the examination and you'll be
 18 tape recording the history portion of the
 19 examination, kindly provide me with a copy of the
 20 tape.
 21 Q Did you read this letter when you got it?
 22 A I'm assuming I did.
 23 Q Okay. And I presume you then stuck it in the file,
 24 correct?
 25 A Yes, I believe so, that's the usual course.

1 Q Okay. Did it come to you by fax or did it come to
 2 you by mail?
 3 A I believe there's a fax, I don't know what you call
 4 it, a fax icon that says Law Offices. My impression
 5 is when that's on the top of a paper it came from a
 6 fax.
 7 Q Yeah, 216 771 8214, Law Offices, Cleveland. That's
 8 the fax number for Mr. Sah's office, isn't it?
 9 A I don't know.
 10 Q If I show you something that indicates that that's
 11 the case --
 12 A It should be on here somewhere.
 13 Q Yeah, it probably is.
 14 A That's correct.
 15 Q So he faxed it to you on April 9th; is that correct?
 16 A That's correct.
 17 Q When did this independent medical exam take place,
 18 Doctor?
 19 A According to my notes, April 11th.
 20 Q Okay. So two days after you got this the independent
 21 medical exam took place, correct?
 22 A Yeah.
 23 Q Allright.
 24 A Now, the --
 25 Q I think you've answered my question.

- 1 A No, no. Let me explain a little more.
 2 Q Sure.
 3 A The fax goes to our other office, I believe. Where
 4 is the -- my fax and mail, and I may not have had
 5 this by the time I had the -- did the IME, because if
 6 it went to my office on Monday I'm not there Monday,
 7 and the chart comes in Wednesday, and it may have not
 8 made it to the chart by the time I did the IME.
 9 Q Did you see it before you did the IME?
 10 A I haveno idea.
 11 Q Youhavenoidea?
 12 A No.
 13 Q All right. Did you see it the day that you did the
 14 IME?
 15 A I haveno idea.
 16 Q Did you talk to Mr. Sah at all before you did the
 17 IME, about this case?
 18 A I don't remember.
 19 Q You don't remember whether you did or you didn't?
 20 A No.
 21 Q All right. When my client and I came here on April
 22 11th you refused to allow this to be tape recorded,
 23 didn't you?
 24 A That's correct. Well, I asked you not to do it.
 25 Q Well, you said we couldn't do it, because I had to

- 1 call Mr. Sah from your office here. I remember that
 2 distinctly. Don't you? 'Cause you told me which
 3 phone I could use; do you remember that?
 4 A I don't understand the hostility. I showed you what
 5 phone you could use to make the call.
 6 Q You can characterize the way I ask questions anyway
 7 you like. Do you remember that's what you did on
 8 April 11th?
 9 A I remember, my policy is, I don't allow tape
 10 recording in any of my examinations and I probably
 11 would have told you that and I probably would have
 12 had you call Mr. Sah.
 13 Q Well, I did call Mr. Sah; do you remember that?
 14 A I believe so. Again, this was four months ago.
 15 Q Okay. Why is it that you will not allow someone to
 16 tape record an independent medical examination?
 17 A Because the tapes can be altered.
 18 Q Are you suggesting that I would have altered the tape
 19 somehow?
 20 A No. You asked me a question. I don't know you. I
 21 believe before April was the first time I've seen you
 22 in April. I don't know you. A tape can be altered.
 23 I'm not saying you would alter it. A tape can be
 24 altered.
 25 Q Why would somebody alter a tape?

- 1 A Oh, why do people alter tapes all the time?
 2 Q Why would you think that I might alter a tape?
 3 A I don't know you. I didn't know you prior to that.
 4 I'm not saying you would. It's just people have
 5 altered tapes, we all know that. I don't want to be
 6 in that box.
 7 Q You don't want to be in that box. You mean you --
 8 A Of having an altered tape with my voice on it.
 9 Q What leads you to think that somebody would alter a
 10 tape?
 11 A Can you say Watergate?
 12 Q That's your answer?
 13 A Oh, people have altered tapes throughout history as
 14 long as there have been tape recorders.
 15 Q Has that ever happened to you since you've done IMEs
 16 did --
 17 A I've not had one taped that I'm aware of.
 18 Q So even though defense counsel agreed with me that we
 19 could tape record, you weren't going to let it
 20 happen; is that right?
 21 A That's correct.
 22 Q All right.
 23 A I believe I have some rights, too.
 24 Q Sure. Anything else you want to say, or you're done?
 25 A For now.

- 1 Q If you feel like you want to make any comments, feel
 2 free to do so.
 3 I wrote down what you said, just as you said it.
 4 You said, "Do you think I was born yesterday? You
 5 guys could alter the tape." Do you remember saying
 6 that to me?
 7 A I would have said that, yes. ★
 8 Q Do you remember saying that?
 9 A I don't remember every word that came out of my mouth
 10 four months ago.
 11 Q Do you trust that's what you said if I wrote it down
 12 exactly as you said it?
 13 A I would probably say that.
 14 Q Wouldn't a tape more accurately reflect what took
 15 place?
 16 A It may, sure.
 17 Q All right. But you refuse to let anybody ever tape
 18 you when you do an independent medical exam, correct?
 19 A I believe so.
 20 Q Well, do you or don't you?
 21 A It's my policy not to let anyone tape me.
 22 Q And that's because the tape could be altered?
 23 A That's correct.
 24 Q All right. And you seem to have some kind of a fear
 25 that that's likely to happen, correct?

- 1 A It can happen, sure.
 2 Q Why would somebody do that, do you think?
 3 A I don't know why people do things. People have
 4 altered tapes, they have many reasons for doing them,
 5 I don't know every one.
 6 Q Okay. What's Plaintiffs' Exhibit 3?
 7 A A copy of the invoice to Mr. Sah for the IME.
 8 Q Okay. You don't know any reason why I didn't get
 9 that, do you?
 10 A No.
 11 Q You wouldn't have had a problem with me being
 12 provided with this ahead of time, would you?
 13 A No, not at all.
 14 Q So according to Plaintiffs' Exhibit 3, for a review
 15 of the medical documents, and a review of the outside
 16 radiographs, the IME and the preparation of the
 17 medical report in this case on 4/11/01, it says
 18 moderate degree of complexity, you charged \$675,
 19 correct?
 20 A If that's what it says, yes, that's correct.
 21 Q Okay. How long did it take you to do all those
 22 things?
 23 A I don't know. Again, that was over four months ago.
 24 I would think everything together would have probably
 25 gone into a couple hours.

- 1 Q Do you keep track of the time so you know how much to
 2 bill for?
 3 A No.
 4 Q Do you bill an hourly rate for these kinds of things?
 5 A In general, yeah, and sometimes the complexity has
 6 something to do with it as well.
 7 Q This one was a moderate degree of complexity?
 8 A Yeah.
 9 Q And why was that?
 10 A Because there's going to be a contention as to
 11 whether or not the pars defect was a traumatic or
 12 acquired or congenital or something other than
 13 traumatic.
 14 Q Anything else other than that as to why this is a
 15 moderate degree of complexity?
 16 A Not that I could think of right away.
 17 Q So 675. What is your hourly rate for doing this kind
 18 of work?
 19 A Anywhere from 350 to 375.
 20 Q Okay. And you say you think you charged for about
 21 two hours for what I just read in the first paragraph
 22 of Plaintiffs' Exhibit 3?
 23 A Two hours would be 750.
 24 Q So a little less than two hours?
 25 A Probably.

- 1 Q And then the second part of it is the fee for the
 2 radiographic exam, that's the plain x-rays you took
 3 when Mr. Seelie and I were here?
 4 A That's correct.
 5 Q All right, sir. And that's your total. And did CNA
 6 Insurance Company send you a check for this 870?
 7 A I don't know who sent me a check.
 8 Q You billed it to Mr. Sah. Do you recall who sent you
 9 the check?
 10 A It's generally an insurance company. I don't know if
 11 CNA or whoever.
 12 Q How much of this kind of work do you do, Dr. Smith?
 13 A I do probably -- Wednesdays are when I do my IMEs and
 14 probably, if I'm in town, one to three a day on a
 15 Wednesday, something like that.
 16 Q Every Wednesday?
 17 A No.
 18 Q Well, how many Wednesdays out of the month do you do
 19 one?
 20 A Again, that depends on how much I'm in town. I'm in
 21 the Navy Reserve and I have to do a lot of traveling,
 22 sometimes I do no IMEs a month.
 23 Q Do you keep records of how many you do?
 24 A We have an appointment book or ledger type thing.
 25 Q That would tell you how many you do?

- 1 A Roughly, because some get canceled and they're still
 2 in the book.
 3 Q Sure.
 4 A But I don't keep track.
 5 Q Does your doctors group office keep a separate ledger
 6 for IMEs versus billing for patients and insurance
 7 companies?
 8 A No.
 9 Q You don't?
 10 A No.
 11 Q Okay. Now, what insurance companies do you do these
 12 kinds of examinations for besides Allstate and CNA,
 13 you do them for that company, right?
 14 A I trust you. What insurance companies, I don't know
 15 specifically what insurance companies.
 16 Q Well, you do them --
 17 A I do several. I do Workmens' Compensation IMEs for
 18 the Bureau of Workmens' Compensation. I do Workmens'
 19 Compensation for attorneys. I do what I guess would
 20 be termed as malpractice, I review cases for
 21 malpractice for plaintiff and defense.
 22 Q I'm just talking about defense IMEs.
 23 A I understand, and I don't know what the names of
 24 these insurance companies or law firms are, to be
 25 honest.

1 Q You don't keep track of those things?
 2 A No.
 3 Q Any particular reason why not?
 4 A It's not important to me.
 5 Q Not important?
 6 A Tome.
 7 Q It may be important to someone else, though?
 8 A Possibly.
 9 Q Okay. You do them for CNA and Allstate, you've done
 10 them for Mr. Sah's office before, haven't you?
 11 A Yes.
 12 Q You've done them for Mr. Hartman in Mr. Sah's office;
 13 is that correct?
 14 A That's correct.
 15 Q Any other lawyers in his office?
 16 A I don't know who's in his office.
 17 Q Tell me what your recollection is of who else in
 18 Mr. Sah's office, which is the Allstate house
 19 counsel --
 20 A I don't know.
 21 Q Let me finish the question before you answer.
 22 You do them for Nationwide, too, don't you?
 23 MR. SAH: Objection.
 24 A I don't know.
 25 Q Well, there's a lawyer named Dan Sucher, who's a

1 personal friend of mine who took your deposition and
 2 he indicated that was for a case you did for
 3 Nationwide.
 4 A I believe.
 5 Q Okay. You don't remember him taking your deposition?
 6 A No.
 7 Q You do them for State Farm Insurance Company?
 8 MR. SAH: Objection.
 9 A I believe.
 10 Q You do them for Farmer's Insurance Company?
 11 MR. SAH: Objection.
 12 A I don't know.
 13 Q You do them for Progressive?
 14 MR. SAH: Objection.
 15 A I don't know that, either.
 16 Q You don't know? How much money do you make from
 17 these independent medical examinations?
 18 MR. SAH: Objection.
 19 A I don't have that figure.
 20 Q Do you have any idea?
 21 A No.
 22 Q How much money have you made this year from doing
 23 independent medical examinations?
 24 A I don't know.
 25 Q Do you have any records that would reflect that?

1 A W-2s, or, I'm sorry, 1099s and my tax form.
 2 Q Those are available?
 3 A Right now?
 4 Q Not right this minute.
 5 A Sure.
 6 Q Okay. How long would it take you to get those?
 7 A I assume my tax guy has a copy.
 8 Q So if a judge ordered you to produce those documents
 9 you could produce them, couldn't you?
 10 A Oh, I could, yeah.
 11 Q And you mean to tell me this -- what's the name of
 12 the group that you're affiliated with here?
 13 A Orthopedic Associates, Inc.
 14 Q How many doctors in that group?
 15 A Nine.
 16 Q How many do independent medical exams besides you for
 17 defense?
 18 A I don't know, to be honest with you. We all have our
 19 own practice within the group. Some do IMEs, some
 20 don't. I don't know who does plaintiff and who does
 21 defense primarily.
 22 Q Do you keep track of them altogether, though, or do
 23 you have your own little individual ways of keeping
 24 track?
 25 A That's correct.

1 Q Which way?
 2 A We have our own -- this is not, nothing of the
 3 independent medical evaluation, Workmens' Comp thing
 4 is run through the corporate book.
 5 Q But your secretary I would presume would have
 6 records, because you mentioned with me appointment
 7 books of how many you do and who you do them for,
 8 right?
 9 A Not who we do them for. Let me just explain what
 10 happened.
 11 Q Please.
 12 A My secretary will get a call, say I would like to do
 13 an IME on a patient, Mr. Jones, that can either come
 14 from BWC, Bureau of Workers' Compensation, plaintiff
 15 or a defense, Attorney General's office, and then
 16 she'll say, when do you want it done. She has a book
 17 with a five by seven, one of the steno pads in it,
 18 and each Wednesday has a page, and if I'm not here
 19 there's no page, she'll write the name of the patient
 20 or client, the person to get the IME and a contact
 21 phone number, and that's it. And then if there's no
 22 packet or folder, a few days prior to the date,
 23 she'll call and say we need this.
 24 Q Okay.
 25 A But it's not written down by, you know, I don't have

1 her ask who's calling or what the insurance company
 2 or law firm is, although I told her that if this, you
 3 know, sounds like it's a real horrendous thing that I
 4 don't want to get involved in, don't say anything and
 5 don't commit yourself until you talk to me.
 6 Q You let her make that decision instead of you?
 7 A As far as --
 8 Q Which ones you get involved in or don't get involved
 9 in?
 10 A Well, no. The BWC, I've told them no backs and --
 11 Q Why's that?
 12 A Because they're more mental aggravation than they're
 13 worth.
 14 Q So you don't do any Bureau of Workmens' Comp back
 15 injuries?
 16 A I do not do the IMEs for the Bureau of Workmens'
 17 Compensation back. I treat them.
 18 Q I'm just talking about IMEs.
 19 A For BWC, right.
 20 Q Do you want to continue on?
 21 A Lost my train of thought.
 22 Q I'm sorry.
 23 A And I think that's all that's written on that page,
 24 so I don't know. We have a point of contact phone
 25 number, and generally that's it.

