TESTIMONY OF ALI GUY, MD; 1996 Trial Trans. LEXIS 687

Supreme Court of New York, Rockland County

Index No.: 6894/93

November 22, 1996

Reporter
1996 Trial Trans. LEXIS 687 *

CAROL GARBER and IRA GARBER, Plaintiffs, -against- LAWRENCE KATZ, M.D., NORMAN MICHAELS, C.P.A., as Executrix of the Estate of MARTIN POPOWITZ, MD, Deceased and SANFORD G. KRYGER, M.D., individually and doing business as AIRMONT ORTHOPAEDICS-SPORTS MEDICINE, a partnership, and AIRMONT ORTHOPAEDICS-SPORTS MEDICINE, P.C., a Professional Medical Corporation, Defendants.

Expert Name: Dr. ERAJ GUY, M.D., F.A.A.P.M.R.

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Counsel

[*1] KELNER & KELNER, ESQS., Attorneys for the Plaintiffs, New York, New York, BY: ROBERT B. MARCUS, ESQ.

FELDMAN & KLEIDMAN, ESQS., Attorneys for the Defendants, Fishkill, New York, BY: PAUL KLEIDMAN, ESQ.

Judges

BEFORE HON. ALFRED J. WEINER, Acting Justice of the Supreme Court

Proceedings

2

[1]
[2]Senior Court Reporter

[3](Jury is not present.)

[4]THE COURT: The Court reserved decision on

[5]the objection of the plaintiff yesterday regarding

[6]the use of the custom and practice, and the

[7]objection is again overruled. **[*2]** The motion to

[8]strike is denied.

[9]Before the jury comes in, does the attorney

[10]for the defendant make wish to make an

[11]application?

[12]MR. KLEIDMAN: Yes, your Honor.

[13]THE COURT: Go right ahead.

[14]MR. KLEIDMAN: Your Honor, the plaintiff

[15]plans to call as a witness Dr. Ali Guy, a

[16]physician who has cared for and treated

[17]Mrs. Garber since approximately the spring of

[18]1993.

[19]We had, during the course of discovery,

[20]requested exchange of medical reports as well as

[21]demanded an authorization for the records of

[22]Dr. Guy. I note that in the exchanged

[23]information, we were not provided with a report

[24]dated May 13, 1993. As a matter of fact, counsel

[25]himself only tells me that he came into possession

[3]
[1]
[2]of it this morning.

[3]I would like to object and preclude Dr. Guy

[4]from testifying with respect to that report since

[5]it was not properly or timely exchanged.

[6]THE COURT: What is the substance of that

[7]report?

[8]MR. KLEIDMAN: The substance of that report

[9]contains a detailed history as he obtained it

[10]apparently on the day of his consultation as well

[11]as physical **[*3]** examination findings made at that

[12]time, assessment and plan made at that time.

[13]THE COURT: What's surprise is there, if

[14]any, based upon your recent -- upon your now

[15]reviewing this, how are you prejudiced?

[16]MR. KLEIDMAN: I'm prejudiced in the sense,

[17]your Honor, that, first of all, I did not have an

[18]opportunity to review the report prior to the

[19]doctor testifying.

[20]THE COURT: I understand that.

[21]MR. KLEIDMAN: I did have not time to

[22]exchange with my expert witness the substance of

[23]this report, a validity of this report and the

[24]significance of the findings of this report, and,

[25]therefore, my ability to cross examine this

[4]
[1]
[2]witness is hamstrung. I think the timely exchange

[3]has not provided the parties with full and fair

[4]opportunity to proceed to trial including cross

[5]examination, and I think by the failure to

[6]exchange this prior to this morning, I have been

[7]so hamstrung.

[8]THE COURT: Thank you. Mr. Marcus?

[9]MR. MARCUS: May I be heard?

[10]THE COURT: Yes, you may.

[11]MR. MARCUS: First of all, this was not a

[12]report prepared for me or at my request.

[13] **[*4]** Apparently Dr. Guy prepared this narrative report

[14]in connection with the Worker's Compensation case

[15]in order to set up the file so that he could

[16]continue to get paid thereafter. We didn't know

[17]about it except it was part of his office

[18]records. We provided counsel with an

[19]authorization years ago for those records. We

[20]understand from Dr. Guy that as recently as July

[21]of this year, his office took $ 42 for copying

[22]costs from the defendant and provided them with

[23]copies of his entire record.

[24]Furthermore, Dr. Guy tells me that

[25]everything contained in that report is contained

[5]
[1]
[2]in his office notes, which they already have, and

[3]is summarized yet again in the report that was

[4]exchanged earlier in October.

[5]So I don't think there's any mysterious

[6]surprise. There's nothing new in that. There's

[7]nothing shocking in there. It's simply the

[8]initial impression that he had memorialized in a

[9]typed note for the Worker's Comp carrier as

[10]opposed to just using office his notes or a Comp

[11]form.

[12]THE COURT: The objection is overruled.

[13]Please bring the jury in.

[14]MR. KLEIDMAN: **[*5]** May I just be heard?

[15]THE COURT: No.

[16]MR. KLEIDMAN: May we approach about another

[17]matter?

[18]THE COURT: No. Is that regarding

[19]scheduling?

[20]MR. KLEIDMAN: Yes.

[21]THE COURT: You may approach.

[22](Side-bar discussion.)

[23](Jury present.)

[24]THE COURT: All right. Plaintiff may

[25]continue.

[6]
[1]
[2]MR. MARCUS: Yes, your Honor. At this time

[3]the plaintiff calls Dr. Ali Guy.

[4]A L I G U Y, MD, having been first duly sworn

[5]by the Court, took the stand, was examined, and

[6]testified as follows:

[7]THE COURT: Have a seat, please.

[8]THE COURT OFFICER: In a loud voice, state

[9]your full name, spell it, and your business

[10]address.

[11]THE WITNESS: My name is Dr. Ali Guy,

[12]A-L-I, last name is Guy, G-U-Y. My current office

[13]address is 1234 Central Park Avenue, Yonkers, New

[14]York 10710.

