# *DEPOSITION OF GEORGE VINCENT DIGIACINTO, M.D.; 1993 Depo. Trans. LEXIS 7550*

DISTRICT COURT OF KANSAS, SEDGWICK COUNTY, EIGHTEENTH JUDICIAL DISTRICT, CIVIL DEPARTMENT

92 C 807

June 16, 1993

**Reporter**
1993 Depo. Trans. LEXIS 7550 *

JEFFREY A. JOHNSON, Plaintiff, -against- CHANDLER S. BETHEL, M.D., ROBERT B. McCOWN, M.D., RODNEY STAATS, M.D., ROBERT A. SWEET, M.D., and M.C. MYRICK, M.D., Defendants.

**Expert Name:** Dr. Vincent DiGiacinto, M.D.

## Disclaimer



## Counsel

**[*1]** BRADLEY J. PROCHASKA & ASSOCIATES, Attorneys for Plaintiff, Wichita, Kansas, BY: GERARD C. SCOTT, ESQ.

FLEESON, GOOING, COULSON & KITCH, ESQS., Attorneys for Defendant Bethel, Wichita, Kansas, BY: RICHARD I. STEPHENSON, ESQ.

WOODARD, BLAYLOCK, HERNANDEZ, PILGREEN & ROTH, ESQS., Attorneys for Defendants McCown and Staats, Wichita, Kansas, BY: JAMES Z. HERNANDEZ, ESQ.

GILLILAND & HAYES, P.A., Attorneys for Defendants Sweet and Myrick, Hutchinson, Kansas, BY: MICHAEL R. O'NEAL, ESQ.

## Proceedings

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[19] **[*2]** DEPOSITION of GEORGE VINCENT

[20]DiGIACINTO, M.D., an Expert Witness on Behalf

[21]of the Plaintiff, taken by the Defendants,

[22]pursuant to Chapter 60 of Kansas Statutes

[23]Annotated, and Agreement, held at the above-

[24]mentioned time and place, before Lynne Stein,

[25]a Notary Public of the State of New York.

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[2]G E O R G E V I N C E N T D i G I A C I N T O ,

[3]having been first duly sworn by a Notary

[4]Public of the State of New York, was examined

[5]and testified as follows:

[6]EXAMINATION BY MR. HERNANDEZ:

[7]Q Would you state your full name for the

[8]record.

[9]A George Vincent DiGiacinto.

[10]Q What is your office address?

[11]A 53 East 67th Street, New York,

[12]New York.

[13]Q Doctor, my name is Jim Hernandez. You

[14]and I were introduced just before this deposition

[15]started.

[16]You understand that we're here in

[17]connection with a lawsuit that's been filed in

[18]Wichita, Kansas, do you not?

[19]A Yes.

[20]Q So that you understand who the parties

[21]are in this case, I represent Dr. Staats and

[22]Dr. McCown, who are two ER physicians at Wesley

[23]Medical Center.

[24]Mr. Stephenson represents **[*3]** Chandler

[25]Bethel, who is an internist who saw Mr. Johnson, the

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[2]plaintiff, a year or so before the hospitalization in

[3]May of 1991.

[4]The gentleman to my left is Mr. O'Neal,

[5]who represents Dr. Sweet and Dr. Myrick.

[6]You do understand that, do you not,

[7]sir?

[8]A Yes, I do.

[9]Q Of course you've had an opportunity to

[10]visit with Mr. Scott before this deposition started?

[11]A Yes, I have.

[12]Q As a matter of fact, I think

[13]Mr. Stephenson and I arrived here at about quarter of

[14]9:00 and Mr. Scott was already here; is that correct?

[15]A Yes.

[16]Q It's approximately 9:33 and we're

[17]starting this deposition.

[18]How long did you visit with Mr. Scott

[19]before this deposition started?

[20]A He arrived approximately 8:30 this

[21]morning.

[22]Q Do I take it that from 8:30 to the time

[23]we started this deposition, with a few interruptions,

[24]you and he have discussed your opinions in this case?

[25]A Yes.

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[2]Q Doctor, it's going to be important in

[3]the course of my examination and the examination here

[4]today that you understand the questions that we **[*4]** ask.

[5]You know that, don't you?

[6]A Yes.

[7]Q Have you given a deposition before?

[8]A Yes, I have.

[9]Q We're going to cover that in more

[10]detail in a second.

[11]If at any time during the course of my

[12]examination or the examination of any of these other

[13]lawyers you don't understand the question, we want

[14]you to tell us so, so that we can rephrase it or

[15]clarify. Is that fair enough?

[16]A Yes.

[17]Q The reason I ask you to do that is I

[18]know sometimes we lawyers are not doctors and do not

[19]maybe use the right vocabulary or terminology, but we

[20]want to make sure we're communicating with you. You

[21]understand that, don't you?

[22]A Yes, I do.

[23]Q I tell you that because at some point

[24]during the trial of this case, should your testimony

[25]differ than it does today, I have the right to show

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[2]the jury the difference in your testimony. You

[3]understand that, don't you?

[4]A Yes, I do.

[5]Q Now, in terms of your opinions here

[6]today, since you have given depositions before, you

[7]understand we'll be asking you questions regarding

[8]reasonable medical probability, **[*5]** do you not?

[9]A Yes, I do.

[10]Q If at any time, again, there is some

[11]confusion as to whether or not your opinion is based

[12]on reasonable medical probability or possibility,

[13]we're going to ask you to please so state. Is that

[14]fair enough?

[15]A Yes.

[16]Q Again, during the course of this

[17]examination, if at any time you refer to some

[18]document to refresh your memory or to give an answer,

[19]that's fine, doctor. I just want you to identify the

[20]document you're referring to. Is that fair enough?

[21]A Yes.

[22]Q As you know, it's very important for

[23]this young lady, the court reporter -- it's easier

[24]for her, put it that way, to have audible answers.

[25]A Yes.

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[2]Q Doctor, we have been furnished a CV in

[3]this case. Have you updated your CV in the last six

[4]months?

[5]A I can't really be sure. I'm more than

[6]willing to send you the most updated CV if it's been

[7]updated since then.

[8]Q If you would, please, after this

[9]deposition sometime, make a note to forward a copy to

[10]Mr. Scott. By record here, we'll indicate we request

[11]he forward us a copy.

[12]A Yes, **[*6]** sir.

[13]Q Doctor, where do you presently hold

[14]privileges?

[15]A St. Luke's-Roosevelt Hospital Center,

[16]Beth Israel North Hospital Center, Harlem Hospital

[17]Medical Center.

[18]Q What type of privileges do you hold at

[19]those hospitals?

[20]A I'm a private practitioner and my

[21]privileges cover the practice of neurosurgery.

[22]Q Do you have staff privileges, courtesy

[23]privileges, or how do you classify them here in

[24]New York?

[25]A Staff privileges, I guess, would be the

[8]

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[2]term.

[3]Q Do you do most of your work at one of

[4]the hospitals you mentioned?

[5]A Yes.

[6]Q Which hospital?

[7]A St. Luke's-Roosevelt Hospital Center.

[8]Q Is that a teaching hospital?

[9]A Yes.

[10]Q Besides being an attending physician or

[11]a practicing physician in the hospital, do you hold

[12]any positions at a hospital?

[13]A Yes, I do.

[14]Q What positions do you hold?

[15]A I am Acting Director of Neurosurgery at

[16]St. Luke's-Roosevelt Hospital Center.

[17]Q Does that include within your duties

[18]teaching residents in neurosurgery?

[19]A I teach residents. They are **[*7]** not

[20]neurosurgical residents. They are general surgery

[21]residents. We do not have a neurosurgery training

[22]program at St. Luke's-Roosevelt.

[23]Q Have you ever been an instructor in

[24]neurosurgery?

[25]A I am an instructor in neurosurgery

[9]

[1]

[2]currently.

[3]Q Where is that?

[4]A Through my affiliation at Harlem

[5]Hospital I am instructor in neurosurgery at Columbia

[6]Medical Center.

[7]Q In terms of your specialty, have you

[8]had any subspecialties other than neurosurgery?

[9]A No.

[10]Q Are you Board certified?

[11]A Yes, I am.

[12]Q How many times did you sit on the

[13]boards to become Board certified?

[14]A Just once.

[15]Q Doctor, let me ask you this: In

[16]connection with your specialty, do you subscribe to

[17]any particular journals?

[18]A Yes, I -- personally, no. Through the

[19]office, yes.

[20]Q The office subscribes to certain

[21]journals in your specialty; is that correct?

[22]A Yes.

[23]Q What journals do you subscribe to?

[24]A The Journal of Neurosurgery, The

[25]journal called Surgical Neurology, and the journal

[10]

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[2]called Neurosurgery.

[3] **[*8]** Q Are those journals that you pay for to

[4]come to you?

[5]A I believe we pay for each one of those,

[6]yes.

[7]Q Do you consider those journals to be

[8]authoritative and reliable in your field?

[9]A They are among the most significantly

[10]used journals.

[11]Q In your specialty?

[12]A In our specialty, yes.

[13]Q Do you subscribe to any family

[14]practitioners journals?

[15]A No.

[16]Q Is there a reason that you do not?

[17]A That's not in my area of specialty or

[18]interest.

[19]Q In your specialty of neurosurgery, do

[20]you see patients as a primary care physician?

[21]A No.

[22]Q So that the jury understands, doctor,

[23]and I understand, when I say "primary care

[24]physician," what do you understand to be a primary

[25]care physician?

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[2]A Patient who has a problem goes to a

[3]physician for the first contact. He's not seen any

[4]other physician or not had any other diagnostic

[5]evaluation up to that point. Sort of the first

[6]medical contact is the primary care physician.

[7]Q In your profession, in your specialty,

[8]are you associated with other neurosurgeons?

[9] **[*9]** A Yes.

[10]Q Are you associated with any family

[11]practitioners?

[12]A No.

[13]Q Are you associated with any other type

[14]of subspecialty other than neurosurgeons?

[15]A No.

[16]Q The percentage of the patients you

[17]receive, doctor, what percentage of those patients

[18]are referrals?

[19]A From another physician?

[20]Q Yes, sir.

[21]A Well over 95 percent, probably. 90 to

[22]95 percent, I'll say.

[23]Q The patients who come to you have had

[24]some contact with a physician, be it a family

[25]practitioner, an internist, orthopedic surgeon, or

[12]

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[2]family practitioner?

[3]A Yes.

[4]Q They come to you for a referral for a

[5]particular neurosurgical problem; is that correct?

[6]A Correct.

[7]Q So to the extent that you receive them,

[8]that patient has already received a working diagnosis

[9]or a differential diagnosis from a primary care

[10]physician; is that correct?

[11]A I can't say if they received a

[12]differential diagnosis or not. They've been

[13]evaluated by them.

[14]I'm just having a problem with agreeing

[15]that they received a differential diagnosis.

[16]Q Let **[*10]** me rephrase that so we're clear.

[17]They have been examined by another

[18]physician and then they're forwarded to you?

[19]A Under most circumstances, yes.

[20]Q Under those situations, doctor, why

[21]would a physician like a family practitioner, an

[22]internist, orthopedic surgeon, refer a patient to

[23]you?

[24]A Because he felt that the patient had a

[25]problem that came under my area of expertise.

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[2]Q So you are more in tune to look at a

[3]particular aspect of the patient, that is the

[4]neurosurgical aspect; is that correct?

[5]A Yes.

[6]Q In that regard, doctor, would you

[7]agree, as you've indicated, that you certainly have a

[8]higher degree of expertise when it comes to diagnosis

[9]and treatment of neurological conditions?

[10]A Yes.

[11]Q Doctor, in terms of articles you have

[12]written, or chapters you have written in texts, we

[13]have been provided a bibliography. I'm going to have

[14]this lady mark that as an exhibit.

[15](Bibliography, referred to above,

[16]was marked Dr. DiGiacinto Exhibit 1 for

[17]identification.)

[18]Q Doctor, I want to hand you what's been

[19]marked as **[*11]** Dr. DiGiacinto Exhibit 1 and ask you, sir,

[20]if you can identify that exhibit (handing).

[21]A (Perusing document.)

[22]It's a listing of articles or chapters

[23]which I have co-authored, listed as "Bibliography,

[24]George Vincent DiGiacinto, M.D."

[25]Q Doctor, I notice that that bibliography

[14]

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[2]goes back to some period of time, either late '60s,

[3]early '70s.

[4]A Yes.

[5]Q I notice the arrangement of the names.

[6]Can you explain to us why some names come first and

[7]another doctor and another doctor? Does that have

[8]something to do with the input of the physician?

[9]A Yes. The primary author of the article

[10]will invariably -- or the leader of the research or

[11]project -- will have his name on the article first.

[12]Q Doctor, what I'd like to do is ask you

[13]this: In the case of Jeffrey Johnson, did you arrive

[14]at any determination as to whether or not the

[15]compression of the spinal cord was either

[16]intramedullary tumor or extramedullary tumor?

[17]A Extramedullary tumor.

[18]Q What do we mean by "extramedullary"?

[19]A The medullary that you're referring to

[20]in this particular **[*12]** case is the spinal cord.

[21]Intramedullary tumor is a tumor which

[22]is growing and expanding within the spinal cord;

[23]intra, within.

[24]Extramedullary tumor is a tumor which

[25]is pressing on the spinal cord from the outside.

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[2]Q Doctor, in regards to Exhibit 1, back

[3]to that, now that we know we're talking about an

[4]extramedullary tumor, can you please circle for us

[5]those articles, texts, chapters, that are set forth

[6]in Exhibit 1 which you feel to be applicable to the

[7]issues of this case, if you would. I'd ask you with

[8]a red pen (handing).

[9]A Several of them will have relative

[10]applicability. Would you like me to mark those?

[11]Q Please.

[12]Put a circle in front.

[13]A (Complying.)

[14]MR. HERNANDEZ: Madam Reporter, I would

[15]ask you to attach the original of the red-

[16]circled bibliography to the original

[17]deposition, make copies for us, please,

[18]attach the copies to the deposition.

[19]Q Doctor, in terms of getting back a

[20]little bit now to extramedullary-intramedullary, are

[21]the signs and symptoms of intramedullary tumors of

[22]the spinal cord the same as the signs **[*13]** and symptoms of

[23]an extramedullary tumor of the spinal cord?

[24]A The two may share a number of signs and

[25]symptoms in common. It's a difficult question to

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[2]answer more precisely than that.

[3]Q Let me ask you this: Would it be fair

[4]to say that symptoms in a tumor of the spinal cord,

[5]some certain symptoms appear early, some appear late?

[6]A In what -- I'm sorry. Repeat the

[7]question. I didn't hear the question itself.

[8]Q Are there such things as early symptoms

[9]versus late symptoms?

[10]A Of?

[11]Q Extramedullary tumors.

[12]A Yes.

[13]Q Are there early versus late symptoms in

[14]intramedullary tumors?

[15]A Yes.

[16]Q Some may share the symptoms, some may

[17]differ, is that correct, as to when they appear?

[18]A Yes.

[19]Q Doctor, have you ever been named as a

[20]defendant in a medical malpractice suit?

[21]A Yes, I have.

[22]Q On how many different occasions?

[23]A Approximately eight times.

[24]Q Has that been when you've been

[25]practicing your specialty of neurosurgery here in

[17]

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[2]New York City?

[3]A Yes.

[4]Q By the way, doctor, **[*14]** just so that I

[5]identify more specifically, how long have you been

[6]located here at 53 East 67th Street, Park Avenue?

[7]A Approximately eight or nine years.

[8]Q Doctor, in terms of the eight suits,

[9]are there any of those suits still pending?

[10]A Yes.

[11]Q Do you know how many are still pending?

[12]A Four or five, I think.

[13]Q Doctor, I've been doing this kind of

[14]work 20-some years. I'm going to ask this question.

[15]Sometimes there appears to be a no suit

[16]for a long time and then a rash of suits. Over what

[17]period of time have you received the eight suits?

[18]Can you be more specific?

[19]A Over the last ten years, I think.

[20]Q Do any of the suits you have pending,

[21]personally, talking about those, involve the

[22]diagnosis and treatment of extramedullary tumors of

[23]the spinal cord?

[24]A No, they don't.

[25]Q Of those that have been disposed of

[18]

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[2]before -- by the way, were any of those other cases,

[3]did they ever go to jury trial --

[4]A Yes.

[5]Q -- or trial?

[6]Do you recall the outcome of those

[7]other cases?

[8]A Yes, I do.

[9] **[*15]** Q What were the outcome? Did you win or

[10]did the other party win?

[11]A One was discontinued before the trial

[12]was ever completed.

[13]I was dropped from a second case. The

[14]plaintiff was successful in that case.