1 Q Any other groups you don't do back IMEs for?
 2 A Not that I can think of. It's not a group thing.
 3 It's just the Bureau of Workmens' Compensation will
 4 come in with a chart that thick and, you know, it's
 5 just --
 6 Q Toomuchwork?
 7 A Well, mentally it's just not something I like to do.
 8 Q I understand. But you did a back case here, didn't
 9 you?
 10 A Oh, yeah.
 11 Q So you delineate which back cases you do and don't
 12 do, right?
 13 A Not necessarily, with the exception of Bureau of
 14 Workers' Compensation.
 15 Q So your secretary would have these Wednesday sheets
 16 that would reflect how many of these you've done over
 17 a certain period of time, correct?
 18 A And I think at the end of the year, I don't think she
 19 keeps them.
 20 Q You'd have them for this year?
 21 A I should.
 22 Q Would you have them for last year?
 23 A I may. I don't know.
 24 Q But if a judge orders you to produce those, you could
 25 do that, couldn't you?

1 A I could produce them. I'm not sure I could interpret
 2 them. Like I said, it's usually a name, that and if
 3 they don't show up, their name may be crossed out,
 4 say no show or something like that.
 5 Q But you could produce them if the judge ordered you
 6 to do so?
 7 A Yeah.
 8 Q Would you have any records of any kind other than the
 9 1099 and these Wednesday calendars that you told me
 10 about that would indicate how many of these you did,
 11 who you did them for and how much you were paid for
 12 them?
 13 A I don't think so.
 14 Q Okay.
 15 MR. HOUSEL: Now, would you
 16 mark this, please?
 17 ---
 18 (Plaintiffs' Exhibit 4
 19 marked for identification.)
 20 ---
 21 Q Handing you Plaintiffs' Exhibit 4, Doctor, take a
 22 look at that and tell me if you can identify that?
 23 A This is a copy of a notary subpoena. SS, does that
 24 mean to me? I don't know what this means.
 25 Q I think it's the State of Ohio, Cuyahoga County. I'm

1 not sure what it means. You got that, didn't you?
 2 A I have -- I believe I have a copy of it.
 3 Q It was served here at your office on you on August
 4 3rd and/or August 6th, wasn't it?
 5 A I don't know. When I came in Monday morning it was
 6 laying on my desk.
 7 Q Well, you have it right there in front of you?
 8 A That's correct.
 9 Q Can I see what you have in front of you?
 10 A Yeah, sure.
 11 MR. HOUSEL: Let's just mark
 12 this one with the check attached.
 13 ---
 14 (Plaintiffs' Exhibit 5
 15 marked for identification.)
 16 ---
 17 Q What's Plaintiffs' Exhibit 5?
 18 A Again, it says Notary's Subpoena, I believe it is --
 19 Q Do you know what a subpoena is?
 20 A I think it's something issued by --
 21 Q A court, right?
 22 A An officer of the court or something like that.
 23 Q Have you ever gotten one before?
 24 A Yeah.
 25 Q All right. So you know what it is, don't you?

1 A Vaguely.
 2 Q Tell me what you understand that to be?
 3 A Something that comes from an officer of the court
 4 that says do something or be somewhere.
 5 Q Okay. When did you get that?
 6 A Like I said, this was on my desk Monday morning when
 7 I walked in. I was not in this office Friday. I
 8 don't know when it --
 9 Q Did you get it this Monday morning?
 10 A This Monday morning it was on my desk, yes.
 11 Q Is that when you got it? I want to know when you
 12 physically saw it?
 13 A Monday morning.
 14 Q So you got it Monday morning, right? What did it
 15 command you to do?
 16 A Command to appear before me, a Notary Public in and
 17 for the County and State aforesaid, at the office of
 18 Robert V. Housel, Suite 1310 Public Square,
 19 Cleveland, Ohio, Wednesday, the 8th of August, 2001,
 20 at 8:00 in the morning, to give evidence and the
 21 truth to say in certain action pending in the
 22 entitled John M. Seelie, et al. versus CNA Insurance
 23 Company to bring with you to the deposition -- see
 24 attached -- I don't know how to say it, duces tecum.
 25 Q Right.

1 A Is that right?
 2 Q That's what it says. Do you know what that means?
 3 A No, I haven't a clue.
 4 Q Okay. What's it say on the second page, the attached
 5 duces tecum?
 6 A Duces tecum. Please produce at the deposition for
 7 the past 10 years the following: and it lists 1
 8 through 7.
 9 Q Please produce at the deposition, right?
 10 A Please produce at the deposition.
 11 Q And that's the deposition we're sitting here taking
 12 right now?
 13 A Correct.
 14 Q When you got that Monday what did you do with it?
 15 A Read it.
 16 Q Then what did you do with it? *independent?*
 17 A Called Mr. Sah's office.
 18 Q Why did you do that? Does Mr. Sah represent you?
 19 A No. To find out what actually this all means. I'm
 20 not a lawyer. I don't understand.
 21 Q Is Mr. Sah your lawyer?
 22 A No.
 23 Q Why did you call his office?
 24 A He was a lawyer that was involved with this case, to
 25 ask for clarification.

1 Q What did he tell you?
 2 A He was in trial. I didn't talk to him until
 3 yesterday.
 4 Q What did he tell you when you talked to him
 5 yesterday?
 6 A That they would file a something, make -- they would
 7 file something that needed my signature.
 8 Q You mean Mr. Sah's office would file something?
 9 A I believe so.
 10 Q Well, did you pay Mr. Sah's office a fee to do that
 11 for you? *☆*
 12 A Not that I know of.
 13 Q Well, did he tell you he charged you a fee to do
 14 that?
 15 A He didn't mention that.
 16 Q Just assume he'd do it for nothing?
 17 A No.
 18 Q Are you expecting he'll bill you for that?
 19 A I have no idea.
 20 Q What did he tell you he was going to do for you?
 21 A File a motion.
 22 Q To do what?
 23 A So that I would not have to produce this today.
 24 Q Why didn't you want to produce this?
 25 A I can't produce it --

1 Q Go ahead. Sorry.
 2 A Give me chance to answer.
 3 Q Please go ahead.
 4 A I get here Monday morning, I'm on call for the
 5 emergency room, which means I have probably 20 extra
 6 patients, I have patients all morning, patients all
 7 afternoon -- I'm sorry, surgery afternoon, back here,
 8 do the charts Monday night, be on call for the
 9 emergency room, until 6:00 in the morning. Tuesday
 10 morning, patients all morning, surgery in the
 11 afternoon, patients Tuesday night, and then come in
 12 here for the deposition. There's no way I could do
 13 this.
 14 Q Did you call me to tell me that?
 15 A No.
 16 Q Why?
 17 A No particular reason.
 18 Q The thought never occurred to you that you should
 19 contact me and say, I can't get you this information
 20 by Wednesday, Mr. Housel?
 21 A Actually the thought did never occur to me.
 22 Q That never occurred to you?
 23 A That's exactly right.
 24 Q Okay. Do you have a private attorney that you use
 25 when you need legal matters attended to?

1 A I haven't had to do that other than I guess buying a
 2 house. I do not have an attorney on retainer.
 3 Q The thought never occurred to you to call your own
 4 attorney? You just figured Mr. Sah would do it for
 5 you?
 6 A I don't have an attorney.
 7 Q You don't have one?
 8 A No. *independent?*
 9 Q But you never thought of getting one, either?
 10 A Of getting an attorney -- in the past when I've had
 11 things that have been sent to me regarding a case, I
 12 call the lawyer that I'm working with on that case
 13 and they generally take care of whatever it was.
 14 Q Are you working with a lawyer on this case, is that
 15 what this is all about, an independent medical exam,
 16 you're working with a lawyer; is that the idea?
 17 A No, that's not the idea.
 18 Q What's the independent of an independent medical
 19 examination; what does that mean?
 20 A Exactly what it means.
 21 Q Tell me what it means.
 22 A An independent evaluation of a patient.
 23 Q Right; regardless of what your feelings are one way
 24 or another, right?
 25 A I don't know what that question means, my feelings.

1 Q Well, in other words, you're not supposed to slant
 2 what your opinion may be in one direction or another,
 3 are you?
 4 A That's correct.
 5 Q That's what independent means?
 6 A That's correct.
 7 Q But you're working with a lawyer here and you decided
 8 to call him so he'd take care of filing some kind of
 9 motion on your behalf so you wouldn't have to produce
 10 these records, right?
 11 A So I wouldn't have to produce these records today.
 12 Q When could you produce these records? I mean how big
 13 a deal would it have been for you to say to your
 14 secretary, Xerox copies of the Wednesday appointment
 15 book for this -- let me finish the question -- for
 16 this year and call my accountant and tell him I need
 17 the 1099s; how hard would that have been for you to
 18 do?
 19 A That's not all that's included here.
 20 Q Those are the two things you told me you had?
 21 A Yes.
 22 Q Let me finish. When you get this subpoena and you
 23 read it, you certainly understood it, didn't you?
 24 A Not totally.
 25 Q Tell me what you didn't understand about it.

1 A I didn't understand some of this language.
 2 Q Which language didn't you understand?
 3 A I didn't know what duces tecum means.
 4 Q You know what it means, it says, please produce for
 5 the deposition the past ten years the following. Do
 6 you have any problem understanding that?
 7 A No.
 8 Q Then you read 1 through 7, correct?
 9 A Correct.
 10 Q Did you have any problem understanding any of those
 11 things?
 12 A No.
 13 Q Okay.
 14 A May I interject?
 15 Q Say whatever you like, Doctor.
 16 A Sure. There are things that I cannot get here for
 17 the past 10 years, all documents listing every
 18 insurance company, any issued checks, any and all
 19 documents listing the amount of money you earned each
 20 year, any and all documents that lists the entities
 21 that issues his check, number of exams you performed,
 22 works list all defense firms you've retained.
 23 Q Some you couldn't get?
 24 A That's right.
 25 Q Well, why didn't you respond in that way? Why didn't

1 you tell Mr. Sah since he was going to do it for you
 2 for nothing, I can't get all of this -- let me
 3 finish -- but I can certainly tell you how many I did
 4 from my Wednesday appointment book and I can get the
 5 information from 1099 about how much money. Did you
 6 tell Mr. Sah that when you talked to him?
 7 A I told him that I could get some of these things, but
 8 I'm not sure how readily I could get them. Certainly
 9 not all by Wednesday.
 10 Q Did he tell you to get them?
 11 A I don't believe so.
 12 Q You don't believe so?
 13 A I don't believe so.
 14 Q Why didn't you get them?
 15 A What?
 16 Q Why didn't you get them?
 17 A Well, some of them I can't get.
 18 Q Well, those that you could get, why didn't you get
 19 them?
 20 A I would not have been able to do my normal routine
 21 and comply with this.
 22 Q And your secretary couldn't have got these things
 23 that you told me about for you?
 24 A I don't think so.
 25 Q Why?

- 1 A Well, she doesn't have access to a list of all the
 2 patients for the past ten years.
 3 Q She has access to the appointment book you told me
 4 about, doesn't she?
 5 A Yeah, but that goes back possibly a year.
 6 Q However far it goes back, you could have provided
 7 those records by today, couldn't you?
 8 A Possibly.
 9 Q And you couldn't have could have called your
 10 accountant and asked for the 1099 to reflect how much
 11 money you made from those, couldn't you?
 12 A That's correct. But that still wouldn't have
 13 complied with all this says.
 14 Q Well, you can't always comply with everything, you
 15 comply with what you can. If you don't have them,
 16 you --
 17 A I believe it doesn't say bring what you can.
 18 Q It doesn't say that?
 19 A It doesn't say bring what you got.
 20 Q It says, please produce at the deposition. Do you
 21 have trouble understanding that?
 22 A No. But it says, produce these things and it doesn't
 23 say if I couldn't produce, it doesn't say that's
 24 okay.
 25 Q Did you ask Mr. Sah about that?