[15]THE COURT: Thank you very much.

[16]You may examine.

[17]MR. MARCUS: Thank you.

[18]THE COURT: I didn't say good morning,

[19]ladies and gentlemen of the jury.

[20]MR. MARCUS: Neither did I. Good morning,

[21]ladies and gentlemen.

[22]Do you want to say good **[*6]** morning before I

[23]get started?

[24]MR. KLEIDMAN: I'll say good morning when I

[25]get up.

[7]
[1]
[2]DIRECT EXAMINATION BY MR. MARCUS:

[3]Q Good morning, Dr. Guy.

[4]A Good morning.

[5]Q Before coming into the courtroom today, did

[6]you and I have an opportunity to review your records and

[7]go over some of the salient points of your testimony this

[8]morning?

[9]A Yes.

[10]Q When did we do that?

[11]A Around 8 o'clock this morning.

[12]Q And have we met before that to discuss this

[13]case?

[14]A No.

[15]Q Okay. Did we speak on the telephone before

[16]this?

[17]A Yes, we did.

[18]Q Dr. Guy, are you a physician licensed to

[19]practice medicine in the State of New York?

[20]A I am.

[21]Q And when did you receive your license?

[22]A 1985.

[23]Q Could you briefly go over your educational

[24]background for the jury, please?

[25]A College, I went to Queens College. Medical

[8]
[1]
[2]school, I graduated from University of Northeast in the

[3]Dominican Republic in June of 1981. I then did three

[4]separate residencies. First one, a period of 18 months

[5]in the field of internal **[*7]** medicine at Mount Sinai Medical

[6]Center, New York. Then I did one year of general surgery

[7]at Cabrini Medical Center. Then I did three years of

[8]physical medicine and rehabilitation at Mount Sinai

[9]Medical Center again.

[10]I'm board certified in the field of

[11]physical medicine and rehabilitation. I'm a clinical

[12]instructor at the Hospital for Joint Diseases, Orthopedic

[13]Institute. I'm also on the staff at Cabrini Medical

[14]Center, at the Hospital for Joint Diseases, Orthopedic

[15]Institute.

[16]Q Do you have any connection with the Rusk

[17]Institute?

[18]A yes.

[19]Q What is your connection?

[20]A Well, the Hospital for Joint Diseases is a

[21]major affiliate of Rusk and the residents of Rusk rotate

[22]through the Hospital for Joint Diseases. I also give

[23]lectures to the residents at Rusk periodically. At the

[24]NYU Medical Center, I'm a direct affiliate for the

[25]Hospital of Joint Diseases.

[9]
[1]
[2]Q Okay. Could you tell the jury what board

[3]certification in this specialty means, how one obtains

[4]it?

[5]A Board certification is the equivalent of a

[6]PhD. It's the highest degree which you can **[*8]** obtain in

[7]your level of specialty. In my field, in order to become

[8]board certified, you must first satisfactorily complete

[9]one year of a prerequisite in another field other than

[10]physical medicine and rehabilitation. You must then

[11]satisfactorily pass the yearly examinations given by the

[12]Department of Physical Medicine and Rehabilitation at

[13]Mount Sinai, score at least 70 percent or higher on a

[14]yearly basis. After you graduate, you sit in for an

[15]eight-hour examination and you must pass that

[16]examination. You must then be in private practice for a

[17]period of not less than 18 months, be sponsored by two

[18]other board-certified doctors who know you closely.

[19]There has to have been no complaints against you in any

[20]capacity, criminally, legally, ethically. You then go to

[21]the Mayo Clinic where all the research and textbooks are

[22]written. You are then tested orally by a group of

[23]doctors in the field. Other tests are necessary, the

[24]study of gait analysis, electromyography, MRI's, EMG's,

[25]orthopedic medicine, neurology and other principles of

[10]
[1]
[2]medicine. Once you prove co these doctors that your

[3]knowledge **[*9]** is up to par, then you are passed and you're

[4]given a title of Diplomate and Fellow at the American

[5]Board of Physical Medicine and Rehabilitation.

[6]Q What other requirements are there to become

[7]a clinical instructor who teaches other doctors?

[8]A You have to have good credentials and you

[9]have to have deep-funded knowledge and your superiors

[10]have to know you personally. They must be convinced that

[11]you have knowledge to do a good job in teaching the

[12]residents.

[13]Q And what's the difference between -- now,

[14]you said your field is physical medicine and

[15]rehabilitation. Is that also known as physiatry?

[16]A Yes.

[17]Q Okay. And what's the difference between a

[18]physiatrist, an orthopedic surgeon, such as Dr. Katz, and

[19]a neurologist?

[20]A Physical medicine and rehabilitation has a

[21]big overlap between the two fields, orthopedics and

[22]neurology. Our title is physiatrist. We are not

[23]considered orthopedic surgeons nor neurologists, but we

[24]have a lot of training in orthopedics, nonsurgical

[25]orthopedics. We don't do surgery. In fact, we try to

[11]
[1]
[2]avoid surgery if at all possible. A **[*10]** good name for

[3]physical medicine would be orthopedic medicine, or

[4]nonsurgical -- well, orthopedics.

[5]The difference between us and an orthopedic

[6]surgeon is, 1, we don't do surgery. 2, we do not

[7]concentrate on the bony system as much as the orthopedic

[8]surgeons do. We do not manage acute fractures. We

[9]manage postacute fracture cases once the cast comes off.

[10]Then we begin to -- the process of rehabilitation,

[11]restoring body function.

[12]We also concentrate on the musculoskeletal

[13]system, the peripheral nervous system as opposed to a

[14]neurologist, who concentrates on the central nervous

[15]system. It's the nervous system of the brain, diseases

[16]like Alzheimer's, multiple sclerosis, Parkinson's

[17]Disease, things of that nature and diseases of the spinal

[18]cord and the peripheral system falls under our

[19]specialty. In fact, in most teaching hospitals, wherever

[20]there's a neck or back problem, they refer the patient to

[21]physiatrist.