[15]Q In terms of those other cases which are

[16]not pending, did any of those involve the diagnosis

[17]and treatment of extramedullary tumors of the spinal

[18]cord?

[19]A No.

[20]Q Did any of the cases, of all those

[21]you've been sued in, pending or otherwise, involve

[22]the diagnosis and treatment of intramedullary tumors?

[23]A No.

[24]Q Doctor, in terms of being an expert

[25]witness in a medical malpractice case, how many times

[19]

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[2]have you been retained, regardless as to the party,

[3]as an expert witness to review cases?

[4]A Twenty or twenty-five times.

[5]Q Over what period of time has this

[6]request taken place?

[7]A Over the last ten or twelve years. I

[8]can't remember the first time, but probably about

[9]twelve years ago.

[10]Q Of those which you've been requested to

[11]review, what percentage of those cases have been

[12]requested by the plaintiff, that is the party **[*16]** doing

[13]the suit, or bringing the suit?

[14]A You're testing my memory.

[15]Three or four. So percentage, I guess,

[16]would be 12 percent, 15 percent, something like that.

[17]Q For the plaintiff?

[18]A Yes.

[19]Q On those cases where you have -- the

[20]balance of the percentage being for the defendant,

[21]have those been for defendants in the state of

[22]New York?

[23]A They have been, not exclusively.

[24]Q Have the bulk or the majority of those

[25]cases been in the state of New York, for the

[20]

[1]

[2]defendant?

[3]A You know, you're pushing me on

[4]numbers. I'm sorry I can't be precise.

[5]There was a case in Vermont, there was

[6]a case in Wichita, Kansas, which we're dealing with

[7]today, and I believe there were two cases in New York

[8]for the plaintiff.

[9]Q When you've testified for the

[10]defendant, have you testified for the defendant

[11]primarily in the state of New York?

[12]A I have never -- for defendant, yes, in

[13]the state of New York.

[14]Q When you've been asked to be a witness

[15]for the plaintiff, those have been generally those

[16]cases outside the state of New York? **[*17]**

[17]A I just answered your question by saying

[18]two were outside New York and two were in New York.

[19]Q Have you been asked to review any

[20]cases, whether it be -- first of all, let's talk

[21]about outside the state of New York, besides this

[22]one -- where it involved the diagnosis and treatment

[23]of an extramedullary tumor of the spinal cord?

[24]A No.

[25]Q In those cases which you reviewed in

[21]

[1]

[2]New York --

[3]A For?

[4]Q For whatever party.

[5]-- have any of those cases involved a

[6]case where it was the diagnosis and treatment of an

[7]extramedullary tumor of the spinal cord?

[8]A I'm going to say yes, one did, more or

[9]less. I'll explain if you want, why I'm qualifying.

[10]Q Please.

[11]A The one case I'm thinking of involved

[12]ependyma of the cerebellum, which grew into the

[13]extramedullary space around the cervical spinal

[14]cord. It was not strictly an extramedullary tumor.

[15]Otherwise, not to my recollection.

[16]Q Do you recall the caption or style of

[17]that case, the name of it?

[18]A No, but I can certainly find out for

[19]you.

[20]Q Do you keep a list on **[*18]** a computer of

[21]those cases?

[22]A No.

[23]Q Do you recall whether or not you gave a

[24]deposition in that case?

[25]A I did not give a deposition.

[22]

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[2]Q How many times have you given a

[3]deposition, doctor, as an expert witness?

[4]A Deposition as an expert witness?

[5]Q Like we're doing here today.

[6]A To my recollection, twice.

[7]Q How many times have you given a

[8]deposition as a defendant in a medical malpractice

[9]case?

[10]A Five or six times, to my recollection.

[11]Q In those depositions you've given as an

[12]expert witness, back to that category, do you recall,

[13]were those cases outside the state of New York.

[14]I'm testing your memory, doctor.

[15]A Yes, you are.

[16]One was definitely outside the state of

[17]New York. I can't remember the other one. The --

[18]New York State doesn't give depositions as experts,

[19]which is why the number is so low.

[20]Q Do you keep a list for income tax

[21]purposes or otherwise of the cases in which you've

[22]given depositions?

[23]A No.

[24]Q Is that information readily attainable?

[25]A I think I can dig it out **[*19]** from my tax

[23]

[1]

[2]records.

[3]Q I'm just wondering if somewhere is

[4]there a list of the cases you've given depositions.

[5]A No, I don't.

[6]Q Or copies of the depositions?

[7]A I don't have any copies of the

[8]deposition.

[9]Q Have you ever testified in court as an

[10]expert witness?

[11]A Yes.

[12]Q How many times?

[13]A Four or five.

[14]Q Has that been in New York?

[15]A In New York only.

[16]Q In New York City?

[17]A Yes, always in New York City.

[18]Q As I understand it, doctor, according

[19]to Mr. Scott, you charge a thousand dollars an hour

[20]for your deposition time; is that correct?

[21]A No. I charge a flat fee of $ 3,000.

[22]Q When you say "a flat fee of $ 3,000,"

[23]how many hours does that entitle the examiner to?

[24]A I don't think it's ever come up, so I

[25]never thought about it.

[24]

[1]

[2]Q For example, if we take four hours --

[3]if we take one hour you get $ 3,000; is that correct?

[4]A Yes.

[5]Q If we take two hours or four hours, you

[6]get $ 3,000?

[7]A Yes.

[8]Q Have you reviewed any medical records

[9]or **[*20]** cases for Mr. Scott or Mr. Prochaska, his partner,

[10]before this one?

[11]A No.

[12]Q Have you reviewed any other cases for

[13]any other lawyers in Wichita, Kansas?

[14]A No.

[15]Q It's not a big place, but you might

[16]have remembered.

[17]A I would remember.

[18]Q Doctor, have you ever belonged to any

[19]organization whose purpose it is securing expert

[20]witnesses for medical malpractice cases?

[21]A No.

[22]Q Have you yourself ever advertised in a

[23]magazine regarding your availability as an expert

[24]witness to review cases?

[25]A No.

[25]

[1]

[2]Q In preparing the opinions for this

[3]particular case, did you do any particular type of

[4]medical research?

[5]A No.

[6]Q Doctor, when do you recall being first

[7]contacted in this case?

[8]A I believe in September or October or

[9]November of 1991. That's a real approximation. I

[10]believe it was before the end of 1991.

[11]Q Do you recall, doctor -- did you bring

[12]today with you your entire file in this matter?

[13]A No, I did not.

[14]Q Do you know where that file is?

[15]A Yes, I do.

[16]Q Will you tell us.

[17] **[*21]** A It's at home.

[18]Q What is your rate of charge to review a

[19]file?

[20]A $ 250 an hour.

[21]Q Do you recall -- and I know we have two

[22]reports from you -- do you recall how many letter

[23]reports you have prepared in this case?

[24]A Two.

[25]Q Did you prepare any rough drafts? I

[26]

[1]

[2]know you sit here with a computer on your desk.

[3]A I type them right on the computer and

[4]then mostly have to correct typos.

[5]Q Do you keep the rough drafts?

[6]A No.

[7]Q Do you know -- and I'm going to cover

[8]the reports in a minute with you, and they set forth

[9]the material you reviewed -- would it be fair to say

[10]that the reports set forth all the materials that you

[11]reviewed in arriving at your opinions?

[12]A To the best of my knowledge, yes.

[13]Q Do you recall -- let's start first with

[14]the first report. Do you recall the number of hours

[15]you spent in reviewing the materials that resulted in

[16]your letter report of June 8, 1992?

[17]A Not precisely. I think it was on the

[18]order of five or six or seven or four. It wasn't

[19]twelve hours and it wasn't two hours.

[20]Q Let me **[*22]** ask it this way. I take it --

[21]you require a retainer?

[22]A No.

[23]Q So after you completed your review, I

[24]take it you sent him a letter report and sent him a

[25]statement?

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[1]

[2]A I believe that's how I did it, yes.

[3]Q Do you keep a file in which you keep

[4]these statements or invoices?

[5]A I have -- I'm pretty sure I have a copy

[6]of the statement at home.

[7]Q We'll request a copy of that either

[8]from you or Mr. Scott. I don't care who sends it to

[9]me. I need to know the number of hours.

[10]Do you recall, doctor, how much time

[11]you would have spent in preparing the letter report

[12]that is dated January 12, 1993?

[13]A I would imagine a couple of hours,

[14]three hours. I'm not really certain.

[15]Q I take it the charge for the second

[16]report was the same as the first, 250 an hour?

[17]A To be very honest, I don't recall how I

[18]billed it, whether it was a flat rate for the report

[19]or whether it required -- whether I charged for

[20]re-reviewing some of the material that I read months

[21]earlier. I just don't recall. That may be reflected

[22]in information I have at home, which **[*23]** I'll be glad to

[23]send to you.

[24]MR. HERNANDEZ: Or Mr. Scott will

[25]supply that information. I make that
28

[1]

[2]request.

[3]Q After you reviewed your material but

[4]before you prepared your report, did you contact

[5]Mr. Prochaska or Mr. Scott to discuss your findings?

[6]A I contacted Mr. Prochaska or he

[7]contacted me. I don't recall which direction.

[8]Q Did you make notes of your telephone

[9]conversation with Mr. Prochaska?

[10]A Not to my recollection.

[11]Q Do you today have any independent

[12]recollection of that conversation with

[13]Mr. Prochaska? I'm talking about after the first

[14]report.

[15]A Do I have recollection of a

[16]conversation or conversations with Mr. Prochaska

[17]after the first report?

[18]Q No, before the first report but after

[19]your review.

[20]A I have a recollection of a conversation

[21]with him, but it -- I would be very hard pressed to

[22]report to you the substance of that conversation.

[23]Q That's what I meant.

[24]You recall having one but you don't

[25]recall the contents of it?

29

[1]

[2]A No.

[3]Q Is that correct?

[4]A Except that **[*24]** it dealt with the case, but

[5]beyond that, no.

[6]Q Likewise, after you prepared the first

[7]report and you were asked to prepare a second report

[8]dated January 12, 1993, did you again, before

[9]preparing the second report of January 12th have a

[10]telephone conference with either Mr. Scott or

[11]Mr. Prochaska?

[12]A I had a conversation with Mr. Prochaska

[13]and I can't remember the timing relative to the

[14]preparation of the report.

[15]Q Do you today recall the contents of

[16]that conversation with Mr. Prochaska?

[17]A I really have to answer the same as I

[18]did before. It was about the case, but the specifics

[19]I wouldn't even be able to come close to recalling.

[20]Q I know each of the letter reports, that

[21]is June 8, 1992, and January 12, 1993, refer to

[22]materials you reviewed.

[23]Let me ask you this, sir: Have you

[24]reviewed any depositions in this case?

[25]A Yes, I have.
30

[1]

[2]Q What depositions have you reviewed?

[3]A Deposition by Dr. Sweet; part of a

[4]deposition by Dr. Myrick, I literally just never

[5]finished reading through it; and a deposition by one

[6]of the emergency **[*25]** doctors at Wesley Medical Center

[7]whose name I don't recall right now.

[8]Q Dr. Staats or Dr. McCown?

[9]A Yes, I believe it was Dr. Staats.

[10]Q Any other depositions, sir?

[11]A Not to my recollection.

[12]Q Do you recall when these depositions

[13]were forwarded to you, when you reviewed them?

[14]A A month or two ago.

[15]Q Were you informed at that time as to

[16]why you were being asked to review the depositions?

[17]A Not specifically, other than that they

[18]were relevant to the case.

[19]Q Since those depositions that were

[20]forwarded to you 30 days ago or better, have you

[21]reviewed additional depositions to this day?

[22]A Not to my recollection, no.

[23]Q To this day -- I notice we indicated at

[24]the outset of your deposition you had a conference

[25]with Mr. Scott. Did he read to you any summary of

[31]

[1]

[2]depositions?

[3]A No.

[4]Q Did you review any summaries of

[5]depositions this morning?

[6]A No.

[7]Q In preparation for your deposition

[8]today, what materials did you review? We covered the

[9]depositions.

[10]A Just my two reports -- oh, you mean

[11] **[*26]** specifically for this?

[12]Q The deposition.

[13]A I really just read over my two reports.

[14]Q Did you have a chance -- I want to be

[15]fair with you -- to review the medical records that

[16]had been heretofore forwarded to you?

[17]A No, I did not.

[18]Q Now, I will invite you at any time

[19]during the course of my examination, if you wish to

[20]refresh yourself in the record, please feel free to

[21]do so, all right?

[22]A Yes.

[23]Q As we speak, have you been informed up

[24]to this point by Mr. Prochaska or Mr. Scott that

[25]additional depositions will be forthcoming to you for

[32]

[1]

[2]review?

[3]A No, I haven't.

[4]Q Do you anticipate, for the purpose of

[5]your opinions in this case, to review any additional

[6]documents or depositions?

[7]A If it's sent to me, I'll review it. I

[8]can't answer beyond that.

[9]Q All right, sir.

[10]Now, let's talk about this little

[11]conversation you had with Mr. Prochaska that took

[12]about an hour. Do you recall, first of all, the

[13]contents of that conversation?

[14]A Which one are we talking about?

[15]Q I'm sorry. This morning, before the

[16] **[*27]** deposition started.

[17]A Who are we talking about?

[18]Q You and Mr. Scott.

[19]MR. SCOTT: Your first question was

[20]Mr. Prochaska.

[21]Q I beg your pardon.

[22]You and Mr. Scott.

[23]A Yes.

[24]Q What did you and he talk about this

[25]morning?

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[2]A I reviewed for myself the record and we

[3]discussed the names of the different doctors, as I

[4]have a hard time remembering who was who in the case,

[5]since I haven't gone over the entire records.

[6]And then he asked me, and we discussed,

[7]really, just relevant issues in the case, mostly to

[8]refresh my memory about timing, et cetera, et cetera.

[9]Q Did you and Mr. Scott discuss the

[10]responsibility of other physicians who are not named

[11]as parties in this case?

[12]A We -- I named or Mr. Scott named many

[13]of the physicians involved, and I think we discussed

[14]their relative involvement in the case. I can't

[15]answer more precisely than that.

[16]Q Did Mr. Scott talk to you about the

[17]fact that maybe in the course of our examination you

[18]would be examined regarding the responsibility of

[19]other physicians who had seen this **[*28]** patient other than

[20]the named doctors in this case?

[21]A I'll answer yes.

[22]Q Okay.

[23]A I think so.

[24]Q As a matter of fact, you and Mr. Scott

[25]discussed Dr. Griebel, the oncologist, did you not?

[34]

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[2]A Yes.

[3]Q You and I are going to discuss it in a

[4]minute.

[5]You also discussed, did you not, the

[6]responsibility of a Dr. Sellberg, who's an ER

[7]physician at Saint Joe on the morning this patient

[8]came to Saint Joe's Hospital?

[9]A I don't believe we discussed him. I

[10]don't believe we did.

[11]Q Did you and he discuss Dr. Eyster,

[12]who's an orthopedic surgeon who saw the patient in

[13]consultation at Saint Joseph's Medical Center at the

[14]request of Dr. Sweet and Dr. Myrick?

[15]A Yes, we did.

[16]Q Do you recall the names of other

[17]physicians who are not named in this suit that you

[18]may have discussed?

[19]How about Dr. Lee?

[20]A No.

[21]Q Dr. Shapiro?

[22]A No.

[23]Q When you initially reviewed the records

[24]in this case and you had a conversation with

[25]Mr. Prochaska before you prepared your June 8, '92,
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[2]report, did he ask you **[*29]** to limit your written opinions

[3]to the named parties in this case?

[4]A I don't remember.

[5]Q Doctor, when you were in medical

[6]school, did you work in the emergency room?

[7]A Yes.

[8]Q Was this part of your training, to

[9]float through the emergency room?

[10]A Yes.

[11]Q When you were in residency, did you

[12]work in the emergency room?

[13]A Yes.

[14]Q What capacity did you work in the

[15]emergency room when you were in residency?

[16]A In two different capacities.

[17]As a general surgical house officer I

[18]rotated for 12 hour shifts through the emergency

[19]room, as an intern and as a first-year resident, or

[20]now what's more commonly called PGY-1 and PGY-2, at

[21]which time I had responsibility for seeing patients,

[22]evaluating them, and determining their treatment.

[23]Q That's the first capacity. What was

[24]the second capacity?

[25]A When I was in my neurosurgical
36

[1]

[2]residency training program, I was called as a consult

[3]to see patients in the emergency room.

[4]Q Do you know why you would be called as

[5]a consult to the emergency room to see patients?

[6] **[*30]** A Because the physician who had seen the

[7]patient in the emergency room there felt that there

[8]was a neurosurgical problem.