- 1 A About what?
 2 Q About what you just told me about, if I can't produce
 3 all these, what should I do?
 4 A I believe I said, I can't produce these things and I
 5 think the answer was, we'll file a motion.
 6 Q So they were going to do that for you, right?
 7 A I believe so.
 8 MR. HOUSEL: Mark this,
 9 please.
 10 Q And that's what you wanted to have happened, didn't
 11 you? You didn't want to produce any of these
 12 documents?
 13 MR. SAH: Objection.
 14 A I can't produce these.
 15 Q Well, the ones you told me you could produce you
 16 don't want to produce them, do you?
 17 A That's not true.
 18 Q Will you readily produce them?
 19 A Well, I don't know what readily means.
 20 Q Well, how long will it take you to produce them?
 21 A I can give you the -- I'm assuming now that I can
 22 give you 2001, those pages that I've told you about,
 23 for 2001,
 24 Q I thought you said you might have them from 2000?
 25 A I might. Well, I'm fairly certain I have them from

- 1 January 'til now.
 2 Q Okay.
 3 A 2000 I'm not sure.
 4 Q Well, can you look?
 5 A I can't look now, they're not here.
 6 Q Where would you look?
 7 A They're in my secretaries desk in Westlake, Ohio.
 8 Q How about '99, do you have any from '99?
 9 A I don't believe she keeps those.
 10 Q How long would it take for you to make a search for
 11 these items and give them to me pursuant to the
 12 subpoena before I go to the judge and get an order?
 13 A For the list of people that I've seen over 2001,
 14 possibly 2000.
 15 Q And any other year?
 16 A I'll give you whatever she's got in the book.
 17 Q How long would it take you to do, what, 15 minutes
 18 for her to get the books out, Xerox the books and get
 19 them to me?
 20 A Maybe.
 21 Q How much more, half an hour?
 22 A Maybe.
 23 Q Can you get that done?
 24 A I can.
 25 Q Will you do that or do I have to get a court order?



- 1 A I'll do that.
 2 Q How about the 1099?
 3 A I'm assuming my accountant can get those in a day or
 4 so.
 5 Q He'd have those for quite back a ways, wouldn't he?
 6 A I presume so.
 7 Q How long would it take for him to get them for me?
 8 Will you do that?
 9 A I will.
 10 Q When would you have to do it?
 11 A Let me, one thing, I have patients all day today, I
 12 have patients tomorrow morning, and I'm getting on a
 13 plane and I'm going to be at the Surgeon General's
 14 U.S. Navy Conference next Thursday.
 15 Q Doctor, it's a phone call, isn't it?
 16 A I understand. I have to produce, you told me. I'm
 17 not going to be in town next week. Okay?
 18 Q Your office can send them to me, I don't have a
 19 problem with that. You could have called me on the
 20 phone and told me you don't have these records.
 21 A And you would have said, sure, Doctor Smith, I'll be
 22 more than happy to bend over --
 23 Q How do you know what I would have said?
 24 A Would you?
 25 Q Sure. Okay. Yeah, had you called me, but you didn't

1 do that.

2 A So when we think we have everything and we don't, for

3 whatever reason, I can call you and say, for whatever

4 reason you asked for this, and for whatever reason, I

5 need more time, you'll bend over backwards for me?

6 Q Well, the case is set for trial August 27th. I

7 presume you're going to be a witness for the

8 insurance company either by videotape or live, I

9 don't know which. I need them before then. Now

10 you're telling me it's a phone call to two people and

11 you can get the records together?

12 A You asked how readily I could do this. I'm telling

13 you I'm not here next week, I'm leaving on a plane

14 tomorrow or the 10th or whatever it is.

15 Q How long are you gone for?

16 A I told you a week. I'm back next Thursday night in

17 the office next Friday.

18 Q Well, you tell me. You know your schedule, I don't.

19 How soon can you get these records for me, those that

20 you say you have?

21 A I should be able to get you the, we'll call it the

22 appointment sheets, is that a fair term to call these

23 things?

24 Q I don't know what they, whatever you say they are.

25 A Little pieces of paper from a steno book, we call

1 them appointment sheets, is that fair? I can get you

2 those probably within a couple days,

3 Q Okay.

4 A Again, there are probably, I don't know, 30 or so,

5 maybe more, and I'm not going to tie up our fax

6 machine, sending 30 fax things to you. I can put

7 them in the mail.

8 Q Can you Xerox them and mail them?

9 A Yes.

10 Q Okay.

11 A The 1099s, I'll call this guy. I don't know what

12 accountants do. I don't know whether it's microfiche

13 or CD or whatever they do with them.

14 Q Can we have an understanding here so I don't have to

15 go see Judge Sutula on this issue, can we have an

16 understanding as soon as possible, say within the

17 next week you'll get all this stuff together and mail

18 it off to me?

19 A It may be longer than a week, if I can't get it to

20 you by Thursday. I'm going -- I'm back Friday. I

21 would think the following week, whatever that is, I

22 can tell you.

23 Q Let's --

24 A I'm back the 18th, I'm back August 17th, in the

25 office, so I would think by the 27th which is the --

1 Q I need them before the 27th.

2 A Okay. I'm assuming the accountant can pull those out

3 and send them down.

4 Q Okay. Will you tell him to do that?

5 A I will.

6 Q Just so we have an understanding. Otherwise I'll

7 just have to go to the judge, we'll get an order and

8 if you want me to do that, I will, and I'll come back

9 and depose you a little more.

10 A That sounds like a threat.

11 Q It isn't a threat. It's just what I'm entitled to do

12 on behalf of my client.

13 A I understand that and I understand what you're

14 entitled to do. I'm entitled to be out of town to do

15 things for the Navy, I believe and --

16 Q I don't have any problem with that, but you're

17 telling me all you got to do is have other people do

18 it for you.

19 A No. I said I'm assuming the accountant can do that.

20 I'm fairly certain my secretary can Xerox those

21 things and mail them to you.

22 Q Okay. When can I expect to receive those so I don't

23 have to go and bother Judge Sutula?

24 A If you want to bother Judge Sutula, bother Judge

25 Sutula. Okay.

1 Q I don't want to. Do you want me to?

2 A You can do whatever you want to do.

3 Q I think I can --

4 A I'll tell you that when we're done here, when we're

5 done with the deposition, I will call my secretary,

6 tell her to Xerox whatever she can get ahold of.

7 Q As far back as she's got them.

8 A As far back and throw them in the mail and get them.

9 Q And call your accountant and tell him to get the

10 1099s.

11 A Sure, 55 Public Square, 1310 Suite, Illuminating

12 Building.

13 Q Right.

14 A Right. So I'll make the call right after we're done

15 here and do that, call the accountant and tell him to

16 pull the 1099s that have to do with IMEs and send

17 them to you.

18 Q Thank you, sir.

19 A Is that fair?

20 Q That's fine.

21 A Okay.

22 Q When were you scheduled to testify in this case?

23 A Ihavenoidea.

24 Q You haven't been scheduled for a videotape

25 deposition?

1 A I don't know.
 2 Q So you haven't been?
 3 A I don't know.
 4 Q If you don't know, obviously you haven't been.
 5 A So my secretary, like I say, that's in my appointment
 6 book, I don't know.
 7 Q Okay.
 8 ---
 9 (Plaintiffs' Exhibit 6
 10 marked for identification.)
 11 ---
 12 Q Doctor, this is Plaintiffs' Exhibit 6. Tell me if
 13 you can identify that?
 14 A This looks like the objection, Physician's Objection
 15 to Subpoena for Production of Documents.
 16 Q And did you sign that?
 17 A Yes -- I signed a copy.
 18 Q You signed a copy?
 19 A Well, this is unsigned.
 20 Q The two copies I got were both unsigned. Did you
 21 actually go to Mr. Sah's office and sign that, sir?
 22 A I believe I signed the original.
 23 Q Did they bring it over for you to sign?
 24 A Not here, to West Shore Hospital.
 25 Q Oh, they brought it over to the hospital for you to

1 Q Did you read the second page?
 2 A In accordance with the -- yes.
 3 Q What does this mean to you?
 4 A Ihavenoidea.
 5 Q Youhavenoclue?
 6 A My impression was that this would delay the
 7 production of the documents.
 8 Q Which is what you wanted to do, right?
 9 A Well, I couldn't get them by the time you wanted
 10 them.
 11 Q It says in there that there should be written
 12 objections to the production, doesn't it?
 13 A What line are you on?
 14 Q I'm in about the fifth, sixth line in the indented
 15 portion there, Doctor.
 16 A Written objection to production, you're asking me if
 17 that's what it says?
 18 Q Yeah.
 19 A It says written production.
 20 Q Are there any objections listed in this document that
 21 you see anywhere?
 22 A If there may be, I'm not sure that I would understand
 23 it.
 24 Q Well, read it. You're not an unintelligent man,
 25 Doctor Smith. Read it and tell me if you see any.

1 sign?
 2 A That's correct.
 3 Q And Mr. Sah prepared it for you? You can hold it. I
 4 have a copy.
 5 A I believe so. ★
 6 Q Did you read it before you signed it?
 7 A No.
 8 Q You didn't prepare this yourself, did you?
 9 A That's correct.
 10 Q It says Duret Smith M.D., in propria persona. Do you
 11 know what that means?
 12 A No.
 13 Q Do you have any idea?
 14 A No.
 15 Q There's no law office name on this that would lead
 16 one to conclude that somebody other than you prepared
 17 this, is there?
 18 A I don't know what anyone would conclude.
 19 Q Well, have you ever read this thing?
 20 A No.
 21 Q Why don't you read it, since you signed it, why don't
 22 you read it and I'll ask you some questions about it.
 23 A Okay.
 24 Q Have you read it?
 25 A Yes.

1 A If I see any what?
 2 Q Written objections to producing this material other
 3 than just saying you object.
 4 A So saying I object is not a valid objection?
 5 Q There's no reason in there, is there?
 6 A You said is there an objection? Yes.
 7 Q Is there a reason in there given for not producing
 8 them by the deposition time? Is there a reason?
 9 Take your time and read it and answer my question.
 10 A I'll try.
 11 Q Thank you.
 12 A Now what was the question?
 13 Q Is there a reason given in this document that you
 14 have in front of you why you will not produce the
 15 documents by the time the deposition's being held
 16 today?
 17 A I don't see one.
 18 Q Okay. And the last sentence says, "In accordance
 19 with this rule, this physician does not intend to
 20 comply with the subpoena until the physician receives
 21 an Order directly from the Court." Right?
 22 A You read it correctly.
 23 Q Is that what Mr. Sah advised you that he would do for
 24 you?
 25 A The purpose of this was to I believe postpone having

1 to do it by today because I can't produce it by
 2 today.
 3 Q It doesn't say that, though, does it? It says that
 4 the physician does not intend to comply with the
 5 subpoena until the physician receives an Order
 6 directly from the Court; that's what it says, doesn't
 7 it?
 8 A That's exactly what it says.
 9 Q Is that what you intended to do?
 10 A I have no idea.
 11 Q You didn't read it, did you? You just signed it?
 12 A You asked me that several minutes ago.
 13 Q And that's true?
 14 A That's correct.
 15 Q And let me make sure I understand this. When did
 16 Mr. Sah's office prepare this for you?
 17 A I don't know.
 18 Q When did they bring it to you to sign?
 19 A Yesterday.
 20 Q And you understand they're just doing that gratis,
 21 right, they're not going to charge you for that?
 22 A I havenoidea.
 23 Q Did they tell you they were going to charge you for
 24 that?
 25 A Wasn't brought up one way or the another.

1 Q Did they ask you if you'd pay them for it?
 2 A No.
 3 Q Did you ask them if you were going to be charged for
 4 it?
 5 A No.
 6 Q It's because you're working with this lawyer that he
 7 did it for you, right?
 8 A No. You would have to ask this lawyer.
 9 Q No. I'm asking you.
 10 A I have no idea why he did it.
 11 Q Do you usually sign things like this without reading
 12 them?
 13 A Yes.
 14 Q Okay. How much do you charge --
 15 A Do you want this to go in that stack, too?
 16 Q Yeah, might as well. Do you want the check? You
 17 know you're entitled to cash that.
 18 A I don't want the check.
 19 Q You don't want it? Okay.
 20 When a lawyer like me takes your deposition like
 21 I am this morning, what do you charge for that?
 22 A Seven-fifty an hour, or, it's \$750 for the deposition
 23 if it takes two minutes or one hour. After the one
 24 hour it's billed quarterly, quarter of an hour
 25 increments.

1 Q At the 750 rate?
 2 A That's right.
 3 Q So it it's two minutes it's 750, if it's ten minutes
 4 it's 750?
 5 A Right.
 6 Q How do you arrive at that figure?
 7 A Actually a lawyer told me that that's the going rate.
 8 Q Who told you that?
 9 A Oh, I don't know. A group of physicians and lawyers,
 10 I guess you would call it a cocktail party, and this
 11 is what I'm told the going rate was -- is.
 12 Q What lawyer told you that?
 13 A I havenoidea.
 14 Q Where was the cocktail party?
 15 A I don't remember.
 16 Q What was the meeting about that led to the cocktail
 17 party?
 18 A This was a couple years ago.
 19 Q How long have you been doing this kind of work?
 20 A I would think five or six years, maybe more.
 21 Q Do you do spine surgery?
 22 A I have. I don't.
 23 Q When's the last time you did it?
 24 A Probably '82, '83, '84, maybe.
 25 Q You're a hand surgeon, aren't you?

1 A I specialize in hand surgery.
 2 Q How long have you specialized in hand surgery?
 3 A Since '82, December '82, January, '83.
 4 Q Have you ever operated on somebody's discs in their
 5 back?
 6 A Yeah, sure.
 7 Q When is the last time you did that?
 8 A '82 would have been the last time.
 9 Q Okay. This \$750 figure, you arrived at that because
 10 some defense lawyer told you that's what the going
 11 rate was?
 12 A I don't know if he was defense or plaintiff. My
 13 impression that that was and is the going rate.
 14 Q Have you had your fee reduced by a court for a
 15 deposition?
 16 A I think so.
 17 Q Mr. Sucher got it reduced in that Nationwide case,
 18 didn't he?
 19 A I don't know who it was.
 20 Q What was it reduced to?
 21 A I have no idea. I don't remember.
 22 Q You have no recollection?
 23 A No.
 24 Q How many times have you given your deposition in a
 25 discovery deposition like we are doing here?