[22]MR. KLEIDMAN: Objection as to what they do

[23]in most hospitals. Move to strike.

[24]THE COURT: Sustain the objection.

[25]A We refer patients to orthopedic surgeons, **[*11]**
[12]
[1]
[2]neurologists, vice versa. We refer to other specialties

[3]and the other specialists refer to us, as well. The

[4]function -- the main function of physiatrists is to

[5]restore body function, bring a patient to the optimal

[6]level of care prior to their injuries. Whether it's in a

[7]nerve injury, in a spinal cord injury, from an accident,

[8]from a stroke, or an amputation, our job is to restore

[9]function.

[10]Q By the way, as part of your training, were

[11]you trained in the reading an interpretation of

[12]diagnostic tools, such as x-rays, CAT scans and MRI's?

[13]A Yes. It's part of our boards.

[14]Q Okay. And do you regularly, in the course

[15]of your practice, read and interpret MRI films, CAT

[16]scans, x-rays?

[17]A MRI and CAT scans of the spine, yes. Not

[18]the joints. I don't have as much training in the joints

[19]as I do in the spine.

[20]Q Okay. Now, in the course of your work, do

[21]you deal with traumatic injuries as opposed to disease

[22]processes that may be congenital or otherwise obtained or

[23]both?

[24]A I deal with both but mostly traumatic

[25]injuries.

[13]
[1]
[2]Q Now, do you lecture **[*12]** at all, Dr. Guy?

[3]A I do.

[4]Q To whom?

[5]A To residents, medical students, rehab

[6]nurses, to lay people, to attorneys, to -- I'm not

[7]allowed to use this word, but other defendants.

[8]Q Now, Dr. Guy, do you get paid for the

[9]teaching duties that you perform --

[10]A No.

[11]Q -- as clinical professor?

[12]A No. It's strictly voluntary. I enjoy

[13]teaching.

[14]Q Have you ever testified in a court before

[15]today?

[16]A Many times.

[17]Q How many times would you say?

[18]A On the average, five to six times per

[19]year. Sometimes more, sometimes less, but that's the

[20]average.

[21]Q What percentage of your overall

[22]professional time is devoted to the treatment of

[23]patients?

[24]A I would say 98 percent.

[25]Q What percentage is devoted to teaching?

[14]
[1]
[2]A Out of that 98 percent, I would say about

[3]15 percent.

[4]Q 15 percent of the 98 percent is for

[5]teaching?

[6]A Yes, teaching residents.

[7]Q Do you teach them by demonstrating on

[8]patients?

[9]A Both, by formal, didactic lectures as well

[10]as making teaching rounds with them, **[*13]** as well as clinical

[11]rounds with them through the clinics at the hospital and

[12]sometimes they also rotate through my office.

[13]MR. MARCUS: Your Honor, at this time, I

[14]would move the admission of Dr. Guy as an expert

[15]witness in the field of physical medicine and

[16]rehabilitation.

[17]THE COURT: Motion is granted.

[18]Q Doctor, are you being compensated for your

[19]time today?

[20]A I am.

[21]Q In what way are you being compensated?

[22]A For canceling my patients, being away from

[23]my practice. In this particular case, I'm being

[24]compensated at the rate of $ 350 per hour.

[25]Q Depending on how long you're here today

[15]
[1]
[2]will determine how much you're paid?

[3]A Yes, that is correct.

[4]Q Now, Doctor, you say you testify five to

[5]six times a year. Is that on behalf of plaintiffs, on

[6]behalf of defendants, on behalf of both?

[7]A Majority of the cases it's in the patients

[8]that I have treated, patients that I have treated. I

[9]guess that falls under the plaintiff category because I

[10]am a treating doctor.

[11]Q Have you ever testified in court on behalf

[12]of the defense in **[*14]** a case?

[13]A Yes, I have.

[14]Q When most recently can you recall

[15]testifying for the defense?

[16]A The case of Melissa Price versus NYU

[17]Medical Center. That was about maybe six months ago.

[18]Q Now, in addition to treating your patients,

[19]do you -- are you, from time to time, called upon to

[20]perform what are referred to as independent medical

[21]examinations on behalf of defendants?

[22]A Yes.

[23]Q Okay. Do you do that from time to time, as

[24]well?

[25]A I do.

[16]
[1]
[2]Q Okay. Dr. Guy, did there ever come a time

[3]when you first encountered a patient named Carol Garber?

[4]A Yes.

[5]Q Did you bring with you today your office --

[6]office chart and records referable to Carol Garber?

[7]A Yes, I did.

[8]Q Is that that pile of material there?

[9]A Yes.

[10]Q For how long a period of time have you been

[11]treating Carol Garber?

[12]A I've been treating Ms. Garber since May

[13]of '93.

[14]Q Is she continuing under your active care

[15]today?

[16]A She is.

[17]Q Have you seen her on a regular basis over

[18]these three years or did you see her and then stop **[*15]** seeing

[19]her for a couple of years and then pick up again?

[20]A I would say for the most part I've been

[21]seeing her on an average basis of a monthly basis. Some

[22]months I've seen her more regularly. She's been coming

[23]on a weekly basis for trigger point injections and

[24]paraspinal injections.

[25]Q Now, do you know how she was referred to

[17]
[1]
[2]you?

[3]A I believe she told me she was referred

[4]through one of the doctors that she was treating with.

[5]They wanted her to find a physiatrist and she called a

[6]couple of hospitals and she had gotten my name through

[7]one the of the doctors at Rusk.

[8]Q And when for the first time did you

[9]encounter her?

[10]A May 13, 1993.

[11]Q Doctor, before we get into the treatment,

[12]you mentioned something about paraspinal injections,

[13]trigger point injections. Do you want to tell the jury

[14]what that means?