[9]Q He had a suspicion of that and asked

[10]you to either rule out or rule it in; is that

[11]correct?

[12]A Correct.

[13]Q Now, when was the last time that you

[14]have ever worked a full-time shift in the emergency

[15]room?

[16]A 1972.

[17]Q That was when you were a --

[18]A A surgical house officer.

[19]Q Forgive me, doctor, but it seems like

[20]whenever I depose physicians, they're younger than I

[21]am.

[22]Doctor, have you ever, since 1972,

[23]other than being a consultant in the emergency room,

[24]have you ever worked in the emergency room in any

[25]other capacity?

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[2]A I think that I did -- I'll have to

[3]revise my earlier answer. You've made me jog my

[4]memory.

[5]I think I did one or two shifts at the

[6]Columbia Presbyterian emergency room or screening

[7]clinic in the emergency room area as a moonlighting

[8]physician. That's a very vague memory, but I'm

[9]pretty sure I did a couple of shifts. Again, whether

[10]it was in the emergency room or the screening **[*31]** clinic

[11]attached to the emergency room, I can't recall.

[12]Q I'm going to venture to say that was

[13]when you were a resident?

[14]A Yes.

[15]Q You completed your residency program in

[16]19- --

[17]A '78.

[18]Q Let me be more specific.

[19]In the treatment of spinal cord

[20]compression, be it extramedullary or intramedullary

[21]tumors, do you consider yourself to have more

[22]expertise than a family practitioner?

[23]A Yes.

[24]Q Do you consider yourself to be more

[25]astute and experienced than an internist, Board-

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[1]

[2]certified internist?

[3]A Yes.

[4]Q Can you tell us why, doctor?

[5]A My training in neurosurgery, I'm sure,

[6]exposed me to more information. My experience as a

[7]clinical physician would more often bring me in

[8]contact with such patients than an internist or a

[9]family practitioner.

[10]Q Doctor, let's talk a little bit about

[11]medicine in general.

[12]Is history given to a physician by a

[13]patient significant?

[14]A Yes.

[15]Q Why is that, sir?

[16]A It's one of the important sources of

[17]information about what's wrong with the patient.

[18] **[*32]** Q History frequently leads a physician to

[19]set forth a differential diagnosis; is that correct?

[20]A It's one of the factors, I'm sure, yes.

[21]Q I once heard, doctor, a physician say

[22]history was 80 percent of diagnosing a problem. Do

[23]you agree or disagree with that type of observation?

[24]MR. SCOTT: I'll object to the form of

[25]the question.

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[2]Q You may answer, doctor.

[3]A That's a tough question to answer

[4]because you'd have to tell me what else was

[5]available.

[6]Q Okay.

[7]Doctor, in terms of giving a detailed

[8]history, would you agree that a patient has a duty

[9]and responsibility to give a detailed history, as

[10]much as possible?

[11]A Yes.

[12]Q Would you also agree that a patient has

[13]a responsibility and duty to give, where possible, an

[14]accurate history of his complaints and condition?

[15]A Yes.

[16]Q Would you further agree, doctor, that a

[17]patient has a responsibility and duty to follow

[18]medical instructions that may be given to him by a

[19]physician?

[20]A Yes.

[21]Q For example, that would include -- if

[22]you prescribed certain medication **[*33]** to a patient,

[23]doctor, you do that for a reason, don't you?

[24]A Yes.

[25]Q Hoping that will improve the patient;
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[1]

[2]is that correct?

[3]A Yes.

[4]Q Do you expect the patient to follow

[5]your instructions in regard to that medication, do

[6]you not?

[7]A Yes.

[8]Q You feel in that regard he has a duty

[9]and responsibility in his helping himself; is that

[10]correct?

[11]A Yes.

[12]Q In terms of, for example, physical

[13]therapy, if you prescribe physical therapy for a

[14]patient, you feel that you do that for a reason,

[15]don't you?

[16]A Yes.

[17]Q You know that physical therapy will

[18]hopefully rehabilitate the patient to some extent?

[19]A Yes.

[20]Q You expect the patient to follow your

[21]advice in that regard?

[22]A Yes.

[23]Q You feel, do you not, doctor, that a

[24]patient has a duty in that regard, do you not?

[25]A Yes.

[41]

[1]

[2]Q Doctor, let's talk about physicians and

[3]treatment.

[4]Medicine is not an exact science, is

[5]it, sir?

[6]A No.

[7]Q The reason it's not an exact science,

[8]isn't it, sir, that physicians have to **[*34]** use medical

[9]judgment in the care and treatment of patients?

[10]A Yes.

[11]Q Physicians have to evaluate situations

[12]that are presented to them, be it on the clinical

[13]findings and also on the history given to them by

[14]patients, do they not?

[15]A Yes.

[16]Q Certainly you're of the opinion, are

[17]you not, sir, that a physician exercising medical

[18]judgment, that if there is a misdiagnosis, that in

[19]itself is not evidence of negligence, is it, sir?

[20]A No, it is not.

[21]Q As a matter of fact, doctor, in your

[22]profession, you've been in situations where you have

[23]to give a diagnosis and later you found the diagnosis

[24]you made was in error; is that correct, sir?

[25]A Yes.

[42]

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[2]Q Would you generally agree, sir, that

[3]attending physicians, that is a physician who is

[4]seeing the patient in a clinical setting, is

[5]generally in a better position to evaluate a patient

[6]than someone who might be looking at records somewhat

[7]down the line?

[8]MR. SCOTT: Objection to the form of

[9]the question.

[10]Q You may answer, sir.

[11]A Yes.

[12]Q The reason is that a physician

[13] **[*35]** assessing the situation at the time may have a better

[14]clinical picture than someone who is reviewing

[15]pictures and does not see the patient?

[16]MR. SCOTT: Objection to the form of

[17]the question.

[18]Q You may answer.

[19]A Yes.

[20]Q When you reviewed these records, were

[21]you cognizant, were you not, sir, of the outcome of

[22]this patient, that is that he in fact had a

[23]compression of the spinal cord?

[24]A Yes.

[25]Q To that extent, you were aware of what
43

[1]

[2]the end result was before you started your review; is

[3]that correct, sir?

[4]A Yes.

[5]Q Unfortunately, doctor, in your

[6]profession, physicians do not have the benefit of

[7]hindsight when they first see a patient, do they,

[8]sir?

[9]A No, they do not.

[10]Q Would you agree, sir, that even with

[11]the best of care, best of treatment, patients still

[12]have bad results or poor results?

[13]MR. SCOTT: Object to the form of the

[14]question.

[15]Q You may answer, sir.

[16]A Yes.

[17]Q And the fact that a patient may have a

[18]poor result from treatment is not in itself evidence

[19]of medical negligence, is it, **[*36]** sir?

[20]A No, it is not.

[21]Q Doctor, when we have extramedullary

[22]tumor of the spinal cord, what can be some of the

[23]causes of an extramedullary tumor?

[24]A What can be some of the causes?

[25]Q What can be causes of the
44

[1]

[2]extramedullary tumor?

[3]A I can't really answer that question.

[4]Q All right.

[5]Can an extramedullary tumor of the

[6]spinal cord be caused by trauma?

[7]A No.

[8]Q So we're talking about a nontraumatic

[9]origin; is that correct?

[10]A Correct.

[11]Q Doctor, let's stay with extramedullary

[12]tumors of the spinal cord.

[13]What would be early symptoms that you

[14]as a neurosurgeon would see with that type of tumor?

[15]A Among the symptoms that may be seen

[16]early, if I understood your question --

[17]Q Yes, sir.

[18]A -- might be pain, might be numbness,

[19]might be paresthesias or sensory phenomenon, might be

[20]changes in bowel or bladder, or sexual function,

[21]might be weakness, might be changes in gait and

[22]ability to move around freely.

[23]Q Let's talk about late symptoms. What

[24]would you find to be late symptoms in an

[25]extramedullary **[*37]** tumor of the spinal cord?

[45]

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[2]A I could and probably would list all of

[3]those which I just listed as possibly occurring early

[4]or possibly occurring late.

[5]Q Are there some, doctor, that you could

[6]say these are unique to an early symptomatology

[7]versus a late symptomatology?

[8]A No.

[9]Q Let's talk about physical findings in a

[10]patient with an extramedullary tumor of the spinal

[11]cord. What would you expect to find as early

[12]physical findings?

[13]A Patient may have a normal examination.

[14]Patient may have a sensory loss, patient may exhibit

[15]changes in reflex, change in motor function or muscle

[16]strength, muscle tone.

[17]Q Would your answer differ if I were to

[18]ask you if you can give us late physical findings

[19]with an extramedullary tumor of the spinal cord?

[20]A Again, it would be the same symptom

[21]group.

[22]Q Would there be any additional ones?

[23]A I think we covered most of the

[24]important areas, yes.

[25]Q I notice, doctor, in your answer -- and
46

[1]

[2]I'm sure you're not being evasive with me -- you used

[3]the word "may." Do I take it they may or may **[*38]** not

[4]appear?

[5]A Correct.

[6]Q Would it be fair to say that the

[7]physical findings which you just enumerated, none of

[8]these are specific to extramedullary tumors of the

[9]spinal cord?

[10]A By specific, do you mean the only thing

[11]that can cause these? No.

[12]Q Let's talk about symptoms again. Back

[13]up to that.

[14]Any of the symptoms which you mentioned

[15]to me, either in the early category or late category,

[16]are any of those specific to extramedullary tumor of

[17]a spinal cord?

[18]A No.

[19]Q That is to say, doctor, so that I

[20]understand and the jury understand, these can appear

[21]with other illnesses or injuries; is that correct?

[22]A Yes.

[23]Q Doctor, what do you mean by metastatic

[24]lymph adenopathy in the mediastinum?

[25]A Metastatic lymph adenopathy means that
47

[1]

[2]the lymph nodes, which are normal structures in the

[3]body, have been infiltrated and expanded by tumor

[4]from somewhere else in the body.

[5]Q Is there any significance as to the

[6]size of the lymph node?

[7]A I will not try to qualify myself as

[8]either a radiologist or oncologist.

[9] **[*39]** The larger, the more concern, is about

[10]the only way I can respond to you.

[11]Q Let's talk about Percocet. Are you

[12]acquainted with Percocet?

[13]A Yes.

[14]Q Do you use Percocet in your practice?

[15]A Yes.

[16]Q What is Percocet?

[17]A It's a narcotic analgesic, narcotic

[18]pain reliever combining oxycodone, I believe is the

[19]chemical name, and Tylenol.

[20]Q You've indicated two of the indications

[21]with it. Helps the patient with the pain he's

[22]having?

[23]A Yes.

[24]Q Like any other medication, Percocet has

[25]side effects, doesn't it?

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[2]A Yes.

[3]Q What are some of the side effects, in

[4]your opinion, of Percocet?

[5]A Drowsiness, allergic reaction, I think,

[6]are the two most common.

[7]Q Are some of the side effects urinary

[8]retention?

[9]A I will have to answer by saying

[10]probably yes. Have I specifically read that it is, I

[11]can't say that I have. But I wouldn't disagree with

[12]that statement if it was shown to me.

[13]Q That is to say, doctor, some

[14]medications, when they're working as -- whether it be

[15]for pain reliever or whatever -- some **[*40]** may have other

[16]side effects that may, for example, cause nausea,

[17]some may cause vomiting, some may cause urinary

[18]retention; is that correct?

[19]A Yes.

[20]Q Doctor, in your specialty,

[21]neurosurgery, do you make a distinction between

[22]urinary retention and inability to void?

[23]A Yes.

[24]Q Let's talk about urinary retention.

[25]How does Dr. DiGiacinto, who is you, define urinary
49

[1]

[2]retention?

[3]A An inability to void which has

[4]persisted for a period of time so that the patient

[5]has stated -- how to state -- things you don't think

[6]about, you know -- so that the patient has made an

[7]effort to void and has not been able to produce any

[8]urine. Then there has to be a time element in that.

[9]Q Let's talk about the time element.

[10]What kind of time element?

[11]A If a patient had voided a half an hour

[12]ago and then tried to void again, he might not be

[13]able to. If the patient had not voided for four or

[14]five hours and then tried to void, it would bring up

[15]a question as to why he couldn't void.

[16]Q You would define that as being urinary

[17]retention?

[18]A I would **[*41]** start to think about it.

[19]Q Is urinary retention specific to any

[20]illness?

[21]A No.

[22]Q Is it specific to injury --

[23]A No.

[24]Q -- of any type?

[25]We already discussed the fact that it
50

[1]

[2]can be associated with medication, can't it?

[3]A We've brought up that possibility, yes.

[4]Q Let's talk about -- I'm just trying to

[5]find out, doctor, and I need your help -- the words

[6]"inability to urinate or void," how do you define

[7]that?

[8]A Someone tries to void and he can't

[9]produce any urine. I think that's inability to void.

[10]Q Have you ever had a patient come in

[11]this office where you've asked for a specimen who's

[12]not been able to give you one?

[13]A No, because we don't collect specimens.

[14]Q I guess that's one good reason.

[15]Doctor, in your experience, even

[16]medical school and residency, have there been

[17]occasions where you've seen patients who were asked

[18]to give urine specimens who at that particular moment

[19]could not give a specimen?

[20]A Yes, there have been occasions.

[21]Q That can happen without any cord

[22]compression, can't it? **[*42]**

[23]A Correct.

[24]Q The setting of which the patient

[25]appears may be a factor in that regard, isn't that

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[2]correct, doctor, that causes that inability to void?

[3]For example, if you go to the hospital you're

[4]nervous, or emergency room?

[5]A Yes.

[6]Q Doctor, I want to talk to you a little

[7]bit about Dr. Griebel.

[8]You know Dr. Griebel to be an

[9]oncologist, don't you?

[10]A Yes.

[11]Q As a matter of fact, in reviewing the

[12]records in this case, you reviewed -- besides Wesley

[13]medical records you reviewed records from Dr. Lee's

[14]office, who is an oncologist and partner of

[15]Dr. Griebel, is he not?

[16]A I reviewed those records, yes.

[17]Q You knew Dr. Lee to be an oncologist

[18]following this patient after Dr. Steinberger had

[19]removed his testicle; is that correct?

[20]A Yes.

[21]Q In reviewing the records of Dr. Lee,

[22]you note in there, did you not, that on May 19th

[23]Dr. Griebel dictated a note of a telephone

[24]conversation she had with Jeffrey Johnson, the

[25]plaintiff in this case, did you not?

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[2]A Yes.

[3]Q Do you, doctor, on occasion work **[*43]** with

[4]oncologists in the care of patients?

[5]A Yes.

[6]Q Do you consider -- what is the purpose

[7]of an oncologist? Let me ask you that.

[8]A An oncologist -- oncology is a

[9]subspecialty that deals with the diagnosis and

[10]treatment of tumors, in the grossest terminology.

[11]Q We're talking about a physician who's

[12]been to medical school, who has been through a

[13]residency in internal medicine, and who's taken a

[14]fellowship in oncology; is that correct?

[15]A I don't know that those are all the

[16]requirements. It's one course to call yourself an

[17]oncologist. Whether every oncologist has done that,

[18]I have no idea.

[19]Q Certainly an oncologist, from your

[20]observations of them, and from -- has more experience

[21]in the treatment of cancer than a family

[22]practitioner, obstetrician, or neurosurgeon, wouldn't

[23]you agree?

[24]A Yes.

[25]Q Certainly as an oncologist, you would
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[2]expect an oncologist to be aware of the various types

[3]of cancers and the side effects of those cancers,

[4]would you not, doctor?

[5]A Yes.

[6]Q Dr. Griebel has prepared two reports in

[7]this **[*44]** case. I want you to be aware of that. Have you

[8]been provided copies of those reports?

[9]A I don't believe so.

[10]Two reports other than the note in

[11]Dr. Lee's --

[12]Q Yes.

[13]A I do not believe so.

[14]Q Dr. Griebel, I want you to assume, has

[15]stated that had she been informed on May 19th by

[16]either Mr. Johnson or the Wesley Medical Center ER

[17]staff that he had a chest X-ray which revealed a

[18]mediastinal mass and chest wall pain and urinary

[19]retention, that she would immediately have embarked

[20]on a workup to exclude spinal cord compression as the

[21]etiology of his symptoms. I want you to assume that

[22]to be true.

[23]A Um-hum.

[24]Q If she had been aware of that

[25]information, in your opinion, standard of care
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[2]medical practice would require that she order a stat

[3]MRI of the thoracic region; is that correct?