1 A I'm not sure. Sometimes when it's a discovery or the
 2 other kind, so when I book a deposition we don't
 3 know, I don't know if it's discovery or not.
 4 Q Well, your secretary asked me and I told her that I
 5 didn't have to --
 6 A She said it was discovery?
 7 Q Well, sure. I told you I didn't have to meet with
 8 you ahead, you're not my witness.
 9 A That I don't think in her mind translates into a
 10 discovery deposition.
 11 Q Well, she asked me if I needed to meet with you ahead
 12 of time.
 13 A So, that doesn't mean it's a discovery deposition.
 14 Q So you don't delineate between the two?
 15 A I don't. Neither does she. She books a deposition,
 16 the thing that's important is the time and the date
 17 and when we can fit it in. I don't think she knows
 18 the difference between discovery or other deposition.
 19 Q Did you charge Mr. Sah? Are you going to charge Mr.
 20 Sah for the 15 or so minutes that he met with you
 21 here this morning before this deposition started?
 22 A No. **independent I*
 23 Q How come?
 24 A The deposition was supposed to start at 8:00. We
 25 were here at 8:00.

1 Q But he met with you without me being in here for
 2 about 15 minutes before we started, didn't he?
 3 A I don't think it was 15 minutes, maybe five minutes.
 4 Q Well, whatever it was, are you going to bill him for
 5 that?
 6 A No.
 7 Q Why?
 8 A Because that's part of the 750.
 9 Q If I wanted to meet with you ahead of time, and spend
 10 10, 15 minutes, would you bill me for that?
 11 A I don't know if I can.
 12 Q What do you mean, you don't know if you can?
 13 A Well, why would you pay me to meet with you, when
 14 you're the opposing counsel?
 15 Q What if I wanted to; would you charge me if I wanted
 16 to? Let me ask you this question: Would you meet
 17 with me?
 18 A I don't know, to be honest with you.
 19 Q Okay. What did you talk with Mr. Sah about before I
 20 came in here to take your deposition this morning?
 21 A He says this is fairly straightforward, we went
 22 through the report, my IME report, and that was it.
 23 Q Do you feel it was fairly straightforward?
 24 A Yeah.
 25 Q Do you?

1 A Yeah.
 2 Q If I was a new patient and I came into your office
 3 and made an appointment, and you'd never seen me
 4 before, and you met with me and took a history from
 5 me and you conducted an examination of me and it took
 6 about an hour, how much would you charge me for that?
 7 A We're limited by the reimbursement right now what we
 8 charge. That would be a level four or level five
 9 exam and I don't know how much that is.
 10 Q You have no idea what you'd charge me?
 11 A No. We write on our fee sheet what level of
 12 examination it is.
 13 Q What level would that be, new patient?
 14 A For an hour, probably five.
 15 Q What would the fee be?
 16 A I don't know what my fee would be. You might find
 17 that incredible. I don't know what my fees are.
 18 Q The jury might find it more incredible than I do.
 19 Let me ask you this: If I didn't have insurance and
 20 I wanted to pay you cash and give you a check, what
 21 would you charge me for that hour?
 22 A I guess a level five.
 23 Q What would it be?
 24 A I don't know.
 25 Q If you weren't limited by insurance company

1 regulations, what would the fee be?
 2 A I have no idea. I don't think that's come up.
 3 Q Would it be more than \$100?
 4 A I would think so, yes.
 5 Q Would it be more than \$200?
 6 A That I don't know.
 7 Q It wouldn't be \$750, would it?
 8 A Well, it would be if there were some documents I had
 9 to do beforehand and do all those other things.
 10 Not -- are you trying to equate the IME to a new
 11 patient examination?
 12 Q I think I get to ask the questions, sir.
 13 Did you have any trouble understanding my
 14 question?
 15 A You said if I wanted to interject, to feel free to.
 16 Q Okay. I'm just asking you a question. Did you
 17 understand the question?
 18 A I'm trying to answer you.
 19 Q Would you charge a new patient for an hour's
 20 examination and history taking 750 bucks?
 21 A But there's more --
 22 Q Would you or wouldn't you?
 23 A No, I wouldn't.
 24 Q It wasn't tough to answer that, was it?
 25 A Yeah.

1-3-2000

1 Q Oh, it was?
 2 A Yeah.
 3 Q Did Mr. Sah ask you to do certain things in this
 4 case?
 5 A I don't understand the question.
 6 Q When is the first time you talked to Mr. Sah about
 7 this case?
 8 A I don't know.
 9 Q You don't know?
 10 A No. This was four months ago that I saw the patient,
 11 so if there were any conversation, it probably would
 12 have taken place before. I'm assuming when you say
 13 did he ask me to do things to the patient, you're
 14 referring to the letter?
 15 Q Did you talk to Mr. Sah about this case before you
 16 saw my client?
 17 A I don't believe so.
 18 MR. HOUSEL: Mark this,
 19 please.
 20 ---
 21 (Plaintiffs' Exhibits 7 and 8
 22 marked for identification.)
 23 ---
 24 Q Take a look at Plaintiffs' Exhibit 7, tell me if you
 25 can identify that?

1 A This appears to be a copy of the letter to me from
 2 Mr. Sah dated March 13, 2001.
 3 Q Give me the copy that you have in your file, because
 4 obviously you put some highlights on it.
 5 MR. HOUSEL: Why don't you
 6 mark this one?
 7 ---
 8 (Plaintiffs' Exhibit 7
 9 remarked for identification.)
 10 ---
 11 Q Incidentally, are you charging Mr. Sah the \$750 an
 12 hour for your deposition today?
 13 A I don't know who is paying.
 14 Q You don't know who's paying? If I was paying I would
 15 have had a check or you wouldn't have gone forward;
 16 isn't that right?
 17 A That's not true.
 18 Q Really?
 19 A We send the letter out saying bring the check, I can
 20 say half the time they show up without the check.
 21 Q I never got a letter that said that.
 22 A That said what?
 23 Q To bring 750. To bring a check. You know the court
 24 ordered the insurance company to pay this, don't you?
 25 A I don't.

1 Q You don't know that?
 2 A No.
 3 Q If that's the case, will you be billing them 750 an
 4 hour for your deposition?
 5 A I'll be billing someone.
 6 Q That amount, is that what you'll bill them?
 7 A It's 750 an hour.
 8 Q Is that what you'll bill them?
 9 A Or what I said previously, quarterly increments.
 10 Q What's Plaintiffs' Exhibit 8?
 11 A A?
 12 Q Plaintiffs' Exhibit 8.
 13 A Oh, I thought you said A.
 14 Q Oh, I'm sorry.
 15 A This is a letter from Perrin Sah to me dated
 16 March 13, 2001 regarding John Seelie.
 17 Q That's the one that was in your file, right?
 18 A Yes.
 19 Q Okay. Why don't you give me that one?
 20 A As opposed to the copy.
 21 Q Yeah, that's the copy I got. The copy I got doesn't
 22 have the highlighting. When did you do the
 23 highlighting?
 24 A Probably before the examination sometime.
 25 Q Before the examination? Well, then how come the copy

1 I got doesn't show the highlighting?
 2 A Where did you get the copy?
 3 Q Well, you sent it to him and he sent it to me,
 4 remember?
 5 A I sent this to him, yeah.
 6 Q 7 doesn't have the highlighting on it, does it?
 7 A Okay.
 8 Q On the copy. Do you know why that is?
 9 A No. Unless there's more -- sometimes I'll get a
 10 Xerox of this and then the original as well.
 11 Q You keep that one, I've got some questions to ask
 12 you.
 13 A Sure.
 14 Q When did you get that letter?
 15 A I don't know. I would assume sometime after
 16 March 13th.
 17 Q You talked to Mr. Sah before you got that letter,
 18 didn't you?
 19 A I don't believe so.
 20 Q Well, the first sentence says, "Thank you for
 21 agreeing to conduct the independent medical
 22 examination." One could logically conclude that you
 23 talked to him before the letter was sent, right?
 24 A One could logically conclude that he talked to my
 25 secretary and set up an appointment to see

1 Mr. Seelie.
 2 Q So you let your secretary handle all these things?
 3 A The scheduling, yes.
 4 Q The letter indicates that certain records were
 5 provided to you, correct?
 6 A That's correct.
 7 Q It says additional records will be forwarded to you
 8 as they are received, correct?
 9 A Correct.
 10 Q Were any additional records ever forwarded to you
 11 other than what you have in the file?
 12 A I think the x-rays from Fairview.
 13 Q Anything other than that?
 14 A I don't think so.
 15 Q All right. It says, "After you have examined this
 16 individual, please provide us with your report
 17 detailing both your examination and findings. We
 18 further would appreciate your opinions relative to
 19 the following issues:" Then it lists 1, 2, 3, 4, 5,
 20 correct?
 21 A Correct.
 22 Q Did you answer all those questions in your medical
 23 report that Mr. Sah asked you to answer?
 24 A I believe.
 25 Q You did?

1 A I believe so.
 2 Q Get your medical report out. Do you have a copy of
 3 it there, sir?
 4 A Yes.
 5 MR. HOUSEL: Let's mark it.
 6 ---
 7 (Plaintiffs' Exhibit 9
 8 marked for identification.)
 9 ---
 10 Q Just for the record, Plaintiffs' Exhibit 9 is what,
 11 Doctor Smith?
 12 A Is a copy of a letter dated April 11, 2001, to Perrin
 13 Sah from me regarding Mr. Seelie.
 14 Q Do you understand that in order to testify as an
 15 expert witness who conducts an independent medical
 16 examination you must express certain opinions with a
 17 reasonable degree of medical probability?
 18 A Is that the same as medical certainty?
 19 Q Pretty much.
 20 A Do I understand?
 21 Q Do you understand that's the case?
 22 A I've not been told that in order to express an
 23 opinion you have to, whatever you said, I've never
 24 been set down and said you must do this.
 25 Q No one ever told you that?



1 A No.
 2 Q Have you ever testified in court in a case like this?
 3 A Oh, no, not in a case like this.
 4 Q Not as an independent medical examiner?
 5 A Yes.
 6 Q You've testified as a witness for a plaintiff in a
 7 case, haven't you?
 8 A Yes.
 9 Q 'Cause you did for me a long time ago.
 10 A In court or video deposition?
 11 Q One or the other.
 12 A Yeah. I've only been in court twice.
 13 Q By video deposition, have you ever testified in an
 14 independent medical examination such as you have done
 15 here?
 16 A My understanding, the videotapes are either discovery
 17 deposition or trial deposition.
 18 Q They're almost always trial deposition. They could
 19 be discovery, but --
 20 A You asked if I ever videotaped in an independent
 21 medical examination.
 22 Q Let me make it simpler for you. After having done an
 23 examination like you did here and writing a report,
 24 have you ever testified under oath so that your
 25 videotaped deposition would be played back in a


1 courtroom?
 2 A Yes.
 3 Q And you've done that for an insurance company?
 4 A Yes.
 5 Q Okay. How many times have you done that?
 6 A I don't know.
 7 Q Now, do you understand that in order to express an
 8 opinion you must express that opinion to a reasonable
 9 medical certainty? *★*
 10 A Oh I see what you're saying. Yes.
 11 Q What's that mean?
 12 A Within a reasonable degree of medical certainty I've
 13 been told by counsel 51 over 49 percent.
 14 Q Other than being told by counsel did you ever know
 15 what that meant?
 16 A We don't use that term. That's not a medical term.
 17 That's a legal term.
 18 Q I understand.
 19 A Other than asking counsel, have I ever used that
 20 term?
 21 Q Yes.
 22 A Yes.
 23 Q When?
 24 A Within a reasonable degree of medical certainty?
 25 Q Yeah, that's what we are talking about.

*Lawyers tell him
 that's what it means!*

- 1 A Whenever I express an opinion in a matter like this.
 2 Q Okay.
 3 A But the definition of what constitutes a reasonable
 4 degree of medical certainty I've been told is 51 over
 49 percent.
 6 Q So you use that as your guidelines to determine what
 7 you use to express an opinion?
 8 A No. That's the minimum guideline.
 9 Q The minimum guideline?
 10 A Yeah.
 11 Q How do you know that?
 12 A Well, it could be 99 over 1 percent.
 13 Q But it has to be at least 51?
 14 A That's what I'm told.
 15 Q More than 50 percent?
 16 A That's what I'm told, yeah.
 17 Q That's what you're told?
 18 A I've never seen the definition. If you have one,
 19 please give it to me of what constitutes within a
 20 reasonable degree of medical certainty.
 21 Q Okay. Do you express some opinions in your medical
 22 report that's marked as Plaintiffs' Exhibit --
 23 A 9.
 24 Q What is it? 9. Thanks, Doctor. Didn't you?
 25 A Yes.