[15]A Yes. A trigger point is defined an area of

[16]muscle cachexia. The muscle becomes fibrous, becomes

[17]degenerated, and when you do a trigger point injection,

[18]you inject a local anesthesia in the form of 1 percent

[19]lidocaine in the area. You numb **[*16]** the area. Then with a

[20]needle you break up all the adhesions. Therefore, the

[21]adhesions in the area of degeneration breaks up. The

[22]muscles in the surrounding area, by sprouting, form new

[23]muscle fibers and thereby get rid of the muscle that's

[24]scarred or that has become damaged and hopefully all the

[25]toxins that have been trapped in the muscle, they're all

[18]
[1]
[2]able to be washed out of the area that has become

[3]ischemic and that spasm around the area backs up.

[4]The trigger point is a very painful area on

[5]physical examination. You have pinpoint tenderness with

[6]a palpable nodule inside the muscle fiber, and that can

[7]be caused from trauma. And once you break up the

[8]adhesions, you hope that new muscle fibers form and the

[9]area does not become as painful as before.

[10]Q You also mentioned something about

[11]paraspinal injections.

[12]A Yes.

[13]Q Does that have to do with the peroneal

[14]muscle?

[15]A Peroneal muscle.

[16]Q Could you tell the jury what that is?

[17]A In the lower back, we have five lumbar

[18]vertebra. Between each vertebra, we have a disc. Right

[19]behind, we have the spinal **[*17]** canal and where the spine lies

[20]as it goes from the lower portion of the body to the

[21]brain, it gives rise to the nerve roots on the right and

[22]left side. These nerve roots in turn branch off. All

[23]the nerves that go to your legs come off the nerve roots

[24]in the lower back. Each nerve root -- rather each muscle

[25]in the leg correlates to a specific nerve root in the

[19]
[1]
[2]lower back. For instance, the calf muscles and the

[3]gastrocnemius muscles is from the nerve root from the

[4]L5-S1 nerve root, the first sacral vertebra. And when a

[5]nerve gets compressed or irritated and you have

[6]radiculopathy -- radiculopathy, R-A-D-I, it is derived

[7]the Latin word which means nerve roots, opathy,

[8]O-P-A-T-H-Y means any kind of pathological condition. So

[9]when a nerve root gets inflamed, you get a shooting pain

[10]down the legs with tremendous stiffness of the lower

[11]back. So we inject a combination of 3 cc's of 1 percent

[12]lidocaine, 40 milligrams of Prednisolone, which is a

[13]long-acting cortisone derivative, and 4 milligrams of

[14]Dexamethasone, which is a short-acting cortisone

[15]derivative. You bathe the area around the nerve root

[16] **[*18]** with this combination. And you hope that the anesthetics

[17]break up the inflammation at the area. You inject at the

[18]level where the most inflammation is on both sides. You

[19]give one injection to the right side, one injection at

[20]left side. You palpate the spinous pulposus, which is

[21]what you touch in the back, in your back, you go down

[22]laterally on both sides, you direct your needle at a 45

[23]degree angle so you go right above the area without

[24]actually hitting the spinal canal, the epidural space.

[25]This is not an epidural space. The paraspinal injection

[20]
[1]
[2]is for pain management and trying to reduce

[3]inflammation.

[4]Q By the way, Doctor, these are two more

[5]models. During the course of your testimony, feel free,

[6]if you wish to refer to any of them.

[7](Models submitted.)

[8]Q Now, could you tell us, what happened on

[9]the first visit that Carol Garger made to your office?

[10]Do you need to refer to your records from time to time?

[11]A Yes.

[12]Q Okay.

[13]A I basically reviewed some past medical

[14]records. I took a history and I examined her.

[15]Q And what was the history that you **[*19]** took from

[16]her?

[17]A The history was that she was 58 years of

[18]age, a registered nurse. On 12/24/92, when she was

[19]working on the job, she twisted her left foot and ankle

[20]and she then developed lower back pain. She was seen by

[21]a doctor that was affiliated with the hospital and she

[22]saw an orthopedist at the hospital and initially she was

[23]told that she had a sprain or torn ligaments in her foot

[24]and ankle.

[25]She was then referred for a neurological

[21]
[1]
[2]consultation. An MRI was performed. She was then

[3]referred for surgical intervention for the L5-S1 disc

[4]herniation with a loose fragment compressing on the L5

[5]nerve root. She had surgery. She developed a left foot

[6]drop. She was wearing on ankle foot orthosis for the

[7]left foot drop.

[8]She complained of numbness and tingling in

[9]her foot and her toe with lower back pain, and she stated

[10]that she had no significant improvement from the surgery

[11]except for some reduction in her lower back discomfort.

[12]The foot drop did not return.

[13]Then past medical history was significant

[14]for history of a small -- slight amount of hypertension,

[15] **[*20]** treated with diet and Maxzide, M-A-X-Z-I-D-E. History of

[16]a prior injury to her back, 1974, 1976, resulting in

[17]laminectomy, L4-5 disc herniation, laminectomy which was

[18]performed on 3/79 with good results, history of bilateral

[19]carpal tunnel syndrome and status post total abdominal

[20]hysterectomy. Then I went on to examine her.

[21]Q Now, Doctor, what did you find on -- by the

[22]way, before you get into that, could you tell the jury

[23]what a foot drop is?

[24]A When you have no power in the foot at all

[25]to dorsiflex and plantar flex your foot.
[MISSING PAGE 22]

[23]
[1]
[2]various muscles from your legs in your anatomy so you

[3]know what muscle is innervated by which nerve root. As I

[4]stated, the gastrocnemius muscle is supplied by L5-S1.

[5]The extensor hallicus longus muscle is a L4-L5 muscle

[6]supplied by the L5 nerve root. And if you -- when you

[7]insert a model -- the needle into these muscles, you have

[8]an EMG continue with an oscilloscope. An oscilloscope is

[9]about 4 inches by 4 inches. When you insert a needle

[10]into a normal muscle, on your screen, there is no

[11]increased activity. There is no going up and down. **[*21]** It's

[12]silent. When you insert a needle into an abnormal

[13]muscle, you find increased insertional activity, a lot of

[14]activity on the screen. You look and hear. You hear

[15]abnormal sound waves. Your ear should be trained to pick

[16]up positive sharp waves and fibrillation potentials,

[17]which are both pathological. Positive sharp waves are

[18]large downward deflections. If you see a large downward

[19]positive wave, the pathology is abnormal. Then you look

[20]at abnormal responses on the screen and view them. You

[21]record them and you get a tracer and then you go to the

[22]lower back muscles to confirm if the anatomy is evoked

[23]when you touch them. The iliac crest in the lower back,

[24]you go all the across to the back. That's the L4

[25]region. The one below is L5. Then you insert your

[24]
[1]
[2]needle in the muscles through 3 centimeters or inches

[3]away from the middle and you insert needle into different

[4]levels and report the abnormalities. That's basically

[5]what an EMG is.