[4]A It would have required that she work it

[5]up. What she had available, I can't answer. I tend

to agree with your answer, but she should -- with the
information that it's assumed that she had available
by this question, it would have been indicated that
she **[*45]** evaluate the patient for this problem, yes.
Q And certainly, from your experience
with oncologists here in New York City, they
certainly have a higher knowledge or better
knowledge -- or should have better knowledge -- of
the effects of cancer; is that correct, doctor?
MR. SCOTT: Objection to the form of
the question.
Q You may answer.
A Yes.
Q I want you to assume further, doctor,
that information I've given you, if the doctor had
asked for an ER physician to call her back, but the
ER physician, for whatever reason, did not call her
back, standard of prudent medical practice would
require that oncologist to follow up to see why she
wasn't called back or what the results were of an
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examination; is that correct?
MR. SCOTT: Objection to the form of
the question.
The doctor is not an oncologist. I
don't think he can testify to the standard of
care of an oncologist.
MR. HERNANDEZ: Wooster versus Hart,
Supreme Court in Kansas, says he's an M.D.,

[10]he can give an opinion.

[11]Q You can answer.

[12]A I don't have enough information. **[*46]** You

[13]jumped to the emergency room doctor calling back and

[14]there's a lot missing in between. There must be

[15]exchanges that you haven't supposed or inserted.

[16]Q That's not your fault. That's my

[17]fault. Let me rephrase that.

[18]I want you to assume, doctor, in this

[19]case the following: I want you to assume that on

[20]May 19th, Mr. Johnson went to the ER at Wesley

[21]Medical Center and after he was released from the ER

[22]he stopped to obtain pain-relieving medication, that

[23]he went home.

[24]I want you further to assume that he

[25]fell asleep, that he awakened a few hours later, that

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[2]he tried to reach Dr. Lee, his oncologist, because he

[3]had been told at Wesley the chest X-ray revealed a

[4]mediastinal mass and he was recommended to contact

[5]Dr. Lee the next day, that he, when he awakened,

[6]tried to reach Dr. Lee but instead reached

[7]Dr. Griebel, who was covering for Dr. Lee that

[8]weekend.

[9]I want you further to assume that

[10]Dr. Griebel is a partner and an oncologist with

[11]Dr. Lee, that when he called that he reached

[12]Dr. Griebel, that he at that point informed

[13]Dr. Griebel he was a patient **[*47]** of Dr. Lee, that he had

[14]had testicular cancer, seminoma, that Dr. Lee had

[15]been following him with periodic CT scans

[16]approximately every three months of the chest,

[17]abdomen, and pelvis.

[18]I want you further to assume that he's

[19]testified he told Dr. Griebel at that time that he

[20]had a racquetball injury where he hit his chest.

[21]I want you further to assume that he

[22]reported to her he had gone to the ER and that he had

[23]had a chest X-ray taken which revealed a mediastinal

[24]mass, that he had returned home.

[25]I want you to further assume that when
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[2]he awakened he told Dr. Griebel, the oncologist, that

[3]he was unable to void.

[4]I want you further to assume that he

[5]told Dr. Griebel in that telephone conversation that

[6]he was now having tingling and loss of sensation in

[7]his legs, that he further told Dr. Griebel that he

[8]had called the ER at Wesley and they had recommended

[9]a catheter.

[10]I want you further to assume that her

[11]note of May 19th indicates that she discussed with

[12]him that if he had not been taking fluids, that would

[13]be the cause of his inability to void.

[14] **[*48]** And I want you further to assume that

[15]she told him go to the ER.

[16]Assume those facts to be true, doctor.

[17]Standard of prudent medical practice would require

[18]that if she were given that information that she

[19]order a stat MRI, does it not, doctor?

[20]A Given the information that you have

[21]cited in this --

[22]Q Hypothetical?

[23]A -- hypothetical, the answer is yes.

[24]Q Standard of prudent medical practice,

[25]if she sent the patient to the ER, would be to ask
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[2]the physician to call her, would it not, sir?

[3]A Not necessarily.

[4]Q How could she order a stat MRI, doctor,

[5]by phone?

[6]A She could order a stat MRI by phone.

[7]Q When you say "stat MRI," that would

[8]mean to have an MRI performed that particular day,

[9]would it not, doctor?

[10]A If such was possible, yes.

[11]Q When you say "if such was possible,"

[12]what do you mean by that?

[13]A Some hospitals may not have MRI scan

[14]available 24 hours a day. In 1991, in that setting,

[15]I don't know if they did or didn't.

[16]Q If it wasn't available, doctor, to

[17]Dr. Griebel, it certainly wasn't available **[*49]** to the

[18]other physicians; is that correct, doctor?

[19]A That's correct.

[20]Q So you couldn't fault them for not

[21]ordering a stat MRI, could you, sir, if it's not

[22]available?

[23]A I couldn't fault them because I don't

[24]know what their hypothetical involvement is.

[25]Q I want you further to assume that
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[2]Dr. Griebel recommended to this patient that he go to

[3]the Wesley emergency room.

[4]I want you further to assume that she

[5]called and left a message of if any problems, to

[6]call.

[7]I want you further to assume that the

[8]physician in the ER did not call Dr. Griebel back.

[9]Assuming those facts to be true, and

[10]the facts that I related to you that the patient told

[11]her, if the ER physician did not call Dr. Griebel

[12]back, standard of prudent medical practice would

[13]require that given the physical findings and symptoms

[14]that this patient gave Dr. Griebel that she follow up

[15]and call the ER and see what happened to this

[16]patient, would it not, doctor?

[17]A In your hypothetical question you

[18]included that she be called back if there were a

[19]problem. The reason it's difficult **[*50]** to answer the

[20]question yes or no is you haven't given me the

[21]supposition that there was still a problem or that

[22]when the patient was seen in the emergency room the

[23]problem was resolved.

[24]The hypothetical that you posed

[25]indicates that Dr. Griebel wanted to be called if
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[2]there was a problem. If the patient arrived at the

[3]emergency room and voided or was found not to be any

[4]urine in his bladder or was found to have a reason

[5]for the complaints, then she might not anticipate

[6]being called back.

[7]Your hypothetical did state that she

[8]told the emergency room doctor to call her if there

[9]was a problem, not "Call me under any

[10]circumstances." I think in that hypothetical, I

[11]could not automatically fault Dr. Griebel for not

[12]following up.

[13]Q Here's what I want you to do: I want

[14]you to assume the note that you read of Dr. Griebel's

[15]of May 19th, the notation of the telephone call -- do

[16]you remember that?

[17]A Yes.

[18]Q If you want to look at it, I'll provide

[19]it to you.

[20]A Ask me and I'll tell you if I need it.

[21]Q Keeping that in mind, and also keep in

[22]mind **[*51]** -- I want you to assume that Mr. Johnson told

[23]her, "I've got this pain in my chest, the chest

[24]X-rays found a mass in the mediastinum area, I can't

[25]void, and I've got loss of sensation in my legs, some

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[2]tingling."

[3]Given those facts, doctor, wouldn't you

[4]agree if this patient was in fact evaluated at the ER

[5]and Dr. Griebel did not get a call back, given those

[6]symptoms and physical findings, that Dr. Griebel

[7]should have, with those symptoms and findings, have

[8]contacted the ER or the patient to see what happened?

[9]A Again, I have to answer the question as

[10]you've posed it by saying that you -- one of your

[11]suppositions was that Dr. Griebel told the ER doctor

[12]to call back if there was a problem. That covers a

[13]lot of territory. And if that was the requirement

[14]for the call back and if Dr. Griebel was assuming --

[15]I'm not going to make suppositions.

[16]I'm sorry.

[17]If Dr. Griebel said, "Call me if there

[18]is a problem," and she gets no call, she may have

[19]been -- within reasonable bounds to assume that the

[20]patient voided at the emergency room, that the

[21]problem had resolved sufficiently **[*52]** for her not to get

[22]the call back.

[23]Q The reason I'm having trouble with your

[24]answer -- and I certainly don't mean to be

[25]argumentative.

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[2]I'm saying that earlier when I gave you

[3]the hypothetical of the information the patient gave

[4]her, you were of the opinion that the standard of

[5]prudent medical practice required that she order the

[6]MRI stat if possible. Remember that?

[7]A Yes.

[8]Q I'm saying, I assume, doctor, that

[9]under that hypothetical and under your answer that

[10]she would either make arrangements for the stat MRI,

[11]would she not, doctor?

[12]A Your hypothetical assumed she had just

[13]spoken to the patient on the phone and not actually

[14]seen the patient. One of the advantages of having

[15]her have the patient go to the emergency room is have

[16]the physician examine the patient, verify or nullify

[17]any of the findings which you have described.

[18]If a physician were not to call her --

[19]with instructions to call her if there were a

[20]problem, depending on what criteria for calling she

[21]had given, she may or may not be in the clear. If

[22]she had said, "If the guy's in urinary **[*53]** retention and

[23]has a sensory level and has trouble moving his legs

[24]and is still complaining about numbness, call me, but

[25]if he doesn't have those things, don't call me," then
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[2]she's not departing by not getting a call back. If

[3]she says, "Call me after you see the guy and tell me

[4]what's going on no matter what," then she would be

[5]more obligated because she would be expecting the

[6]call no matter what. Your hypothetical didn't give

[7]me that information.

[8]Q Certainly you would want her, in any

[9]event, to call the ER and say, if she's not going

[10]down there -- as an oncologist who has a better

[11]degree of knowledge on this condition, would you

[12]think that she -- standard of prudent medical

[13]practice required her to call the ER and say, "Look

[14]for these things and tell me what you find"?

[15]A In your hypothetical, I think that's a

[16]reasonable course, yes.

[17]Q I mean, certainly that's something you

[18]would do with your patients, if you're seeing a

[19]patient that you suspect to have some neurological

[20]problems, don't you?

[21]A Yes.

[22]Q The reason you do that is because you

[23]know **[*54]** as a neurosurgeon you certainly have a higher

[24]degree of training in certain areas of medicine than

[25]an ER physician, don't you, sir?

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[2]A Yes.

[3]Q Now, I want you to assume further,

[4]doctor, that this patient was admitted to Saint Joe's

[5]Hospital later that night, early on the morning of

[6]the 20th, okay?

[7]A Yes.

[8]Q You have not been provided with this

[9]information, but I'll provide it to you. That is

[10]that I want you to assume that on Tuesday,

[11]May 21st, Jeffrey Johnson calls his ex-wife, Darlene

[12]Johnson Knight, and says, "I cannot reach my parents,

[13]I cannot reach my sister." She says -- "and I need

[14]some help." She said, "What do you want me to do?"

[15]He says, "Would you please call somebody and tell

[16]them my problem."

[17]I want you further to assume that

[18]Ms. Knight, his ex-wife, calls Dr. Lee's office

[19]knowing that he was the oncologist when she was still

[20]married to Mr. Johnson, that Dr. Lee is on vacation.

[21]I want you further to assume that she

[22]talks to a person and identified her as a female

[23]doctor. She can't remember her name.

[24]I want to be fair with **[*55]** you. I want you

[25]to further assume that the only female physician with
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[2]Dr. Lee was a Dr. Griebel, that she tells Dr. Griebel

[3]or the female physician that "Jeffrey Johnson is in

[4]the hospital, he's having a lot of pain and that he

[5]tells me he cannot move his legs," and reminds the

[6]doctor that he was a patient of Dr. Lee, a cancer

[7]patient, that Mrs. Johnson or Mrs. Knight is informed

[8]by the female physician, she says, "Don't worry about

[9]it, I'll follow up at the hospital with him." That's

[10]on Tuesday.

[11]Assuming that information, doctor, that

[12]I just gave you, coupled with the additional

[13]information of Dr. Griebel's note that she's dictated

[14]on May 19th --

[15]And also I want you to assume

[16]Mr. Johnson spoke to her and related the information

[17]of inability to void, like I've already talked to

[18]you, inability to void, tingling in his legs, loss of

[19]sensation, chest mass.

[20]Assuming those facts, doctor, standard

[21]of prudent medical practice would have required

[22]Dr. Griebel on Tuesday, May 21st, to immediately see

[23]that patient at the hospital, would it not, doctor?

[24]A Assuming **[*56]** all of the hypotheticals,

[25]which I believe we've been using all along, the
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[2]answer is yes.

[3]Q The reason is because time is of the

[4]urgency in this situation, is it not, doctor?

[5]A Yes.

[6]Q Dr. Griebel, as an oncologist, with her

[7]superior knowledge in the field of cancer, would have

[8]been in a better position to put all the pieces of

[9]the puzzle together in treating this patient; isn't

[10]that correct, doctor?

[11]A I have to take issue with the question

[12]of "put in a better position." She was in a position

[13]to. Better relative to who, what, you know…

[14]Q She certainly knew of the chest pain;

[15]that's correct, isn't it?

[16]A Yes.

[17]Q If you assume Mr. Johnson's statements

[18]to be true -- his testimony -- their client, under

[19]oath, to say he had urinary inability to void, loss

[20]of sensation in his legs, chest mass, and later

[21]additional information that he had lost all motor

[22]function, if she had all that information, and no one

[23]else had all that information, all the pieces, she

[24]certainly is in a better position, isn't she, doctor?

[25]A You added what was missing. **[*57]** She had

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[2]all that information and, quote-unquote, no one else

[3]did in this hypothetical.

[4]Q Right.

[5]A Yes, she would have been in a better

[6]position.

[7]Q It is your opinion, isn't it, doctor,

[8]that had something -- had surgery and decompression

[9]been performed on the 21st, the afternoon of the

[10]21st, 24 hours before it in fact was, that this

[11]patient had a significant chance of recovering or

[12]avoiding permanent neurological deficit; isn't that

[13]correct, doctor?

[14]A Yes.

[15]Q As I understand it, so that I'm

[16]clear -- I'm not trying to be argumentative here, but

[17]you've never been provided with the deposition of

[18]Mr. Johnson as to what he told Dr. Griebel?

[19]A Not to the best of my recollection.

[20]I'm essentially certain that I was not.

[21]Q Doctor, do you know who Dr. Sellberg

[22]is? Let me help you here. Dr. Sellberg is the --

[23]let me back up.

[24]The patient was seen at Wesley on the

[25]19th, Sunday, in the morning by Dr. Staats, who is my

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[2]client. He's seen later that day at Wesley by

[3]Dr. McCown, who is my client --

[4]A Okay.

[5]Q and **[*58]** is named in this case.

[6]He went home. And then, if you recall,

[7]at 4:05 in the morning he shows up at Saint Joseph's

[8]Medical Center ER and Dr. Sellberg is the ER

[9]physician there.

[10]A Okay, yes.

[11]Q Do you know what Dr. Sellberg's

[12]education and experience in the ER is?

[13]A No.

[14]Q Do you have any reason to question the

[15]qualification of Dr. Sellberg to work the emergency

[16]room at Saint Joe's ER, from what you know?

[17]A I know nothing as far as I know,

[18]therefore I can't question one way or the other.

[19]Q I recognize that might have been a poor

[20]question.

[21]I'm just wondering, as far as you know,

[22]he's an M.D. working in the ER?

[23]A I think that's about what I know, yes.

[24]Q I'm not being critical, mind you.

[25]Is it your opinion that an ER physician
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[2]should be qualified to recognize an extramedullary

[3]compression of the spinal cord?

[4]A Yes.

[5]Q I guess you're going to tell me that,

[6]"Jim, your clients, Dr. Staats and Dr. McCown,

[7]should be so qualified," aren't you?

[8]A I wasn't going to bring it up.

[9]Q Let me ask you, **[*59]** doctor: Would you

[10]agree that Dr. Sellberg, if you believe as you do,

[11]that ER physicians should recognize that, do you

[12]believe he should recognize as an ER physician an

[13]extramedullary compression of the spinal cord?

[14]A You'd have to be more specific in terms

[15]of what he knew.

[16]Q I'm going to get there in a minute.

[17]As an M.D., ER physician, do you

[18]believe he should be able to recognize an

[19]extramedullary compression of the spinal cord?

[20]A Yes.

[21]Q Now, at 5:00 A.M., doctor, from your

[22]review of the records, which you told us in your

[23]report you did, you saw the ER physician saw

[24]Mr. Johnson at Saint Joe and that at that time

[25]Dr. Sellberg noted in the ER record -- shows that a
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[2]catheter had been inserted at Wesley Medical Center.

[3]Remember that?

[4]A Yes.

[5]Q He also saw that the patient had an

[6]inability to urinate. That was noted in there, in

[7]the ER record. Did you see that?

[8]A I'd feel more comfortable reviewing it

[9]if you're going to ask me point by point.

[10]Q Fair enough, doctor.