- 1 Q And those opinions are contained on the second page,
 2 correct?
 3 A Yes.
 4 Q Where it says Discussion, correct?
 5 A Yes.
 6 Q All right. Now, the first thing that Plaintiffs'
 7 Exhibit 7 requests that you do in Mr. Sah's letter
 8 says, what injuries, if any, were sustained in the
 9 motor vehicle accident of 7/1/99; did I read that
 10 correctly?
 11 A Yes.
 12 Q Where in your medical report is that information
 13 contained, if anywhere?
 14 A It says Impression, low back pain.
 15 Q So that's where that opinion's contained?
 16 A Yes.
 17 Q "Impression: Motor vehicle accident on or about
 18 7/1/99 with low back pain which at this point is
 19 mostly in the sacroiliac junctions and occasional
 20 right leg pain with no evidence of neurological
 21 deficits whatsoever on examination. Pars defect with
 22 grade I spondylolisthesis, L4-L5." Did I read that
 23 accurately?
 24 A Yes, you did,
 25 Q Is that your opinion of the injuries sustained by my

- 1 client in the motor vehicle accident?
 2 A He suffered low back pain, that is correct.
 3 Q Is the rest of that your opinion to a reasonable
 4 medical certainty as to what injuries he sustained?
 5 A Is the rest of that impression?
 6 Q Yeah. 
 7 A Yes.
 8 Q Okay. So everything contained in your report in the
 9 impression level is what you felt were the injuries
 10 sustained by John Seelie in the motor vehicle
 11 accident of July 1st of 1999, correct?
 12 A Within a reasonable medical certainty, that's
 13 correct.
 14 Q He didn't sustain any herniated disc, right? 
 15 A I don't know for sure that the herniated discs came
 16 at that time or before. There's a study that was in
 17 the Journal of the American Medical Association that,
 18 if I may paraphrase, which I'm not sure I could
 19 produce for you right now, says that, they did a
 20 study of normal subjects with no back pain, no
 21 complaints of back pain whatsoever, and somewhere in
 22 the range of 17 to the high twenties percentage had
 23 herniated discs with no symptoms and no complaints of
 24 their back whatsoever, so there are a significant ?
 25 number of people walking around now, that if they

- 1 were put under the MRI would show herniated discs and
 2 a less percentage would show more than one herniated
 3 disc.
 4 Q Do you have an opinion with reasonable medical
 5 certainty as to whether or not Mr. Seelie sustained
 6 any herniated disc from the trauma of the motor
 7 vehicle accident of July 1st of 1999?
 8 A Yes, I do. And I do not believe that he did suffer a
 9 herniated disc from that.
 10 Q How come you didn't say that anywhere in this medical
 11 report?
 12 A I have no idea. 
 13 Q You have no idea why you didn't say that?
 14 A No.
 15 Q So it's your opinion as you sit here today, but you
 16 didn't put it in the -- *now to state*
 17 A Well --
 18 Q Let me finish my question. That's your opinion as
 19 you sit here this morning, but you didn't put it
 20 anywhere in your medical report; is that right?
 21 A By omission. I was asked what his injuries were, and
 22 herniated disc was not one of them. Under
 23 impression, if you see herniated disc, please let me
 24 know.
 25 Q And you base that opinion on the study you're talking

1 about?

2 A And his examination. He had no evidence of any

3 herniated disc.

4 Q He told you he had radiating pain in his examination,

5 did he?

6 A That's not --

7 Q Did he tell you he had radiating pain?

8 A Yes, sure, sure.

9 Q Did he tell you he had no prior problems with his

10 back at all until he got injured in this accident?

11 A That's correct.

12 Q Did he tell you he had low back pain immediately

13 after this accident?

14 A I don't know if he had it immediately, according to

15 my -- can I have my handwritten sheet back?

16 Q Sure.

17 A Low back pain when he got out of his car.

18 Q That's pretty immediate, isn't it?

19 A Yeah.

20 Q So you agree with that?

21 A Yes. Can I go back and answer your question?

22 Q Sure, go right ahead.

23 A Pain going down the leg is not always disc pain,

24 okay.

25 Q In Mr. Seelie's case what else did you think it might

1 be?

2 A Okay. You can have it from any stretched ligament.

3 Q I asked you what else would it be in Mr. Seelie's

4 case, not what someone else's situation might be,

5 what do you think it was causing that pain right

6 after the accident in Mr. Seelie's case, if you have

7 an opinion? If you don't, tell me so.

8 A I do have an opinion.

9 Q What is it?

10 A That I believe that it was from some stretched

11 ligaments that will send pain down your leg. It does

12 not always mean -- and, in fact, the majority of time

13 it is not a herniated disc when people have pain down

14 their leg.

15 Q How do you know that?

16 A Education and training and experience.

17 Q What's this study that you're telling me about, what

18 does that study show?

19 A That a significant number of normal subjects with no

20 back pain and no disc symptoms had herniated discs on

21 their MRI.

22 Q How many, what was the percentage?

23 A I just told you I was paraphrasing. I don't have the

24 study in front of me.

25 Q What was the percentage, eight percent did you say?

1 A No. I said high teens to mid twenties I believe I

2 said.

3 Q Did you look at the MRIs concerning Mr. Seelie?

4 A I looked at the MRI report.

5 Q Get your MRI report out of your file, would you

6 please?

7 ---

8 (Plaintiffs' Exhibit 10

9 marked for identification.)

10 ---

11 Q So I understand you correctly, your opinion that Mr.

12 Seelie didn't sustain any herniated disc in this car

13 accident is based upon that study that you've told me

14 about?

15 A And his examination.

16 Q And his examination.

17 A That's correct.

18 Q What's Plaintiffs' Exhibit 10?

19 A Plaintiffs' Exhibit 10 appears to be a copy of a

20 Regional Diagnostic Open MRI report dated 7120199.

21 Q Did you consider this exhibit when you wrote your

22 report?

23 A Sure.

24 Q Why don't you let me finish the question before you

25 jump in and answer it?

1 Plaintiffs' Exhibit 10, the conclusion of the

2 Regional Diagnostics people and the open MRI of his

3 lumbar spine says he has a far lateral disc

4 herniation to the right present at the L4-5 level

5 impinging on the exiting right L4 nerve root; is that

6 correct?

7 A That's correct.

8 Q How do you get that kind of a problem?

9 A How do you get a herniated disc?

10 Q Yeah, such as is described there.

11 A I'm sure there are several mechanisms; the annulus

12 which is what surrounds the disc has a weakening and

13 then the disc protrudes.

14 Q If somebody has no problem before with their back,

15 ever before in their life, before the trauma from

16 this accident, and the accident happens and they have

17 a problem and the MRI shows that, wouldn't you

18 logically conclude as a physician and an orthopedic

19 surgeon who's board certified that that was the cause

20 of that problem?

21 A In and of itself, possibly. But given that study and

22 given the lack of findings on his physical

23 examination, that could have been there for a long

24 time.

25 Q Do you think it was?

- 1 A Yeah.
 2 Q You do?
 3 A Yeah.
 4 Q What was the lack of findings on his physical
 5 examination that led you to that conclusion?
 6 A He had no straight leg raising. If I can refer to
 7 my --
 8 Q Sure.
 9 A Physical examination, tender to the left more so than
 10 the right sacroiliac joint, nowhere near the disc
 11 herniation, if, in fact, it was from the accident,
 12 minimally tender in the sciatic notch, left more so
 13 than right. No significant tenderness in the
 14 lumbosacral junction or paraspinal structures.
 15 Normal lateral bending, side to side, hyperextension
 16 and lacks 12 degrees, which should be 12 inches of
 17 touching his fingertips to the floor. Negative
 18 straight leg raising bilaterally. No sensory or
 19 motor deficits, either lower extremity. Deep tendon
 20 reflexes are two plus and equal for knees and ankles.
 21 Toes are down going, good pulses. He had a normal
 22 neurologic examination.
 23 Q Totally normal?
 24 A Normal neurological examination.
 25 Q The fact that he complained about radiating pain down

- 1 happened. Did I witness it? No. I'm taking
 2 Mr. Seelie's word for what happened.
 3 Q What did he tell you what happened?
 4 A On or about 7/1/99 he was a driver of a motor
 5 vehicle, was seat belted. Apparently was a misty day
 6 and around 5:30, 6:00 p.m. he stopped because the car
 7 in front of him was turning. Saw a car coming in his
 8 rear view mirror and was hit in the rear end and
 9 pushed him into the car in front of him. So he was
 10 slowing down because the car in front of him slowed
 11 down and was hit from behind.
 12 Q When is the last time you treated somebody for a
 13 herniated disc?
 14 A Probably three weeks ago.
 15 Q Do you regularly see patients with those kinds of
 16 problems?
 17 A I see patients with back pain and problems with the
 18 back everyday. Not all of them, as a matter of fact,
 19 the vast majority do not have a herniated disc.
 20 Q What does it mean impinging on the exiting right L4
 21 nerve root?
 22 A Putting pressure on.
 23 Q Isn't that what causes pain?
 24 A It can, sure.
 25 Q Doesn't it always?

- 1 into his leg, that's normal as far as you're
 2 concerned?
 3 A That's not an --
 4 Q Is that normal?
 5 A Can I finish?
 6 Q Just answer if it's normal or not.
 7 A It can be.
 8 Q It can be? Was it in --
 9 A People that have a ligamentous injury and other
 10 injuries to their back have pain going down the leg.
 11 It is not always a herniated disc.
 12 Q Do you think he still has a ligamentous injury here
 13 in July of 2001, two years after this accident?
 14 A He certainly has sacroiliac joint pain, which can
 15 radiate pain down the leg.
 16 Q You don't dispute he's got herniated discs at two
 17 levels, do you?
 18 A That's correct.
 19 Q You agree with that, don't you?
 20 A I don't dispute that when this MRI was done two years
 21 ago, it showed herniated discs, that's right.
 22 Q But you don't think they were caused by the accident?
 23 A That's correct.
 24 Q How did the accident happen; do you have any idea?
 25 A Yeah, according to Mr. Seelie I have an idea what

- 1 A No.
 2 Q So you can have a disc that's pressing on a nerve
 3 root and not have pain?
 4 A That's correct. You can have tingling and numbness.
 5 Q He told you he had tingling and numbness, didn't he?
 6 A He said right after, if I can go back.
 7 Q Go ahead.
 8 A He told me that he had right leg pain with no
 9 tingling and numbness, no weakness and no bowel or
 10 bladder symptoms, and that was on April 11, 2000.
 11 Q The second conclusion is a small far lateral disc
 12 herniation to the left is present at the L5-S1 level,
 13 encroaching the left neural foramen. What does that
 14 mean?
 15 A There is a disc that protruded at the L5-S1 level,
 16 the foramen is the opening that the nerve root goes
 17 through from the spine going out into the arms or
 18 legs, any nerve root. The foramen is the hole that
 19 it exits out of, so encroaching means it's coming
 20 towards that foramen.
 21 Q And there may be impingement on the exiting left L5
 22 nerve root?
 23 A That's correct.
 24 Q What does that mean?
 25 A There may be some pressure from the disc pushing on

1 the nerve root.
 2 Q Can you explain to me why, for all of Mr. Seelie's
 3 life up until July of '99 when this accident happened
 4 he wasn't having any pain or problems in his back,
 5 then after the accident, up until now he still has
 6 this pain and problems; if that's the case, how is it
 7 that you conclude that these herniated discs weren't
 8 caused by the trauma from this accident?
 9 A Based on that study and based on his physical
 10 examination, he had no evidence whatsoever that he
 11 had a herniated disc when I saw him on April 11th,
 12 none whatsoever.
 13 Q Where is this study? What's the name of this study?
 14 A It's in the Journal of the American Medical
 15 Association, and I'm sure I'm going to be forced to
 16 produce it, so I will.
 17 Q When can you produce it by?
 18 A I've got to find it, first of all.
 19 Q Can you do that?
 20 A I can. I'm not sure when I can do it.
 21 Q Sure. Can you do it before this case goes to trial?
 22 A I hope so. That's not my, you know, mission in life
 23 to produce this thing. I've got patients and surgery
 24 and other things going on other than producing one
 25 article.

1 Q When was the article written; do you have any idea?
 2 A I can't quote the name of the article or the date.
 3 JAMA comes out every week.
 4 Q You didn't list it anywhere in your report, did you?
 5 A No.
 6 Q If it was one of your basis for your conclusions and
 7 your opinions, how come you didn't list it in your
 8 report?
 9 A I didn't think it was important.
 10 Q When you testify as an expert witness and you give an
 11 opinion, don't you have to come up with some reason
 12 for it?
 13 A Based on a reasonable medical certainty, based on
 14 education, training and experience.
 15 Q So you disagree with what Doctor Stearns says in his
 16 report, don't you?
 17 A What does he say in his report?
 18 Q Did you read it?
 19 A I believe I read, briefly read it, but I can't quote
 20 it. If you can give it to me and I'll read it.
 21 Q You got it in your records there, don't you?
 22 A I do.
 23 Q Did you read any of this stuff before this morning?
 24 A Absolutely. I don't see Kim Stearns' report in here.
 25 Q It's not in there.