[6]Q What does it tell you when it's all done?

[7]A It tells you if there's a problem with the

[8]peripheral nerves versus the nerve root and/or a

[9]combination **[*22]** of both so you can make an accurate diagnosis

[10]so you can render appropriate treatment.

[11]Q And you mentioned a peroneal nerve.

[12]A Yes.

[13]Q That's a peripheral nerve?

[14]A Yes.

[15]Q And nerve roots are not peripheral nerves?

[16]A That is correct.

[17]Q Okay. Now, by the way, did you perform

[18]such a test on Ms. Garber?

[19]A Yes, I did.

[20]Q When did you perform that?

[21]A After I obtained authorization from the

[22]Workman's Comp Carrier. I performed an EMG on

[23]Mrs. Garber on 7/8/93, which revealed electrical evidence

[24]of --

[25]MR. KLEIDMAN: Objection. There's no

[25]
[1]
[2]question.

[3]Q What did that test reveal?

[4]A It revealed electrical evidence of

[5]bilateral L4 to SI radiculopathy.

[6]Q Meaning what in layman's terms, for the

[7]jury?

[8]A There's a nerve root compression in the

[9]lower back from the last two nerve roots in the lumbar

[10]spine, the nerve root between the fourth and fifth lumbar

[11]vertebra and the nerve root between the lumbar and first

[12]sacral bone area.

[13]Q Now, did you perform an examination on May

[14]13th?

[15]A I did. **[*23]**
[16]Q And what were your findings, your physical

[17]findings on your examination?

[18]A The most dramatic and most significant

[19]abnormality was the left foot drop with hyperemia,

[20]increased redness of all five toes, callous formation at

[21]the metatarsal heads. Callous formation is when you have

[22]thickened skin from abnormal wear and tear on the area,

[23]abnormal pressure on the area. Muscle power was trace in

[24]dorsiflexion and other muscles of the foot and the muscle

[25]strength was four over five. The back had a well-healed

[26]
[1]
[2]scar from a lumbar laminectomy. There was no

[3]tenderness. Range of motion appeared within functional

[4]limits. Range of motion and muscle power test was

[5]essentially unremarkable except the left foot and ankle

[6]area. Sensation was diminished to pinprick and touch.

[7]Left medial and left lateral calf and dorsum of the left

[8]foot, that's the distribution of the -- mostly L5-S1

[9]nerve root distribution -- the reflexes were one to two

[10]plus, symmetrical, except for the left ankle jerk, unable

[11]to elicit. That's the SI nerve root. If you cannot

[12]obtain an ankle jerk, that indicates there's SI

[13] **[*24]** compressions. The gait, the way she walked, was slow but

[14]fair and acceptable with the ankle-foot orthosis.

[15]Q She was wearing some sort of device?

[16]A Yes.

[17]Q I show you this, Dr. Guy, and ask you if

[18]this is the kind of device she was wearing?

[19]A Yes.

[20]MR. MARCUS: Could we have that marked, your

[21]Honor?

[22]THE COURT: Yes, certainly.

[23]MR. MARCUS: Or deemed marked?

[24]THE COURT: Would don't we deem it marked.

[25]Q What is that device, Dr. Guy?
27

[1]
[2]A This is an ankle-foot orthosis or PLSO,

[3]posterior leaf spring orthosis. Both of these names

[4]denote this device.

[5]Q Is that a custom-made device?

[6]A Yes, it is.

[7]Q And what's the purpose of that device?

[8]A When a patient has a foot drop, during

[9]normal gait pattern, the patient cannot dorsiflex or

[10]plantar flex. This allows the patient to -- this is a

[11]hard plastic. It's pretty stable, but it has some leaf

[12]spring in it when you walk. It assists with proper foot

[13]elevation off the ground.

[14]Q Did you have any other findings at that

[15]time?

[16]A Those were the basic, significant

[17] **[*25]** findings.

[18]Q And did you have any impression about this

[19]patient's condition and did you formulate a plan of

[20]treatment for her?

[21]A First I made my diagnosis.

[22]Q Which was?

[23]A L3-L4 disc herniation, L5-S1 disc

[24]herniation with a left foot drop, status post L5-S1

[25]laminectomy, discectomy on 1/93. History of prior L4-L5
28

[1]
[2]laminectomy due to a disc herniation. These were my

[3]basic three initial diagnoses. Then I requested

[4]authorization from the Workman's Comp Carrier.

[5]Q For what kind of treatment?

[6]A For therapy and EMG's.

[7]Q And were you granted that authorization?

[8]A Yes.

[9]Q And did you begin to treat this patient?

[10]A Yes.

[11]Q Could you tell us, please, about the

[12]treatment course that followed and bring us up to the

[13]present time?

[14]A I gave her medications in the form of

[15]antiinflammatory medications and pain medications from

[16]Naporsyn, Motrin to Tylenol with Codeine. I prescribed

[17]physical therapy for her. She came to my Long Island

[18]office where I have a hydrotherapy facility. I

[19]instructed her on hydrotherapy, which is the ideal

[20] **[*26]** environment for rehabilitation where you have an injury

[21]of this caliber. You get a tremendous amount of

[22]flexibility in the water. I taught her those exercises.