[11]I will represent to you that here's the

[12]emergency **[*60]** room record, doctor, from Saint Joseph's,

[13]okay? If you want to look at it briefly, review it,

[14]refresh yourself, I have no problem (handing).

[15]A (Perusing record.)

[16]MR. SCOTT: Is that Dr. Sellberg's

[17]record or somebody else's record?

[18]MR. HERNANDEZ: The entire ER record is

[19]the one he was there on.

[20]Q Doctor, have you had an opportunity to

[21]review the ER record from Saint Joe?

[22]A Yes.

[23]Q Doctor, I certainly don't want to

[24]misstate anything. I'll let you look at my copy and

[25]if I should make an error, please correct me.

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[2]A Certainly.

[3]Q When I reviewed the ER record, the

[4]information set forth on the ER record contains the

[5]facts that a catheter was inserted at Wesley Medical

[6]Center; is that correct?

[7]A Yes.

[8]Q I thought I saw a notation in there for

[9]inability to void.

[10]A "Unable to urinate."

[11]Q "Numbness to back"?

[12]A (Nodding head up and down.)

[13]Q Is that in there?

[14]A Um-hum.

[15]Q You have to answer out loud.

[16]A Yes.

[17]Q "Numbness to legs"?

[18]A Yes.

[19]Q "Inability to walk"?

[20] **[*61]** A Yes.

[21]Q With that clinical picture, doctor, and

[22]the history the patient gives in that record, do you

[23]believe that Dr. Sellberg should have in his

[24]differential diagnosis included compression of the

[25]spinal cord?

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[2]A That's a question that's difficult to

[3]answer, again, without knowledge of what level the

[4]doctor is. He -- his primary responsibility, in my

[5]opinion, is to identify there is a problem which

[6]needs further evaluation and referral to the

[7]appropriate physicians and admission of the patient.

[8]Whether he is specifically capable of

[9]making the diagnosis at that moment of spinal cord

[10]compression is a harder one to answer, because,

[11]again, I don't know the level of the physician's

[12]training, whether he's an intern, resident, fully

[13]trained ER doctor or not.

[14]Q I want you to assume that he was not a

[15]resident, he was a member of an emergency medicine

[16]specialty, pediatrics.

[17]A Yes.

[18]Q Someone who contracts with the hospital

[19]to cover the ER physicians. You've seen those,

[20]haven't you?

[21]A I've seen ER specialists, yes.

[22]Q I don't know what they **[*62]** have here in

[23]New York, but in Kansas, and certainly other states

[24]I'm aware of, groups of ER physicians contract with

[25]the hospital to cover the emergency room.

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[2]A Yes.

[3]Q Are you acquainted with that kind of

[4]set-up?

[5]A Yes.

[6]Q Doctor, in that regard, if this

[7]physician is a contracting physician, that is,

[8]representing himself out to be an emergency room

[9]physician, should he be capable of diagnosing under

[10]this clinical picture and symptoms and history

[11]compression of the spinal cord?

[12]A I think I can answer yes.

[13]Q If he fails to do so, is it your

[14]opinion, to a reasonable degree of medical

[15]probability, is it your opinion his was a departure

[16]from standard of prudent medical practice?

[17]A I can't answer that. I feel that his

[18]responsibility is to get the patient admitted to the

[19]hospital and not follow through on his full medical

[20]evaluation. His job is to work in the emergency room

[21]and once the patient needs admission for evaluation,

[22]he's not the doctor who should take responsibility

[23]for that. Whether that's responsive or not, I'm not

[24]sure.

[25] **[*63]** Q We're going to find out.

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[2]It seems to me that earlier, I recall,

[3]you saying that at times you've been called down as a

[4]neurosurgeon on a consult basis to the emergency

[5]room; isn't that correct?

[6]A Yes.

[7]Q The person who called you down there

[8]was an emergency room physician?

[9]A On occasion, yes.

[10]Q Therefore, standard practice in this

[11]community -- standard practice in any community is

[12]that an ER physician can certainly request the

[13]appropriate consultations for a patient, can he not?

[14]A Yes.

[15]Q One of the consultations this kind of

[16]clinical picture and symptomatology should give the

[17]physician, the examining physician, would be

[18]neurological problem, request neurological consult;

[19]isn't that correct, doctor?

[20]A It may be depending on his

[21]responsibility and how the triage system in that

[22]hospital was set up.

[23]In other words, you want me to assume

[24]that it was his responsibility to call the definitive

[25]consult in a patient who was going to be admitted,

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[2]and I differentiate between a patient who was being

[3]treated in the emergency **[*64]** room and may receive his

[4]definitive diagnosis and treatment there versus a

[5]patient who was clearly going to be admitted to the

[6]hospital and therefore will be gotten out of the

[7]emergency room where at least in this state there is

[8]usually a glut of patients. The ER physician who is

[9]responsible for seeing patients in the emergency room

[10]is not responsible, if a patient is going to be

[11]admitted, to do that part of the evaluation.

[12]Q Doctor, in regards to your last answer,

[13]you assume that Dr. Sellberg had already made a

[14]decision to admit this patient.

[15]A I brought that up as one of the things

[16]that would influence what type of consultation he

[17]might in the emergency room obtain.

[18]Q Even before, if he had this clinical

[19]picture and had not made a decision to admit this

[20]patient, one of the things he should have thought

[21]about would have been a consult with a neurosurgeon;

[22]isn't that correct, doctor?

[23]A A consult with someone who could make a

[24]further diagnosis. Whether that would primarily be a

[25]neurologist or neurosurgeon or orthopedic surgeon,
76

[1]

[2]depends on the setting again. **[*65]**

[3]Q Certainly this clinical picture that

[4]you've read in this record indicates at least that

[5]had a decision not been made to admit, one of those

[6]consults --

[7]A One of those specialties should have

[8]been consulted, yes.

[9]Q Certainly that's good medicine to do

[10]that, isn't it, sir?

[11]A Yes.

[12]Q Did you know, doctor, that Dr. Sellberg

[13]himself could not admit patients to that hospital?

[14]A No, I didn't.

[15]Q If he could not, was not able to admit

[16]patients to the hospital, then it would be even more

[17]incumbent upon him to have an appropriate consult.

[18]MR. SCOTT: I want to object.

[19]The question is misleading because

[20]Dr. Sellberg has to order down the attending

[21]physician in the hospital to do the further

[22]evaluation to admit.

[23]To imply that he doesn't start the

[24]process of admission to the hospital is

[25]erroneous, and to imply that he doesn't ask
77

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[2]for the patient to be admitted to the

[3]hospital is erroneous. He may not make the

[4]final decision regarding admission, but he

[5]certainly makes the recommendation.

[6]MR. HERNANDEZ: If he seeks **[*66]** to have the

[7]patient admitted. You're right.

[8]Q If the decision is not made to admit

[9]and he has no part to do so, the question is this:

[10]He could request and it would be more incumbent upon

[11]him to request the appropriate consult?

[12]A I don't know if he could or couldn't.

[13]I think it would be appropriate for the

[14]patient to be evaluated further given the information

[15]that is available on this sheet, yes.

[16]Q If he had not made a decision to admit

[17]or had the authority to admit a patient, standard of

[18]prudent medical practice given this medical picture

[19]would require Dr. Sellberg to seek an appropriate

[20]consultation with either a neurosurgeon, a

[21]neurologist, or orthopedic surgeon; isn't that

[22]correct, doctor?

[23]A Yes.

[24]Q Now, you mentioned orthopedic surgeon

[25]in those consults, that list. Why orthopedic

[78]

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[2]surgeon, doctor?

[3]A At least in my area of practice there

[4]are orthopedic surgeons who deal with spinal tumors.

[5]It is a rarity, but there are two in particular in

[6]this area who deal with tumors of the spine. Most

[7]orthopedic surgeons do not deal with tumors **[*67]** in the

[8]spine.

[9]Q Most in New York, you mean, the city?

[10]A I think most in the United States.

[11]Q But in your training you went through a

[12]residency in general surgery, did you not?

[13]A Two years in general surgery training.

[14]Q Were you exposed to intra- or

[15]extramedullary tumors during those two years?

[16]A I can't recall.

[17]Q Certainly, doctor, if I understand what

[18]you're saying, although orthopedic surgeons may not

[19]typically operate on extramedullary tumors of the

[20]spinal cord, certainly it is within their field of

[21]ability, is it not, sir, or expertise?

[22]A Again, that is very much a function of

[23]the orthopedic surgeon's training. Many orthopedic

[24]surgeons have little or no expertise in treatment of

[25]back problems and very little training in that area.
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[1]

[2]Other orthopedic surgeons have extensive training.

[3]It's a function of the program and his personal

[4]experience.

[5]Q Have you in your treatment of

[6]extramedullary tumors or intramedullary tumors on

[7]occasion worked hand in hand with an orthopedic

[8]surgeon in treating the patient?

[9]A No.

[10] **[*68]** Q We talked about treatment. Now I want

[11]to ask you about this: Do you believe, doctor, as a

[12]neurosurgeon, that an orthopedic surgeon,

[13]disregarding treatment, should be able to diagnose by

[14]symptoms and clinical findings a compression of the

[15]spinal cord?

[16]A Yes.

[17]Q Why, doctor?

[18]A Again, most orthopedic programs should

[19]have some exposure -- I say should; I don't know if

[20]they all do or don't -- to treatment of processes of

[21]the spine, and compression of the spinal cord would

[22]be one of those items which an orthopedic surgeon

[23]should have some degree of familiarity with or a

[24]great degree of familiarity with, depending again on

[25]his training and on his personal practice.

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[2]Q I guess if I were going to ask

[3]Dr. DiGiacinto, doctor, who would you rather have

[4]evaluate a patient for possible compression of the

[5]spinal cord, the family practitioner or Board-

[6]certified orthopedic surgeon, I think, doctor, you'll

[7]tell me you'd rather have a Board-certified

[8]orthopedic surgeon; is that correct?

[9]A Again, with the same limitations,

[10]probably yes.

[11]Q Because you know an **[*69]** orthopedic surgeon,

[12]at some point in diagnosing the condition would have

[13]had more exposure to that than a family practitioner;

[14]isn't that correct?

[15]A In all probability, yes.

[16]Q Now, I understand the diagnosis of

[17]illnesses, injuries, can be made on history and

[18]physical findings; is that correct?

[19]A In many occasions, yes.

[20]Q In some cases physicians want to use a

[21]diagnostic aid, an X-ray, a CT scan, lab studies; is

[22]that correct?

[23]A Yes.

[24]Q But certainly Dr. DiGiacinto at times

[25]makes diagnoses based on history and clinical

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[1]

[2]findings, does he not?

[3]A I'd feel more comfortable if you said a

[4]differential diagnosis rather than a diagnosis.

[5]Clinical findings have to be verified by studies

[6]which can show us the lesion, if you will.

[7]Q Let me rephrase that, doctor.

[8]Dr. DiGiacinto, that is yourself, can

[9]certainly make a differential diagnosis based on

[10]history and physical findings?

[11]A Yes.

[12]Q And what Dr. DiGiacinto might do is

[13]when you seek to rule in or rule out that

[14]differential diagnosis, whichever list you put it in,

[15] **[*70]** you might use diagnostic aids, be it X-rays, MRIs, CT

[16]scans, or lab studies.

[17]A Yes.

[18]Q On the clinical picture you saw of this

[19]patient, as reflected in the ER record here, at Saint

[20]Joe -- and you've indicated that a qualified

[21]emergency room physician should be able to diagnose

[22]or include in his differential diagnosis compression

[23]of the spinal cord; is that correct?

[24]A Yes.

[25]Q You certainly would expect that also of

82

[1]

[2]an orthopedic surgeon, wouldn't you?

[3]A Yes.

[4]Q If those signs or symptoms were present

[5]a day later or later that same day when an orthopedic

[6]surgeon saw him, you would expect that surgeon to be

[7]able to make that working diagnosis or differential

[8]diagnosis, would you not, sir?

[9]A Yes.

[10]Q Doctor, let's turn to your letter

[11]reports.

[12]June 8th.

[13]MR. HERNANDEZ: Would you mark this

[14]Exhibit 2.

[15](Three-page letter dated June 8, 1992,

[16]referred to above, was marked Dr. DiGiacinto

[17]Exhibit 2 for identification.)

[18]MR. HERNANDEZ: Would you mark this

[19]Exhibit 3.

[20](Three-page letter dated January 12,

[21] **[*71]** 1993, referred to above, was marked

[22]Dr. DiGiacinto Exhibit 3 for identification.)

[23](Recess taken.)

[24]Q Doctor, let me ask you -- I note I

[25]defend physicians, doctor. I just note that in this

83

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[2]particular case and your review of the records, you

[3]do not allude to Dr. Eyster in any regard. I'm not

[4]saying -- I personally believe, doctor, nobody did

[5]anything wrong. Be that as it may, in your review of

[6]the records you came up with some opinions and

[7]criticisms. Is there some reason you didn't

[8]criticize Dr. Eyster?

[9]A I can't recall specifically, no.

[10]Q I'm not here in the practice of doing

[11]it, I just want to know -- okay.

[12]Doctor, I believe we adjourned with my

[13]marking of two exhibits. What I've done -- doctor,

[14]you can use yours, if you like.

[15]For the record, I just want you to

[16]identify that Exhibits 2 and 3 are in fact the two

[17]reports that you have prepared.

[18]A They certainly have that appearance.

[19]Q Exhibit 2 is the June 8, 1992, report?

[20]Is that a report?

[21]A Yes.

[22]Q And the Exhibit 3 is a January 12,

[23]1993, report; is that correct, sir? **[*72]**

[24]A Yes.

[25]Q Doctor, in terms of -- what do you mean
84

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[2]by class II-A seminoma?

[3]A I don't know.

[4]Q Do you know -- in your comments in this

[5]report of Exhibit 2, you refer to the fact that

[6]Dr. Lee ordered serial CT scans. Do you recall that?

[7]A Yes.

[8]Q Do you know why the serial CT scans

[9]were ordered?

[10]A My understanding was it was to

[11]ascertain any evidence of recurrence of disease.

[12]Q Do you know why the serial CT scans

[13]were directed toward the chest, the abdomen, and the

[14]pelvis?

[15]A Specifically, no. In general I suspect

[16]those would have been the most common areas to see

[17]recurrent disease.

[18]Q What you're telling me is from your --

[19]admittedly you're telling me your limited

[20]knowledge -- I don't mean that to be offensive,

[21]doctor.

[22]Let me ask it this way: Seminoma is a

[23]type of cancer; is it not?

[24]A Yes.

[25]Q Certain cancers metastasize to certain
85

[1]

[2]parts of the body; is that correct?

[3]A Yes.

[4]Q Are you, in your profession, able to

[5]tell us what are the most likely routes and

[6]destinations **[*73]** of cancer that metastasizes from a

[7]seminoma?

[8]A No.

[9]Q Are you aware of any studies that -- as

[10]a neurosurgeon -- that you can direct me to that

[11]would tell me that in a certain case study of number

[12]of patients with seminoma, that recurrence in cancer

[13]in that regard would metastasize to the spinal cord?

[14]A No, I'm not.

[15]Q Are you aware of any at all?

[16]A No.

[17]Q Let me just ask you one thing: When

[18]you as a neurosurgeon -- I notice you're in practice

[19]with other neurosurgeons here; is that correct?

[20]A Yes.

[21]Q When you leave for a weekend or you're

[22]gone on vacation, do you make arrangements for your

[23]associates to cover for you?

[24]A We always cover for each other, yes.

[25]Q I take it that in your effort to
86

[1]

[2]practice good medicine, you, in leaving the city or

[3]being on vacation or off, you try to inform the

[4]covering physicians of any patients that might have

[5]any particular problems; is that correct?

[6]A Yes.

[7]Q I guess that's poorly worded.

[8]You try to brief them on any patients

[9]that you think might have a problem while **[*74]** you're

[10]gone?

[11]A My practice would be to brief them on

[12]any, quote-unquote, active patients. It would be

[13]impossible to brief them on every patient that I

[14]would see who possibly might develop a problem. So

[15]active patients, meaning primarily in-hospital

[16]patients or very recently discharged hospital

[17]patients.

[18]Q When you're covering for an associate

[19]on a weekend, do you have -- you have a patient of

[20]his that calls for a particular problem. One of the

[21]things you might do is you might take a history of

[22]the patient by telephone. That's correct, isn't it?

[23]A Yes.

[24]Q Or if you have the time or if you think

[25]the condition is such, you might go to the office and
87

[1]

[2]pull his chart?

[3]A I don't think I've ever done that.

[4]Q I just want to put things to bed here.

[5]I didn't see any criticism of the care

[6]given Mr. Johnson at the ER on Wesley on May 7, 1991,

[7]nor on May 13, 1991, in your report. I take it you

[8]have no such criticism of that?