*-Doesn't have
 waiting orthopedics
 report!*

1 A It's not in there.
 2 Q So it's not in your file?
 3 A Here, be my guest. That's everything you handed me
 4 when you gave it back to me.
 5 Q Okay. Did Mr. Sah send it to you or --
 6 A Everything that I have is in that file.
 7 Q The letter, Plaintiffs' Exhibit 7, seems to indicate
 8 that he sent it to you, doesn't it?
 9 A It said hospital records, specifically, you will find
 10 enclosed copies of the records from the following
 11 providers.
 12 Q Well, what does it say?
 13 A Regional Diagnostics Imaging, Inc., Kim Stearns,
 14 Fairview Hospital. It doesn't say medical report of
 15 Kim Stearns.
 16 Q Well, would you have wanted to see the medical report
 17 of Kim Stearns in this case?
 18 A I did not know Kim Stearns did a medical report.
 19 Q You don't know that as you sit here today?
 20 A I do now.
 21 Q When did you first learn that?
 22 A This morning.
 23 Q From who?
 24 A Mr. Sah.
 25 Q So before that, you didn't realize that he had

1 written a report in this case?
 2 A That's correct.
 3 Q You knew that he treated Mr. Seelie?
 4 A Because we treat a patient doesn't mean we write --
 5 Q Did you know he treated Mr. Seelie?
 6 A Yes.
 7 Q You knew that the day he came in for his IME, didn't
 8 you?
 9 A Yes. But we do not always have to write a report
 10 when we treat a patient.
 11 MR. HOUSEL: Mark the whole
 12 file. We'll do it this way.
 13 ---
 14 (Plaintiffs' Exhibit 11
 15 marked for identification.)
 16 ---
 17 Q You did an IME for Williams, Sennett & Scully I see
 18 sitting on top of your desk. That's an insurance
 19 defense firm, isn't it?
 20 A I don't know if they do defense or not.
 21 Q There's a letter right there.
 22 A Does it say defense firm?
 23 Q Well, I know they do defense.
 24 A I don't.
 25 Q Have you done an IME for Williams, Sennett & Scully

X

1.0000

$$\frac{1.0000}{1.0000} = 1.0000$$

1 L.P.A.out in Twinsburg?
 2 A I may have. I saw a Mr. Oponti for them. I don't
 3 know if they're a defense firm, and I don't know what
 4 that was about, but their law firm is Williams,
 5 Sennett & Scully, and I don't know what their
 6 practice pattern is.
 7 Q Plaintiffs' Exhibit 11, identify that for the record.
 8 A This is my folder, if you will, on Mr. Seelie, with
 9 several things in it; MRI, IME, two copies of my IME,
 10 medical records from Kim Stearns.
 11 Q There's a copy of your report. Yeah, there are
 12 medical records from Kim Stearns there.
 13 A Yeah.
 14 Q Show me where they are.
 15 A Rightthere.
 16 Q Did you read these medical records from Doctor
 17 Stearns?
 18 A Yes, as much as I can.
 19 Q What do you mean, as much as you can? You don't read
 20 them all?
 21 A Look at his notes. If you can read them, then you're
 22 a better man than I am.
 23 Q Well, they're typed, aren't they? Aren't they typed?
 24 A Yes.
 25 Q Can you read them?

1 A Yes. Can you read this?
 2 Q Did you read them before you wrote your report?
 3 A Yes.
 4 Q Do you know Doctor Stearns?
 5 A I've met him. If he walked in the room I wouldn't
 6 know him.
 7 Q Who would be in a better position to evaluate
 8 somebody like Mr. Seelie, Doctor Stearns who's seen
 9 him over a period of two years or you who's seen him
 10 once?
 11 A First of all, I don't know Doctor Stearns has seen
 12 him for two years.
 13 Q Assume he has.
 14 A Would he be in a better position to evaluate him?
 15 Q Yeah, and give opinions, you or him?
 16 A It depends on what opinion. I examined him and I'll
 17 stand my exam up against anybody, and opinion.
 18 Q Are you in a better position to evaluate him than
 19 Doctor Stearns is?
 20 A I think I'm just as good an orthopedic surgeon as
 21 Doctor Stearns is.
 22 Q You don't even know Doctor Stearns.
 23 A It doesn't matter.
 24 Q It doesn't matter?
 25 A Yeah.

1 Q Why don't it matter?
 2 A 'Cause I know what I do on a physical examination and
 3 I know what I found, and I know what I didn't find.
 4 Do I get this back or no?
 5 Q When I'm done with it you can have it back.
 6 MR. HOUSEL: Why don't you
 7 mark this.
 8 ---
 9 (Plaintiffs' Exhibit 12
 10 marked for identification.)
 11 ---
 12 Q Take a look at Plaintiffs' Exhibit 12. Have you ever
 13 seen that before I've handed it to you right now?
 14 A I believe I saw a copy of this earlier this morning.
 15 Q The first time you ever saw it was when Mr. Sah gave
 16 it to you prior to the deposition?
 17 A I believe so.
 18 Q Did you and he talk about it?
 19 A I believe we talked about it. He said, here's Doctor
 20 Stearns report, that's, talking about it, then we
 21 talked about it.
 22 Q Did you have any other conversation about it?
 23 A Yes.
 24 Q Tell me what you talked about.
 25 A The fact that -- let me just quote this directly,

1 that I disagreed where he said he believed Mr. Seelie
 2 sustained a traumatic spondylolisthesis --
 3 spondylolysis with early Grade I spondylolisthesis
 4 with disc herniations at the L4-5 and L5-S1 levels as
 5 a direct result of the motor vehicle accident. I
 6 base this on the fact that --
 7 Q I just asked you what you and he talked about.
 8 A I'm telling you, this paragraph. He has no prior
 9 history problems with his back and the MRI shows
 10 increased signal intensity in the L4-5 level
 11 consistent with acute trauma. I disagree with that.
 12 Q Why do you disagree agree with it?
 13 A Because the MRI will show increased signal, whether
 14 that is a traumatic or from micromotion, 'cause when
 15 you have a spondylolisthesis there's a micromotion
 16 which will cause increased activity.
 17 Q Motion from the trauma from being struck in the rear
 18 by a vehicle?
 19 A No. Motion from twisting, turning, bending and
 20 everything in activities of daily living.
 21 Also on the MRI report, 7/27 the addendum says,
 22 a discreet fracture line is not identified. So they
 23 did not identify a discreet fracture on the MRI.
 24 Q Did you ever look at the MRIs?
 25 A No, I don't believe so. I think I just looked at the

1 report.

2 So the MRI did not show a fracture, which is
3 what Doctor Stearns is saying it was, and there will
4 be increased activity with a spondylolisthesis
5 whether or not there's a fracture. The vast majority
6 of spondylolisthesis are not traumatic.

7 Q How do you know that? You have some study you can
8 refer to?

9 A Experience, education and training.

10 Q Is there a study you can refer to?

11 A There may be or there may be a textbook.

12 Q Well, do you know of one?

13 A No, I mean I can't quote one right now.

14 Q Take a look at Plaintiffs' Exhibit 12. Tell me what
15 portion of that medical report of February 1, 2000
16 you disagree with. Or before I get to that, what
17 else did you talk with Mr. Sah about this morning,
18 other than that's the first time he showed you that
19 report?

20 A I think that's about it.

21 Q That was it?

22 A It was a five minute meeting.

23 Q So for five minutes you read that report and then you
24 told him you disagreed with that portion of it; is
25 that what you did?

1 A I said I thought it was fairly straightforward.

2 Q Wouldn't you have liked to have had this report
3 available to you before this morning?

4 A Not necessarily. I mean having it this morning or
5 having it before this morning doesn't change my
6 opinion.

7 Q Why don't you read it, tell me -- first of all, read
8 it and tell me when you're done reading it.

9 A Okay.

10 Q Okay?

11 A Okay.

12 Q Done reading it?

13 A Yes.

14 Q Both pages?

15 A Yes.

16 Q What do you disagree with in that report?

17 A The answers I previously gave you, the paragraph that
18 he sustained the -- first of all, that there is a
19 traumatic spondylolysis, I don't think so.

20 Q You don't think there is one?

21 A No, it wasn't traumatic, it wasn't traumatic.

22 Q Traumatic can be from getting hit at a high rate of
23 speed by a vehicle from behind, can't it?

24 A Absolutely. It's not from that.

25 Q What's it from, then?

1 A I think it's developmental.

2 Q How do you know that? What evidence do you have that
3 would support that opinion?

4 A The natural history of spondylolisthesis.

5 Q No. What evidence in this individual would you have
6 that would allow you to say that? What evidence
7 relative to Mr. Seelie? Not some studies. What
8 evidence relative to Mr. Seelie do you have?

9 A The evidence of the MRI that shows no fracture. You
10 can't have two bones breaking apart acutely without
11 having a fracture. That's the definition of a
12 fracture, okay. They didn't find any on the MRI,
13 that's evidence against it, okay, plus the natural
14 course of events for a spondylolisthesis is not
15 traumatic.

16 Q Have you finished your answer?

17 A Yes.

18 Q Okay. Tell me all the things you disagree with in
19 that medical report.

20 A That the spondylolisthesis was caused from the
21 accident and that the disc herniation was caused from
22 the accident.

23 Q What's a traumatic spondylolysis?

24 A It's a fracture. Spondylolysis.

25 Q What with early Grade I spondylolisthesis?

1 A That's where the bone breaks and moves, slips
2 forward, one vertebrae slips forward on the other.

3 Q And you don't think Mr. Seelie sustained either of
4 those injuries from this accident?

5 A Absolutely not.

6 Q What else do you disagree with?

7 A That his prognosis remains guarded. I do agree that
8 he can have deterioration over time, further
9 slippage, may require physical therapy, brace,
10 medication. Possible surgical intervention, I
11 disagree with that.

12 Q I'm sorry, what do you disagree with?

13 A That he'll need surgical intervention.

14 Q Anything else?

15 A I don't think he'll ever need a brace. I think
16 that's it.

17 Q Is that it?

18 A I think that's it. I'm not sure what else you're
19 going to bring up.

20 Q Well, it's pretty simple. Read the report, tell me
21 what portions of the opinions given by Doctor Stearns
22 you disagree with.

23 A I just did.

24 Q Any others other than what you've told me?

25 A Not that I'm aware. Those are the only opinions I

1 believe he's --
 2 Q Make sure you read it carefully.
 3 A And I don't believe I see anywhere within a certain
 4 degree of reasonable certainty.
 5 Q Is there anything else in the report that you
 6 disagree with other than what you've told me?
 7 A Not that I can think of.
 8 Q It isn't what you think of. Read the report then
 9 answer the question.
 10 A I don't think there's anything else I disagree with
 11 here. That's my answer.
 12 Q All right. So the fact that he said that the disc
 13 herniations at the L4-5 and L5-S1 levels were
 14 directly caused by the motor vehicle accident, you
 15 apparently agree with that, then?
 16 A No. I said the disc herniations. You didn't listen.
 17 Q I didn't hear you say that.
 18 A I did. Do you want to read it back?
 19 Q No. When we get it typed up we'll see it isn't
 20 there.
 21 A I disagree with his opinion that the disc ruptures
 22 were caused from the accident.
 23 Q What kind of injuries did Mr. Seelie sustain in this
 24 accident as far as you're concerned?
 25 A I think he developed low back pain, as I previously

1 said. The pain going down his leg was part of the
 2 low back pain radiation pattern from ligamentous
 3 injury. It's fair to say that he got a sprain or
 4 strain in his low back.
 5 Q Wouldn't that have healed by now most of the time?
 6 A Most of the time, yes.
 7 Q Do you think it's healed in Mr. Seelie's case?
 8 A The sprain, probably.
 9 Q Was it healed at the time you examined him?
 10 A Yes, the lumbar strain and sprain. His main pain was
 11 in his sacroiliac joint.
 12 Q Where's that?
 13 A That's way down below, it's where the sacrum comes
 14 into the ilium.
 15 Q L4-L5, S1?
 16 A No, below that.
 17 Q Below that?
 18 A Yes, below that and to both sides.
 19 Q What's a pars defect?
 20 A That's what all the spondylolisthesis business is
 21 about. The pars interarticularis is a portion of the
 22 spine that dissolves, if you will, or that's the
 23 defect in the part of the bone that causes the
 24 spondylolisthesis.
 25 Q The pars defect with Grade I spondylolisthesis,

1 L4-L5, that's part of your opinion of what his
 2 problems are as part of this accident, correct?
 3 A No, that's not correct.
 4 Q Well, that's what you said, because the impression
 5 portion --
 6 A No, no. This is what he has. That's not what the
 7 accident gave him. When someone comes to me for a
 8 physical examination I give an impression of what I
 9 find on that physical examination, then the
 10 discussion is whether or not that has anything to do
 11 with whatever they're asking.
 12 Q Can somebody not exhibit the problem on a physical
 13 examination but later have the problem, depending on
 14 how you conduct the physical examination?
 15 A Could the sun not come up tomorrow? Yes, the sun
 16 could not come up tomorrow.
 17 Q Where are the American Medical Association guides to
 18 the evaluation of permanent impairment that you
 19 referred to?
 20 A Where are they? It's a book.
 21 Q Do you have it here?
 22 A I believe it's in the other room.
 23 Q Could you go get it?
 24 A I could.
 25 ---

1 (Off the record.)
 2 ---
 3 A It's not on the book case, so I'm assuming one of my
 4 partners has it. It's the standard book put out by
 5 the AMA that you use to do evaluations.
 6 Q Would this be it?
 7 A That's the second edition.
 8 Q Well, is there a difference?
 9 A There's a fourth edition, sure. I don't know how old
 10 that is.
 11 Q Well, see if you can find this area that you refer to
 12 in your report in that book.
 13 A I don't refer to the second edition. That's an older
 14 book.
 15 Q Look through the book and tell me if there's any area
 16 in here that deals with what you mentioned in your
 17 report. Do it, then, okay?
 18 A Are you asking me or ordering me to do it?
 19 Q I'm telling you to do it.
 20 MR. HOUSEL: Why don't you
 21 mark this?
 22 Q You don't seem like you want to, that's why
 23 I'm telling you to do it.
 24 A First of all, it's an old book.
 25 MR. HOUSEL: Just mark it,



1 please.

2 ---

3 (Plaintiffs' Exhibit 13
4 marked for identification.)

5 ---

6 Q What's Plaintiffs' Exhibit 13?

7 A It says Guides to the Evaluation of Permanent
8 Impairment, Second Edition.

9 Q Look through that book and tell me if you can find
10 the section in there that you made reference to in
11 your medical report.