[23]I told her to seek out a place with a pool. She received

[24]injections into the hip, the bursa, into different

[25]trigger points. She received paraspinal injections. And

29

[1]

[2]I had to make some adjustments with the orthosis. A time

[3]came from where her foot and ankle became swollen. She

[4]could not fit her foot and ankle because of the

[5]swelling. I had to order a new one. I had to monitor

[6]for skin breakdown in the foot-ankle area. A time came

[7]where she had more and more difficulty walking around

[8]with the brace. I then prescribed a wheelchair for her

[9]for long-term use and ambulation.

[10]Q Did you ever prescribe a cane?

[11]A Yes. She had that from the beginning.

[12]Q Okay. Now, over the course of three years,

[13]what have you observed with regard to her condition,

[14]generally? What's been the progression of her condition,

[15]has it gotten better, has it that gotten worse, remained

[16]the same?

[17]A Some waxing and waning, getting better,

[18]getting **[*27]** worse, and eventually for the most part of that

[19]it's of a progressive nature. She has -- she's getting

[20]atrophy in the lower extremity muscles in the left leg.

[21]She's --

[22]Q What is atrophy?

[23]A Atrophy is loss of muscle bulk where the

[24]muscle shrinks.

[25]Q Is that from disuse?

30

[1]
[2]A From disuse and/or nerve root origin.

[3]She's been having more stiffness in her lower back. Her

[4]range of motion is diminishing. As a result of altered,

[5]abnormal biomechanics, she's stressing her knee joints

[6]more. She's stressing her hip joints more. She's

[7]getting recurrent bursitis.

[8]Q What do you mean by biomechanics and

[9]altered biomechanics?

[10]A Before I could answer that, I would have to

[11]explain what a normal gait pattern is and normal walking

[12]and then I can go into the biomechanics.

[13]Q Fine. Could you do that?

[14]THE WITNESS: May I be allowed to stand?

[15]THE COURT: Yes, certainly.

[16](Witness left the stand to demonstrate.)

[17]A Normal biomechanics of a gait pattern, heel

[18]strikes first --

[19]MR. MARCUS: Excuse me. Is it all right if

[20]the jury stands up?

[21] **[*28]** THE COURT: Yes. The jury may stand up.

[22]Okay. Fine.

[23]If you could just slow down just a little

[24]bit, the reporter has to take this down.

[25]THE WITNESS: I'm sorry.

[31]
[1]
[2]A Normal gait pattern, heel strikes first,

[3]then toes are down. Then the other foot, you have the

[4]heel going up, heel strike is also first. It's not toe

[5]first. Heel strike is first. If you change this normal

[6]pattern, you overstress the knee joint and the hips

[7]because you're stressing the muscles and the joint

[8]abnormally so you cause disfunction and overstress to the

[9]tendons, ligaments and cartilage in the knee joint.

[10]That's the first pattern. When -- when you don't perform

[11]dorsiflexion and plantar flexion, what do you do? You

[12]overstretch the muscles. You stretch them. Then the

[13]foot -- the knee rather starts to hurt further. What do

[14]you do when the knee hurts? You compensate by unloading

[15]to this side. When you overload the other side, what

[16]happens? You're overloading your hip on this side and

[17]you're overloading your knee on the other side. So this

[18]side gets overloaded and overstressed. So you're using

[19]abnormal problems **[*29]** for this side. You get stressing of

[20]the cartilage, the tendons, the ligaments, of the musclei

[21]and also the bursa in the hip.

[22]The bursa in the hip is a patch that

[23]protects the hip joint like a shock absorber. When the

[24]bursa gets inflamed from too much compression to the

[25]area, it gets swollen and it becomes very painful. So

[32]
[1]
[2]what do you do? This side is painful. You try to unload

[3]to this side and overload the other side. You're

[4]constantly going from one side to the other, overloading

[5]the other side. This is what happens.

[6](Witness resumed the stand.)

[7]Q And what's the long term consequence of

[8]that happening?

[9]A It's a vicious cycle. You overload. You

[10]overstress the different structures and you cause

[11]abnormal or early what is known as traumatic arthritis to

[12]set in to the affected areas, especially the knee joint

[13]and the hips.

[14]Q Now, does the use of the brace, the

[15]orthosis device, eliminate this problem?

[16]A Does not. It helps slightly. Does not

[17]eliminate. The brace itself has problems. It's hard

[18]plastic. When you put skin separated by a sock in a hard

[19] **[*30]** plastic, you sweat abnormally, especially in the summer,

[20]and you have increased friction and your skin wears and

[21]tears much more readily. You get skin breakdown. You

[22]get callous formations at the bottom of the foot and also

[23]around the metatarsal heads.

[24]In fact, if I may be allowed to show in the

[25]patient, I can explain better.
33

[1]
[2]Q We'11 get to that in a moment.

[3]Now, Doctor, other than the

[4]electromyography studies in the past three years, have

[5]you ordered any other diagnostic tests for this patient

[6]from time to time?

[7]A Yes. MRI's of the patient's knee, MRI's of

[8]the patient's shoulder.

[9]Q All right. And with regard to the knee,

[10]was that as a consequence of the wear and tear that

[11]you've just been describing to us from this gait

[12]alteration?

[13]A Yes.

[14]MR. KLEIDMAN: Objection to the form.

[15]THE COURT: I'll sustain the objection as to

[16]the form.

[17]Q Doctor, could you tell us, please, what the

[18]reason was for ordering an MRI for the knee?

[19]A The patient was complaining of persistent

[20]knee pain and I was trying to find out what was the cause

[21] **[*31]** of the knee pain, was it a torn meniscus, was it a torn

[22]ligament, so after I make an accurate diagnosis I can

[23]render the appropriate treatment options. And we did the

[24]MRI and we found that there was a lot of arthritis

[25]setting into the knee joint. There was real serious

[34]
[1]
[2]arthritis.

[3]Q And do you have an opinion as to whether

[4]that was a consequence of the altered gait or from some

[5]other cause?

[6]A Well, she's a -- right now she's a

[7]59-year-old patient --

[8]Q 62. You're very kind.

[9]A and natural aging arthritis does set in,

[10]but this altered mechanics is accelerating the normal

[11]arthritic process that happens in a normal body. It's

[12]causing an acceleration of that normal process,

[13]chondromalacia.