[9]A Correct.

[10]Q That saves some questions.

[11]Doctor, on page 2 of your Exhibit 2,

[12]your June 8th report, I **[*75]** take it, sir, that your

[13]conclusions as set forth at the bottom of page two of

[14]Exhibit 2 are based on your review of the records in

[15]this case and assumptions you have made from those

[16]records; is that correct, sir?

[17]A Yes.

[18]Q Have any of the assumptions you've made

[19]changed by your review of the depositions that have

[20]been provided to you to date?

[21]A No.

[22]Q Doctor, let's talk about the first ER

[23]visit of May 19th, because I think what you've done

[24]in your conclusion is you've kind of lumped the two

[25]together and I want to see if I can bifurcate them a
88

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[2]little bit.

[3]A Yes.

[4]Q In your conclusion, talking about the

[5]A.M. visit, first visit -- I'm going to call it the

[6]first visit.

[7]A There were two on that day?

[8]Q That's correct. One was at 9:50 in the

[9]morning and one was like 8 o'clock that night.

[10]A All right.

[11]Q I'll, again, so I can be as specific as

[12]I can, tell you that Dr. Staats saw the patient in

[13]the first visit of the 19th.

[14]You indicate that the patient appeared

[15]with increasing back pain.

[16]A Where are we now?

[17] **[*76]** Q In your conclusions.

[18]A I'm sorry.

[19]Q You said "his clinical picture of

[20]increasing back pain."

[21]Can you tell us, based on your review

[22]of the record --

[23]A I presume it is, yes.

[24]Q The next statement you make in that

[25]regard is you say patient's "inability to void." I

[89]

[1]

[2]guess I need to ask you, when you say, as it pertains

[3]to the first visit of the morning of the 19th, you

[4]said the patient had inability to void --

[5]Doctor, I am going to let you look at

[6]my record, if you wish.

[7]MR. HERNANDEZ: I want counsel to know

[8]that I'm doing it without waiving my right or

[9]to their having rights to my typewritten

[10]copy, my work product. But I am willing, for

[11]purposes of this deposition, to have the

[12]doctor look at it.

[13]MR. SCOTT: Hold on a second.

[14]He's going to testify based on his

[15]review of that record?

[16]MR. HERNANDEZ: That's the ER record

[17]for the 19th of May.

[18]I have a typewritten portion.

[19]MR. SCOTT: My only problem is how do I

[20]verify? I don't have the record with me. I

[21]could care less about your secretary typing

[22]it. I **[*77]** just can't verify it with the

[23]original. I'm not interested in your work

[24]product or that your secretary typed it out.

[25]Q Doctor, what I want you to do -- that's
90

[1]

[2]the ER record of the morning of the 19th of May --

[3]A Yes.

[4]Q -- of Dr. Staats (handing).

[5]A (Perusing document.)

[6]Q You indicate "inability to void." I

[7]want you to note that the ER record here does

[8]indicate that at 10 o'clock the patient was asked for

[9]a UA. Do you see that?

[10]A Show it to me.

[11]Q (Indicating.)

[12]You see that that "unable to void"

[13]follows their request for a UA, a urine specimen; is

[14]that correct?

[15]A Yes.

[16]Q I want to cover this background.

[17]I want you to also look down at

[18]10:55 --

[19]A I see that, yes.

[20]Q -- the "unable to void," right?

[21]A Yes.

[22]Q As the record shows and we discussed

[23]earlier that sometimes patients put in certain

[24]situations where sometimes they're being asked to

[25]give urine specimens or whatever, sometimes at that

[91]

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[2]particular time cannot void, okay?

[3]A Um-hum.

[4]Q Do we agree on that? **[*78]**

[5]A Yes.

[6]Q Here's what I'm leading up to. I want

[7]you to be aware of the following that you have not

[8]been presented with.

[9]Mr. Johnson, the patient himself, has

[10]testified under oath that he did not have any trouble

[11]urinating or voiding until later that afternoon when

[12]he awakened from a nap. I want you -- and the only

[13]complaint he had up to the time he went to the ER was

[14]chest pain.

[15]I want you further to assume that his

[16]now girlfriend, friend at that time, is Wanda Hodges,

[17]who drove him to the hospital in the morning, said

[18]the only complaint he had was chest pain and no

[19]complaints of inability to void, okay?

[20]Now, what I'm driving to, doctor, are

[21]you aware of any other notation of inability to void

[22]other than this ER record here?

[23]A At what point in time?

[24]Q In the morning session.

[25]A No.

[92]

[1]

[2]Q Okay.

[3]Doctor, given the patient's testimony

[4]and the girlfriend's testimony, wouldn't you agree,

[5]doctor, that the inability to void noted on the

[6]record here in the morning was most likely due to the

[7]request for the UA, doctor?

[8] **[*79]** MR. SCOTT: I'm going to object to the

[9]form of the question. It calls for

[10]speculation on the part of the witness.

[11]MR. HERNANDEZ: Okay.

[12]Q You may answer if you can, doctor.

[13]A If I may speculate?

[14]Q Sure.

[15]A I think deciding the patient is in

[16]urinary retention on the basis of those two

[17]statements would be impossible. Whether he was going

[18]into urinary retention or whether he just couldn't

[19]void because his bladder was empty is impossible to

[20]say at that time.

[21]Q Certainly you as the physician -- going

[22]back to the portion of history, what the patient's

[23]been experiencing away from the hospital setting

[24]might be a factor; is that correct, doctor?

[25]A Yes.

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[2]Q You indicated earlier that as a

[3]neurosurgeon you're not experienced or have

[4]sufficient knowledge as to the distinct routes or

[5]destinations that metastatic cancer may evolve from a

[6]previously treated seminoma; is that correct?

[7]A Yes.

[8]Q And you wouldn't expect a family

[9]practitioner to have any more knowledge than you in

[10]that regard, would you?

[11]A No.

[12]Q You indicate **[*80]** in this report, and I

[13]assume you make reference to Dr. Staats in the

[14]morning visit -- maybe you don't, maybe you do.

[15]Is it your opinion that Dr. Staats

[16]should have ordered, based on this record in the

[17]morning, some type of consultation for this patient?

[18]A No.

[19]Q You also indicate "clearly indicated

[20]studies" should have been obtained. Is it your

[21]opinion that based on the ER record of the morning

[22]that there were some other studies Dr. Staats should

[23]have ordered?

[24]A Harder question to answer because -- I

[25]think I can answer no on the basis of the ER record
94

[1]

[2]at that time, there was not indication to order any

[3]further studies at that time.

[4]Q Based on the status of that state of

[5]that ER record, is it your opinion that this patient

[6]should have been admitted to the hospital at that

[7]time?

[8]A No.

[9]Q Likewise, doctor, your comment then

[10]under the conclusions of Exhibit 2 of "timely

[11]surgical decompression of the thoracic spinal cord"

[12]does not pertain to Dr. Staats, does it, sir?

[13]A That is correct.

[14]Q All right.

[15]Doctor, let me turn **[*81]** to the second ER

[16]visit of that day. I'll give you that.

[17]Doctor, I cannot vouch for the clarity

of these records. I have to tell you that is what

was given to me (handing).

A (Perusing document.)

MR. HERNANDEZ: Gerard, I can only tell

you that's what was given to me, okay?

Q Here's what I want to do, doctor. I

want to discuss the second -- the conclusion of your

report of June 8th of '92 as it pertains to

95

Dr. McCown, who I'll represent to you and refresh

your memory saying that he was the physician that saw

the patient that evening. That evening being, I

believe, the time is 1948, which to me would be about

8 o'clock.

A Yes.

Q Is that right?

A Yes.

Q You make reference to the increasing

back pain here in your conclusion. I want to ask

you: With a history of a racquetball injury, is

increasing back pain specific to spinal cord

compression?

A No.

Q You make reference in this paragraph as

it pertains to Dr. Staats of the inability to void.

Do you see that?

A As it pertains to Dr. Staats?

Q Yes.

**[*82]** A I see a reference to unable to void.

[22]Q I'm sorry. Did I say Staats?

[23]A Yes.

[24]Q I beg your pardon. Let me rephrase

[25]that question, doctor. I didn't mean to and I
96

[1]

[2]apologize.

[3]As it pertains to Dr. McCown, and he's

[4]a physician at the second ER, okay --

[5]A Yes.

[6]Q you're saying the patient had

[7]inability to void when he arrived there at the

[8]Wesley -- that evening; is that correct?

[9]A Yes.

[10]Q Is that inability to void, given that

[11]clinical picture that's before you in the ER record

[12]of May 19th at approximately 8:00 P.M., is that

[13]inability to void specific with compression of the

[14]spinal cord?

[15]A No.

[16]Q Within the possibilities of inability

[17]to void -- this patient was on Percocet by this time,

[18]was he not?

[19]A He had been prescribed it earlier. I

[20]cannot state that he had definitely taken it or not.

[21]Q I want you to be aware that he has

[22]testified that he had taken his medication.

[23]Percocet is one of those medications

[24]that can cause urinary retention, isn't that correct,

[25]doctor, as a possibility?
97

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[2] **[*83]** A We've discussed that and I've indicated

[3]it would not surprise me if that was the case.

[4]Q Doctor, in the record before you, the

[5]second visit to the ER, is there any history given to

[6]the -- by the patient to the nurse or the doctor of

[7]the fact that he had a history of a previously

[8]treated seminoma?

[9]A I do not see it written down.

[10]Q Would that be important, doctor, in

[11]your opinion, to the ER physician, as to his

[12]differential diagnosis?

[13]A Yes.

[14]Q Why, doctor?

[15]A It would be one of the factors that

[16]might explain an etiology of spinal cord compression

[17]or and/or an etiology of urinary retention.

[18]Q If that history is not given to the

[19]physician, then certainly the physician could not be

[20]faulted for not including a recurrence of seminoma

[21]cancer in his differential diagnosis, can he, sir?

[22]MR. SCOTT: Objection.

[23]It implies he can't get it somewhere

[24]else, like from the medical records.

[25]Q Doctor, you may answer the question.
98

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[2]Would you want it repeated, doctor?

[3]A If he has no awareness that the patient

[4]ever had seminoma, **[*84]** and had no other way of finding it

[5]out, it would be unreasonable for him to be expected

[6]to make that diagnosis of seminoma compressing the

[7]spinal cord.

[8]Q Did you, in the ER record of earlier

[9]that morning, and maybe you can help me, see any

[10]reference to seminoma, the one that -- when

[11]Dr. Staats saw him?

[12]A (Perusing document.)

[13]I don't see seminoma written down.

[14]Q Do you see cancer written down?

[15]A No.

[16]Q Is a mass or not in the chest,

[17]mediastinum chest, without a history of cancer or

[18]previously treated seminoma being given to the

[19]physician, is that mass specific to compression of

[20]the spinal cord?

[21]A No.

[22]Q Why not, doctor?

[23]A The mass may or may not relate to the

[24]spine. The question as stated is speaking about a

[25]mass in the mediastinum, and that's what we've been

[MISSING PAGES 99-108]

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[2]started having trouble voiding after he had taken the

[3]Percocet?

[4]MR. SCOTT: Objection to the form of

[5]the question.

[6]A I'm aware of the time sequence which

[7]involves his being seen in the emergency room in the

[8]morning, being **[*85]** given a prescription for Percocet, and

[9]returning later that day with the inability to void.

[10]Therefore, assuming that he filled the prescription

[11]and took a Percocet, Percocet helps us define the

[12]time at which he said he couldn't void.

[13]Does that answer your question?

[14]Q You were never made aware of the fact

[15]that he testified that he started having trouble

[16]voiding after he took the Percocet?

[17]MR. SCOTT: Objecting to the form of

[18]the question. It misstates testimony.

[19]Q That's all I'm asking: Were you made

[20]aware of the fact?

[21]A I was not aware of the testimony.

[22]Q My question is: What consultations,

[23]then, are you saying Dr. McCown should have obtained

[24]that night? That's what your conclusion draws.

[25]A My conclusion is that he did not
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[2]adequately put together the information that he had.

[3]If he had only urinary retention and severe back

[4]pain, he should have obtained consultation to help

[5]explain that. Whether that was having the patient

[6]seen by an orthopedic surgeon or a neurosurgeon or a

[7]neurologist, I can't answer because I don't know what

[8]the system **[*86]** there involves. I feel that he should

[9]have obtained a consultation which indicated that

[10]someone had further evaluated the patient and decided

[11]why or -- decided that he did or didn't have more

[12]severe problems that required more immediate

[13]evaluation.

[14]Q What about "clearly indicated

[15]studies"? What studies are you talking about there,

[16]where you say that in your conclusion?

[17]A Again, he has given a history here and

[18]had a finding which are consistent with spinal cord

[19]compression, from whatever etiology. It is incumbent

[20]upon him to disprove that which is most threatening

[21]to the patient, and therefore studies may have

[22]included a myelo CT or an MRI scan, if available.

[23]Q Now, these findings, this constellation

[24]of signs that you said Dr. McCown had available to

[25]him, these were available to Dr. Sellberg the next
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[2]morning, weren't they, the ER physician at Saint Joe?

[3]A Yes.

[4]Q Not only that, by then he was unable to

[5]walk, wasn't he?

[6]A I believe he stated that he had

[7]weakness in his legs, yes.

[8]Q The record says "inability to walk," as

[9]we read earlier. **[*87]**

[10]A I recall that now, yes.

[11]Q That's even more specific, isn't it?

[12]A Yes.

[13]Q Certainly if Dr. McCown should have

[14]done that on that day, that night, Dr. Sellberg had

[15]more information on which to do it, didn't he?

[16]A Again, we've discussed Dr. Sellberg's

[17]role, and without recounting it, his responsibility

[18]was to see the patient in the emergency room and get

[19]him admitted so that the evaluation could begin.

[20]Q Or order consults?

[21]A Again, I don't know what his

[22]responsibility is. If a patient -- you don't want

[23]patients sitting in the emergency room if they're

[24]going to be admitted to the hospital.

[25]Q This patient was admitted, we know
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[2]that, don't we, Saint Joe?

[3]A Yes.

[4]Q And Dr. Eyster, the orthopedic surgeon,

[5]sees him?

[6]A At some point; I don't remember when.

[7]Q Late on the 20th and on the 21st.

[8]A Yes.

[9]Q With all the constellation of signs

[10]Dr. McCown had plus the inability to walk; isn't that

[11]correct?

[12]A Yes.

[13]Q Compression of the spinal cord should

[14]have been entertained at a time Dr. Eyster **[*88]** saw the

[15]patient?

[16]A Yes.

[17]Q Had it been entertained, as you've

[18]indicated, on the 20th, by someone having a higher

[19]degree of specialty like an orthopedic surgeon,

[20]decompression at that time, on the 20th, could have

[21]prevented permanent neuro deficit; isn't that

[22]correct?

[23]A Possibly, yes.

[24]Q To a reasonable medical probability;

[25]isn't that correct?
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[2]A Yes.

[3]Q As a matter of fact, on the 21st,

[4]24 hours before this patient was in fact operated,

[5]had decompression taken place at that time, on

[6]Tuesday, 24 hours before, permanent neurological

[7]deficit could have been avoided; isn't that correct?

[8]A Possibly, yes.

[9]Q When you say "possibly," that makes me

[10]nervous as a lawyer.

[11]Isn't that more probably true than not,

[12]sir?

[13]A It's always difficult to answer at what

[14]point a neurological deficit is reversible and at

[15]what point it can be arrested in its progression.

[16]That's why I have to say "probably" is really an

[17]answer to all of those questions.

[18]Q I lost you in the last answer.

[19]A You can't guarantee a reversal of a

[20] **[*89]** neurological deficit once it exists. Therefore

[21]stating with absolute medical certainty under any

[22]circumstances is always difficult. Stating with a

[23]high degree of probability that something can reverse

[24]borders on being difficult but is more probable if

[25]the symptoms are minimal.
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[2]Q That's what I'm saying. In this

[3]situation, that's all I'm asking you, is

[4]probability -- that's why I used the words

[5]"reasonable medical probability" earlier. I

[6]recognize there is nothing absolute, doctor, in

[7]medicine.

[8]But to a reasonable medical

[9]probability, this patient, if decompression had taken

[10]place on the 21st, 24 hours before, could have

[11]avoided permanent neurological damage?

[12]A Possibly.

[13]Q You've not been made aware of

[14]Dr. Glasby's report or Dr. Shapiro's report, have

[15]you?

[16]A I do not believe so. I've seen records

[17]of Dr. Shapiro, but I don't recall seeing a report.

[18]I could be wrong about that.