12 A I didn't make reference to this book at all.

13 Q Well, that's the second edition, you're talking about
14 the fourth edition?

15 A Fourth edition, that's correct.

16 Q And you don't have that here in your office?

17 A That's correct.

18 Q Did you ever make copies of that so somebody like me
19 could look at?

20 A The book?

21 Q No, the section that you have referred to.

22 A No.

23 Q You have opened to a page that I have paper clipped
24 there.

25 A I don't know who paper clipped this.

1 the question, please?

2 A Restate the question, please.

3 Q Read it to him again. Never mind. I'll do it again.

4 What's Plaintiffs' Exhibit -- we'll do it the easy
5 way for you -- what's Plaintiffs' Exhibit 13?

6 A I answered that question.

7 Q Well, answer it again.

8 A Okay. It's the Guides to the Evaluation of Permanent
9 Impairment, Second Edition.

10 Q Prepared by the American Medical Association?

11 A That's correct.

12 Q You looked at the same book. The only difference
13 being the fourth edition in preparation for writing
14 your medical report in this case; is that correct?

15 A It was a different book, it was the same author, same
16 title.

17 Q Just a different edition, right?

18 A Then it's not the same book.

19 Q It's not the same book?

20 A That's correct.

21 Q How do you know that?

22 A Because this book is not the same book.

23 Q How do you know that?

24 A You don't know what the other one looks like. The
25 other one is twice as thick as this and has more

1 Q I did?

2 A Fine.

3 Q Does that the cover the area that you're talking
4 about?

5 A It says spine, ankylosis.

6 Q Is that area the same area that you looked at in the
7 fourth edition of that book?

8 A The fourth edition is under the spine section. Is
9 that what you're saying?

10 Q Is the area in the book that you're looking at now --

11 A You've got --

12 Q Let me finish the question, okay? Plaintiffs'
13 Exhibit 13, the same area that you looked at in the
14 book that's the fourth edition by the same name?

15 A And I'm asking you, are you talking about the spine
16 portion?

17 Q I don't know. You're the guy that made reference to
18 it, you tell me.

19 A You asked the question.

20 Q Do you know the answer or not? Is this the area that
21 you referred to in the other book?

22 A Can I ask a question and finish the --

23 Q No. I ask the questions, that's the way a deposition
24 goes, you answer, I ask. If you don't know, you
25 don't know. Not so hard, is it? Would you answer

1 material in it.

2 Q And that book isn't available here in your office?

3 A That's correct, it's not.

4 Q What section of that book do you write, that when you
5 wrote your opinion that according to the American
6 Medical Association guides to the evaluation of
7 permanent impairment fourth edition, Mr. Seelie has
8 no permanent impairment or disability related to this
9 motor vehicle accident?

10 MR. SAH: Objection. Which
11 book, the second edition or the
12 fourth edition?

13 MR. HOUSEL: The fourth
14 edition.

15 A I didn't refer to this book.

16 Q I didn't say you did.

17 A The spine section.

18 Q You're in the spine section there?

19 A You've got the paper clip on ankylosis, which is a
20 section on the spine, so that's why --

21 Q Doesn't this say spine disorders down here?

22 A But you got this right under ankylosis, that's
23 what --

24 Q I just paper clipped the page for easy reference.
25 Can you take a few minutes and look at this?

- 1 A All right. Sure.
 2 Q All right.
 3 A Okay.
 4 Q Have you read it?
 5 A This page, the part that you're referring to, Table
 6 53?
 7 Q Right, what does that have to do with?
 8 A Impairment due to disorders of the spine.
 9 Q Does it have anything to do with any of the things
 10 this case is concerned with?
 11 A That's correct.
 12 Q Which one?
 13 A Grade I or II spondylolysis and spondylolisthesis,
 14 with aggravation, persistent muscle spasm, rigidity
 15 and pain resulting from trauma, none of those fit his
 16 category.
 17 Q He doesn't have any aggravation to his
 18 spondylolisthesis?
 19 A No. Can I answer that?
 20 Q Yeah, sure.
 21 A He has no rigidity, he had no spasm, he had no pain
 22 resulting from the trauma.
 23 Q He had no pain resulting from the trauma?
 24 A Can I finish my answer, please?
 25 When I examined him, his pain was in his

- 1 sacroiliac joint, not his lumbosacral junction and
 2 not where his pars defect is, okay.
 3 Q Did he tell you that he had pain from the trauma
 4 right after the trauma?
 5 A That's correct. I did not examine him at that time.
 6 I examined him on that date, at which point he had no
 7 pain, no rigidity, none of these things here.
 8 Q Can you make available to me, along with these other
 9 things that you're going to make available to me the
 10 copy of the pages of the fourth edition of this book
 11 where you got this information from?
 12 A I can. I don't know if I can get that to you by the
 13 trial.
 14 Q Why can't you get it to me by the trial?
 15 A I've got other things to do. I've got patients to
 16 see.
 17 Q We've heard all those excuses.
 18 A They're not excuses.
 19 MR. SAH: Let him answer the
 20 question.
 21 A The trial is August 20, whatever it is. My life does
 22 not revolve around the trial. I have patients to
 23 see, I have obligations with the Navy.
 24 Q Do you want me to just have a subpoena delivered to
 25 you like I did and have you ordered to produce it?

- 1 A Are you threatening me again?
 2 Q No, I'm telling you what I'll do, that's not a
 3 threat. That's a promise. Would you like me to do
 4 that, or will you get it for me? You can have it
 5 either way.
 6 MR. SAH: Bob, get the order,
 7 get the order.
 8 MR. HOUSEL: I'm not talking
 9 to you. I'm talking to him.
 10 MR. SAH: I understand that.
 11 A Are you through now?
 12 Q Yeah, I'm through now.
 13 A Okay. I can get you the pages. I don't know if I
 14 can get them to you by then. I have to first find
 15 the book, if one of my partners has it at home and
 16 he's on vacation, I can't get the book.
 17 Q You don't know that, do you?
 18 A No.
 19 Q Where do you normally keep the book?
 20 A Right over there, right where I went to look for it.
 21 Q Show me. Did you physically, before you wrote the
 22 report, go and get the book from that book case in
 23 the other room?
 24 A I believe so, unless it was on my desk.
 25 Q Where did you write this report?

- 1 A I believe right here.
 2 Q And do you have any idea where the book is now?
 3 A No.
 4 Q Okay. Will you make a search for it and see if you
 5 can provide me with that information?
 6 A I don't know what make a search means. I will try to
 7 find it within my normal daily routine, okay. That's
 8 not number one on my daily routine. I have a bunch
 9 of patients coming in, I have other things to do.
 10 Tomorrow I have a bunch of patients coming in and I'm
 11 leaving town.
 12 Q I'll just get a subpoena, then, we'll just do it that
 13 way.
 14 Do you feel Mr. Seelie currently has any
 15 problems resulting from the trauma from this accident
 16 of July, '99?
 17 A I feel his pain is from the sacroiliac, based on my
 18 examination of him.
 19 Q Was that caused by the accident?
 20 A No.
 21 Q What was that caused by?
 22 A I have no idea. He didn't have sacroiliac pain then.
 23 He had low back pain.
 24 Q So do you believe he's totally recovered from the
 25 accident?

- 1 A I believe he's recovered to a functional state that
2 he doesn't have a permanent impairment.
- 3 Q Do you think he's totally recovered or he has any
4 residual problems at all?
- 5 A He has spondylolisthesis, which I don't feel, based
6 on a reasonable degree of medical certainty, was due
7 to the motor vehicle accident. He has no symptoms of
8 his herniated discs, based on my examination.
- 9 Q The records you have from Doctor Stearns, one of the
10 notes from an office visit says, the x-rays show a
11 definite crack/spondylolysis at the L4-5 level and it
12 appears that he has an early Grade I slip at L4-5.
13 Did you ever see those x-rays?
- 14 A From Doctor Stearns' office?
- 15 Q Uh-huh.
- 16 A No.
- 17 Q What was your answer?
- 18 A No, I never saw the x-rays.
- 19 Q Never saw them?
- 20 A If they were from his office, I didn't see them. If
21 those were the films from Fairview, yes, I saw them.
- 22 Q You didn't actually see the films themselves, you saw
23 the report?
- 24 A From Fairview I saw the films.
- 25 Q The actual films?

- 1 A That's correct. Now may I have that? That's part of
2 my file.
- 3 Q Well, when we're done, we'll give -- I'm going to
4 take your whole file for the Court Reporter.
- 5 A I understand that.
- 6 Q But don't worry about it.
- 7 Were any of the injuries suffered by Mr. Seelie
8 in the accident of July 1, 1999 new and distinct
9 injuries or were they aggravations of preexisting
10 conditions?
- 11 A You're asking me that question now?
- 12 Q Yeah, that's a question.
- 13 A Let me refer to -- if I can.
- 14 Q You can refer to anything you want.
- 15 A Thank you. I believe he suffered a lumbar strain and
16 I can state within a reasonable degree of medical
17 certainty that the spondylolisthesis and the discs
18 were not part of the motor vehicle accident.
- 19 Q What were the new and distinct injuries?
- 20 A The low back pain and the lumbar strain.
- 21 Q You didn't put that anywhere in your medical report,
22 did you?
- 23 A Low back pain. Impression, motor vehicle accident
24 with low back pain.
- 25 Q You didn't give an opinion with reasonable medical


- 1 certainty anywhere in your opinion medical report
2 that that's what he suffered from as a result of the
3 accident, right?
- 4 A I didn't use that term.
- 5 Q No?
- 6 A I don't believe I used that term.
- 7 Q You didn't. That's in the impression. You didn't
8 use that term where you expressed your opinions in
9 the discussion section, did you?
- 10 A I did use that term, I can state with a reasonable
11 degree of medical certainty as an expert in
12 orthopedic surgery and conditions of the
13 musculoskeletal system.
- 14 Q You didn't indicate that opinion anywhere in the
15 discussion section about the low back pain and/the
16 strain, did you?
- 17 A The low back pain is under impression.
- 18 Q But you didn't give an opinion in that section?
- 19 A No, that's not in the opinion section.
- 20 Q So you didn't give that opinion in your report, did
21 you?
- 22 A That's correct.
- 23 Q That wasn't so hard, was it?
- 24 A I still don't understand the question.
- 25 Q Does Mr. Seelie continue to suffer from any injuries

- 1 sustained in the motor vehicle accident of July 1,
2 '99?
- 3 A I believe his lumbar strain is quiescent.
- 4 Q What's that mean?
- 5 A Gone away, if you will, quiet, not -- as of, these
6 answers are as of April 11th when I examined him.
- 7 Q No, I'm asking about as of today.
- 8 A I've not examined him today, I have no idea what his
9 condition is today.
- 10 Q What preexisting conditions in his spine do you feel
11 Mr. Seelie had prior to this accident?
- 12 A His Grade I spondylolisthesis.
- 13 Q Anything other than that?
- 14 A Yeah, I think the discs were, too.
- 15 Q The discs were what?
- 16 A I believe were there prior to that, too.
- 17 Q But they were asymptomatic, correct?
- 18 A That's correct.
- 19 Q So they became symptomatic after the trauma from the
20 accident?
- 21 A No.
- 22 Q Well, when did they become symptomatic, then?
- 23 A I don't think they are symptomatic. I don't think
24 they ever were symptomatic.
- 25 Q So the fact that Doctor Stearns has examined him a

1 number of times and he told you that they were
 2 symptomatic when you took the examination, you just
 3 disregard all that?
 4 A When I saw him, he had no evidence of neurologic
 5 deficits, which is what a disc will give you.
 6 Q Radiating pain down the leg is--
 7 A That's not a neurological deficit, no, that's not.
 8 Q It's not?
 9 A It's not.
 10 Q It's not something caused by a herniated disc?
 11 A It can be, but it can be caused by other things, as I
 12 previously testified.
 13 Q Why do you recommend he continue his home exercise
 14 program of stretching and flexibility if he doesn't
 15 have any problems?
 16 A He does have a problem, he's got a pars defect, he's
 17 got a spondylolisthesis.
 18 Q Which was asymptomatic before the accident, right?
 19 A That's correct.
 20 Q But the accident didn't cause the problem, right?
 21 A That's correct.
 22 Q What did? You don't know, do you?
 23 A What problem are you talking about?
 24 Q The problems he currently has or problems he had when
 25 you saw him, the problems he's complained to Doctor

1 thigh.
 2 Q Does that indicate a herniated disc to you?
 3 A It does not necessarily in and of itself.
 4 Q Could it, though?
 5 A It could be all kinds of things. It could be, yes.
 6 Q Okay.
 7 A I don't believe it was.
 8 Q What do you think caused the herniated discs?
 9 A I think it was a developmental disc just like the
 10 rest of the asymptomatic discs in that study.
 11 Q What evidence do you have to support that opinion?
 12 A Evidence as in what?
 13 Q Any kind of evidence to support that opinion you just
 14 gave me.
 15 A The study.
 16 Q I'm sorry?
 17 A That study.
 18 Q What study are you talking about?
 19 A The Journal of American Medical Association.
 20 Q Is that something you can make available to me, too?
 21 A Again, I've got to find that, I don't know when I can
 22 make it available to you. You've given me quite a
 23 bit of tasks here already.
 24 Q Well, Doctor, you know, you've been paid a lot of
 25 money to be an independent medical expert in this

1 Stearns about, what caused that?
 2 A Well, you asked about five different questions.
 3 Which one do you want me to answer?
 4 Q All of them.
 5 A Then--
 6 MR. HOUSEL: Go ahead, read
 7 them back.
 8 ---
 9 (Record read.)
 10 ---
 11 A The problems he has currently as of the time I saw
 12 him are sacroiliac pain.
 13 Q Caused by what?
 14 A I haven't idea.
 15 Q All right. Go ahead.
 16 A The problems when I saw him were his sacroiliac pain
 17 with no evidence of disc or anything else. The
 18 problems when Doctor Stearns saw him? Which visit?
 19 Q Any of the visits that you have notes on.
 20 A You've got them.
 21 Q I think you've got them.
 22 A Remember you said you'd give them to me afterwards,
 23 you've got his --
 24 Q Okay.
 25 A Severe left low back pain radiating to the left


1 case and you've expressed a lot of opinions about my
 2 client's injuries different than his treating
 3 physician. Don't you think we have a right to find
 4 out those things?
 5 A Do you have a right? That's correct.
 6 Q So you will attempt to get that for me?
 7 A I will attempt to get that for you, yes, I will.
 8 Q Tell me everything that you remember about that 
 9 survey.
 10 A That the substantial percentage of patients had no
 11 back complaints, no leg complaints, no disc
 12 complaints whatsoever, had an MRI done for the study
 13 and found to have herniated discs.
 14 Q Did they find that the herniated discs were impinging
 15 on the nerve roots?
 16 A I'm not done yet, please.
 17 And a significant number had more than one
 18 level.
 19 Q Did they find that these herniated discs in that
 20 study were impinging on someone's nerve root?
 21 A I'm sure some were. I can't tell you the exact
 22 number they were.
 23 Q When did you read this study last?
 24 A Last?
 25 Q Yeah.