[14]Q What's chondromalacia?

[15]A It's an inflammation of the kneecap where

[16]the kneecap wears and tears abnormally in its socket and

[17]causes crepitation, a grinding sensation, and stiffness

[18]and pain in the knee joint. And also you get

[19]patellofemoral arthritis again from this abnormal wear

[20]and tear.

[21]Q And did you find that condition in her

[22]knee?

[23]A Yes.

[24] **[*32]** Q Now, Doctor, is her condition -- when was

[25]the last time you looked at her in the office?

35

[1]
[2]A 10/31/96.

[3]Q Okay. And did you have an opportunity to

[4]examine her again this morning?

[5]A Yes.

[6]Q Here in the courthouse?

[7]A Yes.

[8]Q And were your findings today consistent

[9]with your findings of 10/31/96?

[10]A Yes.

[11]Q And is there any way to compare those two

[12]findings to when you first saw her three years ago?

[13]A They're getting progressively worse,

[14]especially the lower back. Initially, when I first saw

[15]her --

[16]MR. KLEIDMAN: Your Honor, may we approach?

[17]I have an objection.

[18]THE COURT: Your objection is noted.

[19]MR. KLEIDMAN: If I could state for the

[20]record my objection, the last --

[21]THE COURT: State the objection in this

[22]particular instance -- All right. State your

[23]objection.

[24]MR. KLEIDMAN: The objection is that the

[25]report that was last exchanged was for an
36

[1]
[2]examination of October 19, 1996, not October 31,

[3]1996, when the doctor says that he last examined

[4]the patient. That's not within the appropriate

[5] **[*33]** period of time as required by statute, and I

[6]object.

[7]THE COURT: The objection is overruled.

[8]Q Doctor, is her condition on October 19th,

[9]October 31st and today basically the same?

[10]A Yes.

[11]Q Can you tell us what those findings were?

[12]A Range of motion in the back is markedly

[13]diminished. There's a crepitation in both knees.

[14]Q What's crepitation?

[15]A Grinding sensation. There is swelling

[16]deformity in both knees. The atrophy in the left leg is

[17]much more pronounced. It's clearly visible. The gait

[18]pattern is slightly more altered than before. There's

[19]more skin breakdown on her skin than before. And she has

[20]more noticeable weakness than before.

[21]Q Now, Doctor, is it possible to demonstrate

[22]any of this to the jury with the patient here in the

[23]courtroom?

[24]A Yes.

[25]MR. MARCUS: Your Honor, may we proceed to
37

[1]
[2]do that?

[3]THE COURT: You may start to proceed, yes.

[4](Witness left the stand and demonstrated

[5]with Carol Garber.)

[6]A First, I want to show you the areas --

[7]MR. KLEIDMAN: Objection. There's no

[8]question.

[9] **[*34]** Q All right. Doctor, could you show us what

[10]your findings were on the patient?

[11]A First, I want to show you the appearance of

[12]the foot and ankle. They have increased redness in the

[13]toes as compared to this one. You have a lot of areas of

[14]skin breakdown on the second, third and fourth digits.

[15]That's from the rubbing on the floor when she tries to

[16]clear the floor and she has no power, so these toes

[17]scrape against the floor and this is what you get. As

[18]you could see, there's a lot of atrophy at the

[19]gastrocnemius muscles and extensor flexion muscle in the

[20]anterior portion of the leg. Look at the size of this

[21]leg. Look at the size of this leg. That's a lot of

[22]atrophy and the muscle bulk is completely different as

[23]compared to this side. This comes from disuse and nerve

[24]root compromise.

[25]Also, I want to show you the swelling

38

[1]
[2]deformity on both knees. Okay. There's some swelling

[3]deformity more pronounced on the left side as compared to

[4]the right side. Then when you examine the knee joint, I

[5]don't know if you can hear it, I can hear the grinding.

[6]I can hear the grinding, and with my hand, **[*35]** I can also

[7]feel the crepitation, the grinding, as well. And when

[8]you go from side to side, this is a little bit of pain

[9]and slight instability as well.

[10]Now, let's watch what happens when she

[11]walks. Remember when I showed you the normal gait

[12]pattern, it's heel strike first and toe down. You don't

[13]have that when you have altered your normal

[14]biomechanics. You stress the structures, your knees and

[15]your hip joints and also your lower back.

[16]Okay. What she has to do, she has to do

[17]hiking with her hip, her hip hikes to lift off the foot

[18]and then with the knee, she lifts it off and she puts it

[19]down but the foot and ankle has no movement, so she's

[20]overstressing her hip to lift up the leg. And also with

[21]this type of gait pattern and with the lack of power, you

[22]tend to fatigue very easily and you overstress the

[23]muscles.

[24]And now, let's -- let me show the bottom of

[25]the foot.

39

[1]
[2]Sit down again.

[3]Lift up the foot a little bit more.

[4]As you can see, there's a lot of callous

formation around here and over here on the metatarsals.

This causes metatarsalgia. When the **[*36]** metatarsals get

inflamed, they cause pain in this area and also in the

toes as well. This is because of abnormal increased

friction on the ground when she puts pressure here. Also

the sensation and the distribution of the L5-S1 is

diminished, so she has also altered sensation. This adds

insult to injury.

That's basically it.

And she has the back scar from the

laminectomy.

Q Could you show that to the jury, as well?

A Yes. This is the scar from the surgery,

which is well healed, but she has diminished backward

extension.

Could you bend backwards for us?

That's the best she can. There's no

backward extension. This indicates there's something in

the spine obstructing the normal pathway of a backward

bend and also from the prior surgery with stiffness and

arthritis setting it. Normally, you should be able to
40

bend backwards 20 to 30 degrees at least for a person of

her age. When you're younger you go to 40 to 50

degrees.

(Witness resumed the stand.)

Q Now, Dr. Guy, I'm going to ask you to

assume certain facts that are in evidence, **[*37]** either from

the testimony of Dr. Katz, the testimony of the plaintiff

or various medical records that have already been placed

[10]in evidence in this case and I would like to you to

[11]consider those facts together with your own findings over

[12]the three years that you have treated this patient and

[13]then I'm going to ask you a series of questions based

[14]upon that. All right?