[19]Q Did you know Dr. Glasby, an oncologist,

[20]was critical of the ER physician, Dr. Sellberg?

[21]A I don't know who Dr. Glasby is.

[22]Q He's an oncologist from UCLA. **[*90]**

[23]A I've not seen any report of any kind.

[24]Q Dr. Steven Williams, you've not seen

[25]his report. I want you to assume that he has stated
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[2]in a report to Mr. Scott and Mr. Prochaska, their

[3]expert, that had the patient been treated on 5/21/91,

[4]he would have retained ability to walk. Do you agree

[5]or disagree with that statement?

[6]A Possibly.

[7]MR. STEPHENSON: Possibly disagree?

[8]THE WITNESS: Again, to state absolute

[9]a hundred percent is impossible.

[10]MR. STEPHENSON: That's not what he's

[11]asking you to do.

[12]Q I'm asking you more than 50 percent.

[13]A I can't give you the percentage. The

[14]patient may recover function, the patient may stay

[15]exactly where he is, the patient may be a little

[16]worse after the surgical procedure. All of those are

[17]potential outcomes.

[18]So to say that he would have retained

[19]his ability to walk is within the reasonable realm of

[20]possibility, but is it a high probability, I don't

[21]know what that means. And it's so dependent on where

[22]the patient was when you start.

[23]Q You've reviewed the Saint Joe's medical

[24]records here? **[*91]**

[25]A Yes, and I'll answer the question the
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[2]same way with those records. He may have recovered

[3]his ability to walk, he may have stayed the same, or

[4]that he -- I can't really be more precise than that.

[5]I can't, under the best of circumstances, be able to

[6]guarantee or even offer a high probability that the

[7]patient will recover function that he's already lost.

[8]Q Have you been provided with any records

[9]of Mr. Johnson as to his condition today?

[10]A I have not been provided with any

[11]records, no.

[12]Q You have not been told that he's back

[13]to work and he's got a brace on one leg?

[14]A I've been told that he's back to work.

[15]Q Doctor, have I obtained on behalf of my

[16]clients all your opinions as to your criticism of

[17]Dr. Staats and Dr. McCown?

[18]A I have no idea.

[19]Q What I'm saying, do you have any other

[20]criticism of Dr. McCown for his treatment of the

[21]second ER visit of May 19th that I have not covered

[22]with you?

[23]A I believe we've covered the major

[24]problems relative to that visit.

[25]Q I'm concerned when you say "major."
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[2]Are there **[*92]** other criticisms you have? I want to know

[3]before I leave.

[4]A Short of awareness of anything else he

[5]may have had available or any other information he

[6]may have had, I can't offer any other criticisms.

[7]Q That's all I'm asking. You're

[8]represented to us as being ready to be deposed.

[9]Based on the materials that have been provided to

[10]you, you have arrived at your opinions, have you not?

[11]A That is correct.

[12]Q Doctor, have you understood my

[13]questions, poor as they may have been?

[14]A They were very good, and yes, I

[15]understood them.

[16]MR. HERNANDEZ: Thank you, doctor.

[17](Recess taken.)

[18]EXAMINATION BY MR. O'NEAL:

[19]Q Doctor, we've been previously

[20]introduced. My name is Mike O'Neal. I represent

[21]Dr. Sweet and Dr. Myrick in this case. Of course

[22]they, at the time of this particular matter, were at

[23]Saint Joseph's Medical Center in Wichita, so I'm

[24]going to try to limit my questions to that period of

[25]time.

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[2]As kind of a preliminary, doctor, I

[3]notice that we are not today at 128 Boulder Trail in

[4]Bronxville, New York. Have you moved?

[5] **[*93]** A No. That's my home address and that's

[6]the address from which I generate all my non-office

[7]business reports.

[8]Q In your CV I notice yet another

[9]address.

[10]A I moved in May of 1991 to Boulder

[11]Trail.

[12]Q The permanent address shown on your CV

[13]was your old home address; is that correct?

[14]A Yes. My current home address is

[15]128 Boulder Trail, Bronxville, New York 10708.

[16]Q In looking at your report of June 8,

[17]1992, I notice that you are writing Mr. Prochaska and

[18]you indicate at his request you prepared a report and

[19]rendered an opinion as to the medical care received

[20]by Jeffrey Johnson rendered at the Wesley Medical

[21]Center in May of 1991, and that in preparing that

[22]report you reviewed records from Wesley Medical

[23]Center, Saint Joseph, Martin Lee, Richard

[24]Steinberger, Paul Bauman, Robert Eyster, and William

[25]Shapiro.

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[2]Is that correct?

[3]A Yes.

[4]Q What was your understanding of the task

[5]that you were asked to perform when you first got

[6]this case?

[7]A When I first was given the case, I was

[8]asked to review the records.

[9]Q All of **[*94]** the records that we just listed?

[10]A Yes.

[11]Q Were those your only directions?

[12]A At that time, yes.

[13]Q What were you to do?

[14]A Again, at what point in time?

[15]Q Prior to your rendering of your report

[16]of June 8, 1992, what was your understanding of what

[17]you were to do for Mr. Prochaska?

[18]A I believe to review the records and

[19]contact him.

[20]Q Did you do that?

[21]A Yes.

[22]Q When you contacted him at the time you

[23]contacted him, had you formulated any opinions at

[24]that time?

[25]A Yes.

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[2]Q Was it your understanding when you

[3]reviewed all these medical records that you were

[4]going to be asked to comment about the care that

[5]Mr. Johnson received at Wesley Medical Center and

[6]Saint Joseph's Medical Center as well as from these

[7]individual doctors whose records are listed here?

[8]A I'm not sure how to answer that

[9]question, other than to state that Mr. Prochaska

[10]asked me to write a report relative to Mr. Johnson's

[11]care at Wesley Medical Center, and that I have to add

[12]is an alteration to any specific memory of

[13]conversations I had **[*95]** with Mr. Prochaska.

[14]Q When was it that Mr. Prochaska asked

[15]you to limit your opinions just to the care rendered

[16]at Wesley Medical Center?

[17]A Sometime between my receiving the

[18]records and writing the first report. I don't recall

[19]when.

[20]Q Did Mr. Prochaska explain to you any

[21]reason for limiting your opinions to one facility?

[22]A Not that I recall, except that he asked

[23]me at that point in time just to discuss the first

[24]medical center. I don't recall that he gave me a

[25]reason.

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[2]Q At the time that you rendered your

[3]report of June 8, 1992, did you have any opinions

[4]regarding the quality of care received by Mr. Johnson

[5]that went beyond the scope of your report of June 8,

[6]1992?

[7]A Yes.

[8]Q Did you at that time, the time of your

[9]report, June 8, 1992, share those opinions with

[10]Mr. Prochaska?

[11]A I do not recall if I did or not. I

[12]suspect that I did.

[13]Q But you were specifically asked to

[14]render a report that was related only to Wesley

[15]Medical Center; is that correct?

[16]A Yes.

[17]Q You feel that your responsibilities for

[18]reporting **[*96]** deviations from the applicable standard of

[19]care by health care physicians is any different a

[20]standard when you're practicing your profession as

[21]opposed to appearing as an expert in a medical-legal

[22]matter?

[23]A No.

[24]Q At the time you rendered your report of

[25]June 8, 1992, what opinions regarding the standard of

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[1]

[2]care received by Mr. Johnson did you have that are

[3]not contained in this report?

[4]A Those which are contained in the second

[5]report, I think, very much reflect opinions that I

[6]had at the time of preparation of the first report.

[7]Q Is it your testimony that at no time

[8]were you asked to refrain from commenting on the

[9]standard of care provided by Dr. Lee?

[10]A That is correct.

[11]MR. STEPHENSON: I didn't understand

[12]the question or the answer, doctor.

[13]Would you read that back, please.

[14](The requested question and answer were

[15]read.)

[16]Q Same question with regard to

[17]Dr. Griebel.

[18]A That is correct.

[19]Q Dr. Steinberger?

[20]A That is correct.

[21]Q Dr. Bauman?

[22]A I don't remember who Dr. Bauman was,

[23]but I believe **[*97]** that was correct.

[24]Q Dr. Bauman is the radiation

[25]oncologist.

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[2]A That is correct.

[3]Q Dr. Eyster?

[4]A That is correct.

[5]Q And Dr. Shapiro?

[6]A That is correct.

[7]Q Dr. Sellberg?

[8]A That is correct.

[9]Q When was it in relationship to June 8,

[10]1992, that you were then asked to comment on the care

[11]Jeff Johnson received at Saint Joseph's Medical

[12]Center?

[13]A Sometime after that and before the

[14]preparation of the report dated January 12, 1993.

[15]Q Again, you have no recollection of why

[16]it was that you were asked to refrain from rendering

[17]opinions regarding the care at Saint Joseph's Medical

[18]Center prior to the date that you rendered the

[19]opinion?

[20]A Reasons why? No. He -- as I recall,

[21]Mr. Prochaska just asked me to prepare a report,

[22]being aware of all the information I had of the care

[23]at Wesley Medical Center.

[24]Q You've been involved in between 20 and

[25]25 medical-legal matters as an expert; is that
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[1]

[2]correct?

[3]A Yes.

[4]Q Have you ever before been asked to

[5]limit your opinions to only certain health **[*98]** care

[6]providers during a certain period of time in the

[7]treatment of a patient?

[8]A Yes.

[9]Q Is it unusual, in your opinion, to have

[10]such a request? In other words, that you have

[11]opinions that are critical of other health care

[12]providers but you are limited in providing those

[13]opinions by the person who retains you?

[14]MR. SCOTT: I'm going to object to the

[15]form of the question.

[16]He didn't testify he was limited in his

[17]opinions. He testified the scope of his

[18]report was what the attorney asked him.

[19]Q You may answer.

[20]A I've limited my opinions when the

[21]particular attorney contacting me had a specific

[22]client that he was defending and/or prosecuting. I

[23]think that's responsive to your question.

[24]Q When you agree to accept a case for

[25]review, do you have any particular procedure as to
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[2]what you require by the way of information from the

[3]person retaining you?

[4]A I require as much information as he can

[5]make available to me. I don't send him a list of

[6]things I need because I don't know what's available.

[7]I'm very much dependent on what he sends me **[*99]** as

[8]available.

[9]Q What he sends you you assume is all the

[10]relevant information you would need as a professional

[11]physician to render an opinion?

[12]A I assume it's that information on which

[13]I will be able to base my opinion. I can't make any

[14]presumptions beyond that.

[15]Q Was today the first day you knew that

[16]the patient himself had given sworn testimony?

[17]A I believe it was, yes.

[18]Q Obviously information under oath

[19]directly from the patient himself would be relevant

[20]information that would be helpful for you in arriving

[21]at opinions about his care, wouldn't it?

[22]A Yes.

[23]Q Turning to your report of January 12,

[24]1993, in your conclusions on page 2, you indicated

[25]that at the time of Mr. Johnson's arrival at Saint
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[1]

[2]Joseph's Medical Center emergency room, "he exhibited

[3]a sensory level in the thoracic region." What do you

[4]mean by that?

[5]A He was reported either by the emergency

[6]doctor or by Dr. Sweet to have loss of sensation in

[7]the region of the thoracic dermatomes.

[8]Q You mentioned Dr. Sweet. This

[9]information was not originally conveyed **[*100]** to Dr. Sweet

[10]at the emergency room, was it?

[11]A I answered it that way because I don't

[12]recall if I was basing it strictly on the emergency

[13]room record or on Dr. Sweet's notation.

[14]MR. SCOTT: I think the record

[15]reflected it was Dr. Sweet's exam in his

[16]notation.

[17]Q My point is you acknowledge that the

[18]first doctor who saw the patient at Saint Joseph's

[19]emergency room was Dr. Sellberg. You acknowledge

[20]that, don't you?

[21]A I am aware of that, yes.

[22]Q You indicated that "at that time a

[23]diagnosis of possible spinal cord compression could

[24]and eventually should have been made, especially in

[25]view of this prior history of metastatic seminoma,"

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[1]

[2]correct?

[3]A Yes.

[4]Q What information did you glean from the

[5]Saint Joseph records that this patient had a history

[6]of metastatic seminoma?

[7]A I cannot tell you that I specifically

[8]learned from the Saint Joseph's record that that was

[9]true. I can't tell you that it wasn't there, but

[10]sitting here today I would have a difficult time

[11]saying that I definitely picked it out of the Saint

[12]Joseph's record at that **[*101]** point.

[13]Q You know from a retrospective review of

[14]the records that it turns out that he had metastatic

[15]seminoma, correct?

[16]A Yes.

[17]Q But in fact there was no history given

[18]at Saint Joseph's emergency room of metastatic

[19]seminoma. Isn't that true?

[20]A I believe that's true from what I've

[21]looked at today, yes.

[22]Q So certainly you agree that no one at

[23]the emergency room at Saint Joseph would have had a

[24]history of metastatic seminoma as represented in your

[25]conclusion?

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[1]

[2]A I don't think the chart reflects that

[3]they do. Whether they did or not independently, I

[4]don't know.

[5]Q Is that -- I presume what you mean by

[6]that, the diagnosis eventually should have been made

[7]had there been a history of metastatic seminoma?

[8]A No.

[9]Q If there's no history of metastatic

[10]seminoma, how is it a doctor at Saint Joseph would

[11]have that as a potential differential diagnosis?

[12]A The differential diagnosis that he has

[13]to have is spinal cord compression. Eventually, if

[14]he didn't have the information available then, he

[15]would have appropriately gathered **[*102]** information

[16]indicating a history of seminoma, perhaps by

[17]obtaining records from other doctors or not. But his

[18]diagnosis, absent the existence of seminoma, still

[19]has to be rule out spinal cord compression in the

[20]thoracic region. The seminoma was an incidental

[21]factor which in fact explained why he had the

[22]compression. But not knowing the fact that the

[23]patient had seminoma doesn't eliminate the patient

[24]had symptoms consistent with spinal cord compression.

[25]Q There's a vast difference between a

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[2]history of seminoma and a history of metastatic

[3]seminoma, isn't there?

[4]A Yes. But, again, in this setting of

[5]the symptoms he's presenting, we don't have to make a

[6]diagnosis of what's causing the compression. We just

[7]have to make a diagnosis of the compression.

[8]Eventually -- that's where I think the word

[9]"eventually" is appropriate -- that information

[10]would be gathered and we'd find out it was metastatic

[11]seminoma. If we don't have that information

[12]available initially, it doesn't alter the fact that

[13]the patient is presenting symptoms of spinal cord

[14]compression.

[15]Q This patient **[*103]** also is exhibiting

[16]symptoms that were wholly consistent with his own

[17]history of injury in the racquetball accident,

[18]correct?

[19]A Only if you assume that that injury

[20]could have caused spinal cord compression, and I

[21]agree with you.

[22]Q And certainly history is a very

[23]important part of arriving at a differential

[24]diagnosis, particularly in an emergency room setting

[25]where this is an unattended patient, in other words,
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[2]a patient who has never before presented at that

[3]institution, correct?

[4]A It is a part of that, yes.

[5]Q You say you did review Dr. Bauman's

[6]records?

[7]A I believe I did. I really don't have

[8]very much recollection of that.

[9]Q Do you remember Bauman's records

[10]indicating that on the 20th of May, 1991, which would

[11]have been a Monday, Dr. Bauman noted that the patient

[12]had been in over the weekend and seen in the

[13]emergency room at Wesley Medical Center, a chest

[14]X-ray had found that -- a posterior mediastinal mass,

[15]and he had talked to Dr. Griebel in Dr. Lee's absence

[16]and the plan was to order a CT. Do you understand

[17]that?

[18]A I'm sorry. **[*104]** I don't recall that

[19]specific part of the record. I didn't make any

[20]reference to it in my report. If it's there, I'm

[21]sure it's there. I just don't recall. I can't

[22]recall at this time that part of the record.

[23]Q Getting back to the hypothetical that

[24]Mr. Hernandez gave you, doctor, do you also remember

[25]or do you remember seeing in the records the note
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[2]that Dr. Griebel put on the chart regarding the phone

[3]call she received from the patient?

[4]A Yes, I do recall seeing that.

[5]Q Do you recall that she acknowledged

[6]that Mr. Johnson said he had, when he called her,

[7]that he had not passed urine since he woke up this

[8]morning, that he had not drank any fluids because he

[9]had spent so much time in the ER today and had not

[10]got around to it, and she explained to him it might

[11]be a reason for not urinating, and she acknowledged

[12]that the patient then said he doesn't think he could

[13]pass urine even if he needed to and she indicated

[14]that is something that needs to be evaluated. Do you

[15]remember seeing that in the chart?

[16]A I do recall that phraseology being

[17]used, yes.