- 1 A Six, eight months ago.
 2 Q Significant number. How significant?
 3 A Well, I just gave you -- my recollection would be the
 4 high teens or mid 20 percent of all people.
 5 Q Out of 100 percent?
 6 A Yes.
 7 Q Of people with herniated discs?
 8 A No, of people that had no pain or no complaints
 9 whatsoever.
 10 Q And the other 80 percent did have problems with
 11 herniated discs?
 12 A No. The other 80 percent were normal, normal study.
 13 Q Maybe I'm misunderstanding you.
 14 A Take hundreds of people with a normal back, okay, you
 15 send them through an MRI scanner, okay, a certain
 16 percentage showed that they had herniated discs,
 17 another percentage which was lower but still
 18 significant, had more than one herniated discs and
 19 they never had any trouble with their back
 20 whatsoever.
 21 Q How does that relate to Mr. Seelie's situation?
 22 A He had herniated discs with no symptoms.
 23 Q You don't know that they were herniated before this
 24 accident, do you, because you never seen any evidence
 25 of any kind that would say that, right?

- 1 A I've not seen an MRI of his back prior to the
 2 accident.
 3 Q Did you ask if there were any taken?
 4 A He said he had no previous injury to his back,
 5 therefore, there would be no reason to MRI.
 6 Q You don't disbelieve him when he tells you that, do
 7 you?
 8 A No.
 9 Q So if there was no evidence that you had of any kind
 10 to show what caused the herniated discs or whether
 11 they come from degenerative disc disease or whatever,
 12 how can you use that to express your opinion that
 13 they weren't caused by the accident?
 14 A That is a portion of it. The rest of it is physical
 15 examination, he did not ever have a neurologic
 16 deficit, I could not find a neurological deficit,
 17 that's when a disc ruptures and causes a problem,
 18 that's what it does. There's certain things that a
 19 herniated disc does to you.
 20 Q And they always do the same things; is that what
 21 you're saying?
 22 A There's a pattern of things that they do, yes.
 23 Q And pain radiating down the leg is not one of them,
 24 huh?
 25 A That is one of them, yes.

- 1 Q Numbness and tingling isn't one of them, right?
 2 A Those are things, but those are also symptoms of
 3 other problems.
 4 Q I was here at the exam and I made some pretty careful
 5 notes, and I'm going to be testifying in this case
 6 relative to that because he told you he had numbness
 7 in the leg, that he had pain and tingling and
 8 radiating pain down in the leg.
 9 A I've got down here number two, right greater than
 10 left leg pain. He had no tingling or numbness or
 11 weakness or bowel or bladder symptoms. Those were
 12 his words.
 13 Q What were his words?
 14 A Right greater than left leg pain, no tingling,
 15 numbness, weakness, or bowel or bladder symptoms.
 16 Q That's different than what I heard. That's why it
 17 would be a good idea to tape record these things,
 18 Doctor. When he bent sideways, he told you it hurt
 19 on both sides to do that, didn't he?
 20 A That is not a function of a disc.
 21 Q I asked you if that's what he told you.
 22 A I don't know. I don't have that down.
 23 Q Did he tell you that the left bothers him more than
 24 the right at the time of the examination?
 25 A He told me right more than left.

- 1 Q Really?
 2 A Yes. And he's got that down twice.
 3 Q Twice? Where does it say that twice?
 4 A Kim Steams, right leg more than left, right more
 5 than left.
 6 Q So he told Kim Steams that?
 7 A That's what he told me.
 8 Q That he told Kim Steams?
 9 A That's correct.
 10 Q Did he tell you that he had low voltage shock
 11 feeling, numbness and tingling and his foot goes to
 12 sleep?
 13 A I don't have that down. I've got no tingling and
 14 numbness, chief complaints.
 15 Q So you say he never told you that he had any tingling
 16 and numbness?
 17 A I don't remember that, and I don't have it written
 18 down.
 19 Q Never told you that it felt like a low voltage shock
 20 and his foot goes to sleep, you don't have that down?
 21 A I've got down chief complaints, no tingling, no
 22 numbness, low back pain and right greater than left
 23 leg pain, written down three times, as a matter of
 24 fact.
 25 Q Show me where it's written down three times?

1 A One --
 2 Q No, he told Steams that he did?
 3 A No, no, that's what I'm saying, these are his words,
 4 three places, right greater than left, right greater
 5 than left, and --
 6 Q Well, what's two.
 7 A Two is right greater than left.
 8 Q And what's the rest of it say?
 9 A Right greater than left leg pain.
 10 Q Leg pain. And what's this say?
 11 A No tingling, numbness, weakness or bowel or bladder
 12 symptoms. 
 13 Q So you said he told you he never had any tingling or
 14 numbness, right?
 15 A That's correct.
 16 Q Never told you his foot went to sleep?
 17 A I don't remember.
 18 Q So he may have said that; you just don't remember?
 19 A It's possible he may have recited the Gettysburg
 20 Address and I don't remember.
 21 Q Did you ask him what bothered him the most?
 22 A That's chief complaint, yes.
 23 Q I wrote down that he said low back pain right more
 24 than left.
 25 A That's exactly what I have.

1 Q And that it still radiates into the legs with
 2 numbness.
 3 A I've got right greater than left leg pain, no
 4 tingling, numbness, weakness or bowel or bladder
 5 symptoms.
 6 Q So you didn't write down that he told you that it
 7 still radiates into his legs with numbness?
 8 A I've got radiating into the leg, no numbness.
 9 Q You've got what?
 10 A Nonumbness.
 11 Q Nonumbness.
 12 Did he tell you that he was in pain when he bent
 13 over to try and touch the floor?
 14 A He didn't have to. He lacked twelve inches of
 15 touching his fingertips to the floor.
 16 Q What's that mean?
 17 A He's got some tightness in his back and the pain is
 18 limiting him from touching the floor.
 19 Q Where would that pain be?
 20 A In his low back and his sacroiliac joint.
 21 Q Could I have a copy of your CV?
 22 A Do you have it?
 23 Q Could I have it?
 24 A Yeah, sure.
 25 MR. HOUSEL: Why don't you

1 mark it?
 2 ---
 3 (Plaintiffs' Exhibit 14
 4 marked for identification.)
 5 ---
 6 Q Plaintiffs' Exhibit 14 is your CV?
 7 A Yes.
 8 Q Okay. I don't have any other questions. Thank you.
 9 We're going to take your whole file and have it
 10 marked, so why don't you give the Court Reporter your
 11 whole file, that's part of your file.
 12 A I understand. Can I copy and keep one for myself?
 13 Q We'll get it back to you because there's certainly
 14 some discrepancies from what you say is your file and
 15 what I got, so we'll get it back to you. Okay.
 16 That's all I've got.
 17 A To review the JAMA article on the back.
 18 Q That you used in your medical report, that you
 19 referred to concerning your opinions.
 20 A The one that, normal discs.
 21 Q Yeah.
 22 A The office appointment slips for the IMEs.
 23 Q For as far back as you can get them.
 24 A As far back as I can get them.
 25 Q Right.

1 A And the 1099s regarding IMEs.
 2 Q Right. And the book that's missing from the other
 3 room.
 4 A Now, you want --
 5 Q I want the pages that you referred to and a copy of
 6 the front of it. And when can you realistically tell
 7 me that you might get -- we already talked about the
 8 records of IMEs. When could you realistically get
 9 these other items?
 10 A If the book is in our other office, I could probably
 11 again get that to you by the end of the week. If
 12 it's not there, I don't know where to get one, to be
 13 honest with you. Yeah, why don't you give me a card.
 14 Q All right. What about the JAMA article?
 15 A I'm going to have to find someone that can go into
 16 Index Medicus. I can call, 'cause they're going to
 17 have to reference it by spine and disc and I don't
 18 know how many titles will pop out. If one of the
 19 radiologists -- I'll call over there to see if they
 20 know, 'cause it's a fairly well known study if they
 21 know where to get a copy of it, and I'll get a copy
 22 of it.
 23 Q Do you have a recollection of where you were when you
 24 read it? I mean was it here in your office, was it
 25 from a JAMA magazine?

1 A No, someone had sent it to me as a Xerox.
 2 Q Someone sent it to you here in your office?
 3 A Either here in the office or the other office.
 4 Q Who sent it to you? *→ 1990*
 5 A I have no idea. This article is several years old.
 6 Q Well, did you have the article in front of you to
 7 review --
 8 A No.
 9 Q Let me finish. Before you wrote the medical report
 10 in this case?
 11 A No.
 12 Q It's just from your memory of it?
 13 A That's correct.
 14 Q And you have no recollection of who sent it to you or
 15 when they sent it to you?
 16 A No, it was several years ago.
 17 Q Several years ago it was sent to you?
 18 A Yeah.
 19 Q And you remember it what it said well enough to use
 20 it --
 21 A I remember a significant number of normal people who
 22 had no complaints referable to their back who had
 23 herniated discs and there was a smaller number, also
 24 significant, that had discs at more than one level.
 25 Q That had no complaints?

1 A That is correct. They had to have no complaints to
 2 get in the study.
 3 Q And that's one of the conclusions that led you to
 4 your conclusion that Mr. Seelie's herniated discs
 5 weren't caused by this accident?
 6 A Werenot caused.
 7 Q And the other thing was?
 8 A I found nothing on physical examination that would
 9 indicate a disc.
 10 Q If you can't get this for me would you call me and
 11 let me know that?
 12 A You might be able to get it quicker than I can.
 13 Q I'll try, but I need to know exactly where to look.
 14 A It's JAMA, Journal of American Medical Association.
 15 I'm probably the most computer illiterate guy in the
 16 room, but the key words would be spine or disc or
 17 MRI.
 18 Q Since it's one of the bases for your opinions, it's
 19 obviously pretty important, and if you can't find it,
 20 would you be kind enough to call me and tell me that
 21 you can't find it?
 22 A I will. We have a partner who's a spine surgeon and
 23 he may have it in his folder at home. I'll call his
 24 secretary and see if I can get ahold of him.
 25 Q And the other thing we're talking about is the actual

1 book itself?
 2 A The fourth edition of the AMA Guides to the
 3 impairment.
 4 Q If you can't locate that, let me know.
 5 A That one, I'm sure they have it in the Case law
 6 library, is that what you call it, the law library?
 7 I'm certain they would have it in a law library.
 8 Q So I can expect to hear from you on these?
 9 A Yes. I leave town on Thursday, you will hear from me
 10 before I leave town.
 11 Q Thank you.
 12 A Thank you.
 13 MR. HOUSEL: Do you want to
 14 waive signature on this?
 15 THE WITNESS: Yeah, I think
 16 so.
 17
 18
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 25

1 STATE OF OHIO)
 2) SS:
 3 COUNTY OF SUMMIT.)
 4 I, Mary E. Dunn, a Notary Public
 5 within and for the State aforesaid, duly
 6 commissioned and qualified, do hereby certify
 7 that the above-named DURET S. SMITH, M.D.,
 8 was by me, before the giving of his deposition,
 9 first duly sworn to testify the truth, the whole
 10 truth, and nothing but the truth; that the
 11 deposition as above set forth was reduced to
 12 writing by me by means of stenotype, and was
 13 later transcribed into typewriting under my
 14 direction; that the reading and signing of the
 15 deposition by the witness were expressly waived
 16 by stipulation of Counsel and the witness; that
 17 the said deposition was taken pursuant to
 18 stipulations of Counsel herein contained and was
 19 completed without adjournment; that I am not a
 20 relative or attorney of either party or otherwise
 21 interested in the event of this action.
 22 IN WITNESS WHEREOF, I hereunto set my
 23 hand and seal of office at Cleveland, Ohio, this
 24 21st day of August, A.D. 2001.
 25
 Mary E. Dunn, Notary Public
 My commission expires: 10/16/02.

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