[18]Q You **[*105]** may assume for purposes of this

[19]question that Dr. Griebel has written a letter to

[20]Mr. Prochaska dated October 2, 1992, indicating that

[21]neither Mr. Johnson nor the emergency room staff at

[22]Wesley Medical Center advised her that he had a chest

[23]X-ray which revealed a mediastinal mass and she was

[24]not advised that he had true urinary retention.

[25]"Had I been given that information,
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[1]

[2]the constellation of features of chest wall pain and

[3]urinary retention combined with the mediastinal mass

[4]would have prompted me to have immediately embarked

[5]on a workup to exclude spinal cord compression as the

[6]etiology of his symptoms."

[7]I want you to assume that that is what

[8]she has said, taking into account what she has said,

[9]what is in her own chart regarding the conversation

[10]that she had with the patient.

[11]And assuming further that Dr. Bauman

[12]talked to her on either the 19th or the 20th and

[13]advised her of the mediastinal mass, would it be your

[14]opinion, would it not, that based on reasonable

[15]medical probability her failure to do any follow-up

[16]and order a stat MRI or CT would be a deviation **[*106]** from

[17]the applicable standard of care?

[18]A I have to ask you to review what she

[19]did know. She reviewed it -- if I understand the

[20]question properly, she wasn't sure if he was in

[21]urinary retention, she was made aware that he had a

[22]mediastinal mass -- am I correct in those two?

[23]Q I want you to assume that the patient

[24]told her, as she's put in her records, that he

[25]doesn't think he could pass urine even if he needed

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[2]to and that she stated that that is something that

[3]needs to be evaluated. I want you to assume those

[4]facts.

[5]A Okay.

[6]Q And that she had been told either by

[7]Mr. Johnson telling her, as he said he did in his

[8]testimony, or Dr. Bauman telling her, of the

[9]mediastinal mass.

[10]Given those facts, failure to order a

[11]stat CT would be a deviation from the applicable

[12]standard of care, correct?

[13]A I can't answer the question unless I

[14]know whether the problem with the urinary retention

[15]was further clarified. If she was made aware or had

[16]been certain that he was in urinary retention, then

[17]the answer would be yes, it would be a deviation.

[18]I'm **[*107]** not quite so sure of the answer if

[19]he were evaluated and she were not made aware that he

[20]was definitely in urinary retention. If she

[21]concluded that he was not in urinary retention, I

[22]think it would not have been a departure at that time

[23]to have ordered a test (sic).

[24]Q Doctor, I understood your previous

[25]testimony to mean that those facts would fit your
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[2]definition of urinary retention, inability to urinate

[3]for a period of some four to five hours.

[4]A Yes. But my understanding also of the

[5]question was that she said that had to be evaluated,

[6]and I believe you said she said the patient should

[7]return to the emergency room. And I also

[8]understand -- okay. I'll stop there.

[9]Q I want you to also assume that when

[10]Dr. Bauman talked to her -- he said he talked to

[11]Dr. Griebel in Dr. Lee's absence, and a CT of the

[12]chest would be ordered. Assuming those facts to be

[13]true, the failure of Dr. Griebel to follow up with

[14]the CT scan would be a deviation from the applicable

[15]standard of care, would it not?

[16]MR. SCOTT: Objection.

[17]That's the same hypothetical that was

[18]just asked. **[*108]**

[19]THE WITNESS: Can I answer?

[20]MR. SCOTT: Yes.

[21]Q At that point, doctor, if the decision

[22]has already been made apparently to follow up with a

[23]CT scan of the chest -- that's in the hypothetical.

[24]A Yes, I understand that. But I think if

[25]I understand your question or if I understand what

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[2]you're saying, the deviation is a question of should

[3]it have been on an emergency or should it have been

[4]done as an evaluation of the mediastinal mass, and I

[5]think the answer to that question depends on what

[6]Dr. Griebel's understanding is of the status of the

[7]urinary retention. If the patient is in retention,

[8]then it's my opinion that it is an emergency. If the

[9]patient is not in urinary retention, then it's my

[10]opinion that it's not an emergency.

[11]Q If at that point in time, doctor, it

[12]has been the agreement between Dr. Griebel, the

[13]oncologist, and Dr. Bauman, the radiation oncologist,

[14]that a CT scan would be ordered, how does she find

[15]out whether he's in urinary retention or the results

[16]of the CT scan?

[17]A I'm not sure I fully understand the

[18]question.

[19]I don't **[*109]** believe at that point a CT scan

[20]was ordered, and I believe from what you've told me,

[21]from what Dr. Griebel's note in Dr. Lee's office

[22]record indicates, that she instructed the patient to

[23]go to the emergency room -- and I'm not clear as to

[24]whether she asked them to contact her under any

[25]circumstances or contact her if there was a problem

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[2]with urinary retention. I have to keep giving the

[3]same uncertain answer depending again on the whole

[4]issue of urinary retention and what she did or what

[5]she didn't know, what kind of follow-up she expected

[6]from the emergency room or vice versa.

[7]Q Doctor, the question is: Are you

[8]assuming that she would not order a CT scan until she

[9]was certain that there was urinary retention?

[10]A The indication to do a CT scan that day

[11]would be urinary retention. The indication to do a

[12]CT scan to evaluate the mediastinal mass upon

[13]evaluation basis the following Monday or Tuesday.

[14]I think your question is asking me

[15]should she have ordered a CT scan that day. The

[16]question of urinary retention is the thing I believe

[17]is the determining factor in my mind **[*110]** as to whether it

[18]should have been done immediately or should have been

[19]done in an elective fashion.

[20]Q Given the fact that she has been

[21]presented with a history by the patient that is

[22]consistent with urinary retention, given the fact

[23]that she has sent this patient back to the ER room,

[24]given the fact that she then has a conversation with

[25]the radiation oncologist in which the mediastinal
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[2]mass is mentioned and a plan of the CT scan would be

[3]ordered, would it have been a deviation from the

[4]applicable standard of care not to order a CT stat?

[5]A Given that version of the information

[6]she had available, I think she was under more

[7]obligation to follow up and/or order a CT scan.

[8]Q Were you made aware of the

[9]qualifications of Dr. Sweet when you reviewed the

[10]records?

[11]A I was aware that he was a family

[12]practice resident. Beyond that I don't believe I had

[13]any further knowledge of his qualifications.

[14]Q You don't know whether he was a

[15]first-year resident or not?

[16]A I don't recall that I knew or didn't

[17]know, sorry.

[18]Q Assuming that he is a resident, with

[19] **[*111]** regard to the evaluation of the patients in the

[20]emergency room setting, certainly a doctor who is

[21]specializing in emergency room medicine would be in a

[22]better position to evaluate a patient coming in than

[23]a first-year resident, wouldn't you agree?

[24]A It's too much of a generalization for

[25]me to agree or disagree, depending so much on the
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[2]patient's qualifications and the assignment of the

[3]emergency room physician in deciding how far he

[4]could --

[5]Q You mentioned "patient." I think you

[6]meant doctor's.

[7]A Doctor; I'm sorry.

[8]Q As you sit here today, you don't know

[9]what Dr. Sellberg's particular qualifications are, do

[10]you?

[11]A No, I don't.

[12]Q Or Dr. Sweet's?

[13]A As I stated, I understood he was a

[14]resident in family practice. Beyond that, I don't.

[15]Q It's your understanding that Dr. Sweet

[16]requested the consultation with the orthopedic

[17]specialist, Dr. Eyster?

[18]A I don't know if it was Dr. Sweet or

[19]Dr. Myrick or someone else. I believe it was

[20]Dr. Sweet, but again without the record in front of

[21]me, I wouldn't be a hundred percent sure.

[22] **[*112]** Q Dr. Eyster did evaluate the patient,

[23]did he not?

[24]A I saw a note initially from

[25]Dr. Eyster and there was a signature underneath which
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[2]I think was Dr. Eyster's.

[3]Q Now, in that setting, is the orthopedic

[4]specialist who comes in to consult limited by

[5]whatever the physician who brought him in to consult

[6]has asked him to do?

[7]A No, I don't think so, no.

[8]Q In other words, if the physician that

[9]brings him in says, "This individual has presented

[10]with pain in his back related to a history of a

[11]racquetball injury. I want you to take a look at

[12]him," does that mean that the orthopedic specialist

[13]is therefore limited to a review simply of the low

[14]back area?

[15]A No, not at all.

[16]Q It would be the obligation of the

[17]orthopedist to conduct an independent evaluation of

[18]this patient to determine from an orthopedic

[19]standpoint what needs to be done, correct?

[20]A Yes.

[21]Q Then it would further be his obligation

[22]to provide the attending physician with the results

[23]of his evaluation and any recommendations that he may

[24]have?

[25]A It would be the responsibility **[*113]** of
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[2]the -- of who to do what? I'm sorry. Of Dr. Eyster

[3]or the orthopedic doctor to provide the attending

[4]doctor with recommendations?

[5]Q Yes.

[6]A Yes.

[7]Q Did you, in reviewing the medical

[8]records of both Wesley and Saint Joseph, refrain from

[9]arriving at any opinions regarding the standard of

[10]care received by Mr. Johnson until after you had

[11]reviewed all the records?

[12]A I'm sure I was evolving opinions along

[13]the way, so I can't answer the question. I'm sure I

[14]had opinions after reading one and then the next.

[15]Q Did you note any of those opinions as

[16]you went along?

[17]A In my mind, I'm sure I did.

[18]Q You didn't write them down anywhere?

[19]A No.

[20]Q You said you left your file of this

[21]case at home. What does your file contain?

[22]A That information provided to me from

[23]Mr. Prochaska, which I believe is reviewed at the

[24]beginning of each report. I don't believe it

[25]includes anything else.

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[2]Q The way it's represented here, we're

[3]simply talking about office records and medical

[4]records, Wesley Medical Center and Saint Joseph

[5] **[*114]** Medical Center?

[6]A Yes.

[7]I've indicated that I received copies

[8]of three EBTs, I'm sorry, three depositions, which

[9]are also included in that pile.

[10]Q But those were sent approximately a

[11]month ago?

[12]A I think about a month ago, yes.

[13]Q The medical records that you received,

[14]were they accompanied by a cover letter?

[15]A I presume they were, but I don't

[16]recall. If they were, it's still there.

[17]Q When you received the depositions, were

[18]those accompanied by a cover letter?

[19]A My recollection is that they were.

[20]Q Do you recall whether there were any

[21]instructions given to you in any of the cover

[22]letters?

[23]A I recall the deposition -- first cover

[24]letter, I believe, indicated that I should contact

[25]Mr. Prochaska after reviewing the charts. The second
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[2]cover letter, to my recollection, indicated that I

[3]should contact his office after reviewing the

[4]depositions.

[5]Q We're going to ask that you read and

[6]sign this particular deposition. I'm going to make a

[7]request that when you return the deposition that you

[8]include your file that **[*115]** you have at home, unredacted

[9]and without removal of any of the contents. Will you

[10]agree to do that for us?

[11]A I don't know.

[12]MR. SCOTT: That's okay.

[13]THE WITNESS: That's okay?

[14]A I don't want to copy it.

[15]Q What I don't need, unless other counsel

[16]want, are the medical records that you reviewed,

[17]because we've got those. But it would be anything

[18]that you received or that's in the file, notes,

[19]correspondence, what have you, beyond the medical

[20]records. And I don't want the depositions.

[21]MR. HERNANDEZ: Doctor, did you

[22]make any notes on the margins of these

[23]depositions?

[24]THE WITNESS: No.

[25]MR. HERNANDEZ: Okay.
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[2]I don't want those either.

[3]A If I understand it, you want

[4]correspondence, any notes that I made, but nothing

[5]really that Mr. Prochaska sent me.

[6]Q We have all the medical records and all

[7]the depositions. We don't need those.

[8]A I understand.

[9]MR. O'NEAL: That's all I have.

[10]EXAMINATION BY MR. STEPHENSON:

[11]Q Doctor, I'm going to be brief.

[12]I want to clear up a few questions I

[13]have early **[*116]** on.

[14]I see in your CV that you are

[15]associated with the Morningside Neurosurgical

[16]Associates, a professional corporation.

[17]A Yes.

[18]Q Are you a shareholder in that

[19]corporation?

[20]A Yes, I am.

[21]Q How many shareholders are in the

[22]corporation?

[23]A Three.

[24]Q Are you equal partners or shareholders

[25]in the corporation?
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[2]A Yes.

[3]Q Do you practice neurosurgery

[4]exclusively?

[5]A Yes.

[6]Q Your office is as 53 East 67th Street,

[7]New York City?

[8]A Yes.

[9]Q That's why we're taking this deposition

[10]here today.

[11]A Yes.

[12]Q And it's right off Park Avenue?

[13]A Yes.

[14]Q That's in Manhattan, New York City, is

[15]it not?

[16]A Yes.

[17]Q With respect to the written reports and

[18]your testimony here today, your middle initial is V?

[19]A Yes.

[20]Q As in Vincent?

[21]A Correct.

[22]Q When you signed your reports, I'm

[23]looking first at your report dated January 12, 1993,

[24]your middle initial appears as a D in that report.

[25]A My last name is DiGiacinto,
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[2]D-i-G-I-A-C-I-N-T-O. **[*117]**

[3]Q So you have omitted the V --

[4]A Yes.

[5]Q -- from your signature?

[6]A Yes.

[7]Q Doctor, you were asked by Mr. Prochaska

[8]to evaluate the care and treatment of Mr. Johnson at

[9]Wesley and Saint Joseph Centers, were you not?

[10]A Yes.

[11]Q Were you asked to evaluate the care and

[12]treatment of any other physician in this case? By

[13]that, specifically Chandler Bethel of Wichita,

[14]Kansas.

[15]A No.

[16]Q Do you know who Dr. Bethel is?

[17]A I believe he was the internist who

[18]initially evaluated the patient.

[19]Q Would you refer to him as a primary

[20]care physician in this case?

[21]A I think I would. I don't have enough

[22]information to know if that's absolutely true.

[23]Q Have you had the opportunity or been

[24]requested to review his records?

[25]A No.

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[2]Q You have not been furnished with any of

[3]his records --

[4]A No.

[5]Q -- is that correct?

[6]A That's correct.

[7]Q You've been furnished with no reports

[8]relating to his diagnosis, care, and treatment of

[9]Mr. Johnson?

[10]A I am aware of some of that through

[11] **[*118]** other records, but none of his records or any reports

[12]about his diagnosis, care, or treatment have been

[13]furnished to me.

[14]Q Were you asked to evaluate his

[15]diagnosis, care, and treatment of Mr. Johnson?

[16]A No, I was not.

[17]Q And you have not formed any opinions

[18]pro or con concerning Dr. Bethel's diagnosis, care,

[19]and treatment of Mr. Johnson, have you?

[20]A No, I have not.

[21]Q Nor are you qualified to do so, are

[22]you, sir?

[23]A No, I am not.

[24]Q Do you contend that you have any

[25]special expertise in the area of oncology?
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[2]A No.

[3]Q You express no oncological opinions,

[4]therefore; am I correct?

[5]A That is correct.

[6]MR. STEPHENSON: I have nothing

[7]further.

[8]Thank you, doctor.

[9]FURTHER EXAMINATION BY MR. HERNANDEZ:

[10]Q Doctor, in terms of an area, what

[11]percentage of your income is derived from

[12]medical-legal involvement?

[13]A Under 5 percent.

[14]Q When you say you have no oncological

[15]experience, experience in oncology, you're speaking

[16]about rate of growth and that type of thing; is that

[17]correct?

[18]MR. STEPHENSON: **[*119]** The whole field is

[19]what my question was directed.

[20]MR. HERNANDEZ: That's what I'm trying

[21]to find out.

[22]A Yes.

[23]MR. STEPHENSON: Whose question did you

[24]answer?

[25]A (Pointing to Mr. Hernandez.)

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[2]MR. STEPHENSON: Mr. Hernandez?

[3]THE WITNESS: Yes.

[4]Q Doctor, your answers, and I hope I

[5]don't misunderstand Mr. Stephenson's questions, but

[6]certain also as to what should be done in ordering

[7]tests by a physician presented with a constellation

[8]of signs that might include compression of spinal

[9]cord tumor, your opinions remain as you stated; is

[10]that correct?

[11]A Yes.

[12]MR. HERNANDEZ: Thank you. That's all

[13]I have.

[14](TIME NOTED: 12:50 P.M.)

[15]

[16]

[17]_____

[18]GEORGE DIGIACINTO

[19]

[20]

[21]Subscribed and Sworn to before me

[22]this _____ day of _____, 1993.

[23]_____

[24]NOTARY PUBLIC

[25]

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