[15]A Yes.

[16]Q Okay. First of all, I want you to assume

[17]that there has been testimony that the plaintiff first

[18]experienced a low back problem in 1974 when she was

[19]injured at work. She came under the care of an

[20]orthopedist, Dr. Pappalardo, who treated her through 1979

[21]nonsurgically. She had an additional injury in 1976 and

[22]she had, from time to time, episodes of exacerbation and

[23]remission where she would have back episodes and then it

[24]would resolve, and throughout that period she continued

[25]to work regularly in the school system as a guidance

[41]
[1]
[2]counselor and dean.

[3]In 1978, she underwent electromyography,

[4]which was performed at Rockland Neurological Associates

[5]by Dr. LaBrott for the lower portion of her anatomy and

[6] **[*38]** that the electromyography was reported as normal. There

[7]was no positive findings on the electromyography in

[8]1978. She was hospitalized later in 1978 for traction

[9]for a low back condition, and in March of 1979, she was

[10]operated on for an L4-L5 herniated disc, a lumbar

[11]laminectomy performed by Dr. Pappalardo at Good Samaritan

[12]Hospital. Her condition improved, but thereafter, over

[13]the next seven or eight years, she continued to have

[14]periods, intermittent periods, of back problems in her

[15]lumbar spine.

[16]She had a couple of automobile accidents

[17]that aggravated her condition, work-related problems, and

[18]periodically she would have exacerbations and remissions,

[19]but worked through the period.

[20]In the mid 1980's, she returned to school

[21]while continuing to work in the school system and

[22]obtained a registered nursing degree, and starting in

[23]1987 worked both in the school system and also as

[24]registered nurse on a part-time basis while continuing to

[25]experience intermittent back problems.

[42]
[1]
[2]I want you to assume that in 19 -- on April

[3]21, 1988, Dr. Zeitlin ordered and obtained a computed

[4] **[*39]** tomography of the lumbar spine, a CT scan, we'll talk

[5]about that in a moment, as to what that is, and that the

[6]impression of the CT scan was as follows: Transaxial

[7]sections through the Ll-2, L2-3 and L3-4 levels are

[8]entirely unremarkable. At the L4-5 level, the

[9]intervertebral disc is significantly degenerated. At the

[10]L5-S1 level, there is no abnormality seen. The only

[11]degenerative changes in the facets are at the L4-5 level

[12]and are relatively mild, and the impression was status

[13]post semi-hemilaminectomy, at L4-5 on the left. Severe

[14]degenerative disc disease, L4-5. No evidence of central

[15]spinal stenosis, foraminal stenosis, subarticular

[16]stenosis or recurrent disc herniation is observed.

[17]I want you to assume further that in

[18]October of 19 -- in late September of 1990 she bent in

[19]her shower to pick up a piece of soap and suffered an

[20]exacerbation of her lower back condition and that on

[21]October 2, 1990, she saw Dr. Katz in the emergency room

[22]at the Good Samaritan Hospital. I want you to assume

[23]further that Dr. Katz made findings at that time: The

[24]patient states recurrent pain, left leg and left hip, **[*40]**
[25]lower back, from accident of 9/27/74, and Dr. Katz
43

[1]
[2]dictated an emergency room consultation, where he said in

[3]pertinent part, has had -- Mrs. Garber is a 56-year-old

[4]woman who was injured in 1974 when she was pushed by a

[5]student against a water fountain and since then has had

[6]pain in her back with pain in her left leg necessitating

[7]a lumbar laminectomy by Dr. Pappalardo but has had

[8]multiple other minor injuries and persistent and

[9]gradually increasing symptoms in her left leg to the

[10]point over the past couple of weeks her pain has been

[11]getting worse radiating down the left calf and

[12]paresthesias in a few of her toes, though not at the

[13]present time. Examination today by the doctor shows

[14]straight leg raising positive at about 60 degrees on the

[15]left, refers to posterior calf with tenderness over the

[16]peroneal nerve and referred symptoms to the back of her

[17]thigh. She has moderate spasm of the lumbar spine. She

[18]has weakness on dorsiflexion and plantar flexion of her

[19]foot. Impression, chronic low back strain, rule out

[20]herniated disc. He noted significant weakness in her

[21]left leg and an absent **[*41]** left knee jerk and he felt that an

[22]MRI scan of her back was in order.

[23]I want you to assume further that he

[24]referred her back to Dr. Zeitlin at Rockland Neurological

[25]Associates, who saw her on November 1, 1990 and reported,
44

[1]
[2]among other things, that he found that since her initial

[3]episode in September of 1990, she has been taking

[4]Feldene, which has helped to a degree, that she had a

[5]diminished left knee jerk, a limping gait was noted,

[6]straight leg raising was positive on the left at 90

[7]degrees, mild lumbar tenderness was noted, and his

[8]impression was a mild cervical strain on the left and

[9]left lumbosacral radiculopathy, perhaps SI distribution.

[10]Patient has improved to a degree. Mechanical signs are

[11]not striking. However, on account of marked increased

[12]symptoms at onset, would recommend further workup to

[13]include MRI scan of the lumbosacral spine.

[14]I want you to assume further that other

[15]than the 1978 EMG that I described to you earlier, which

[16]was reported as negative, there were no other EMG's ever

[17]performed on this patient up until the time that you

[18]performed them in July of **[*42]** 1993.

[19]I want you to assume further that there was

[20]an MRI performed at MRI Diagnostics of Rockland on April

[21]26, 1991 of the lumbosacral spine and the impression was

[22]as follows: L3-L4, a small central and more towards the

[23]left of midline herniated disc minimally impressing upon

[24]the ventral thecal sac, and at L4-5 degenerated disc,

[25]overriding and overgrowth of the left facet joint yields

[45]
[1]
[2]left foraminal stenosis, at L5 SI, degenerated disc, and

[3]this was a report sent to Dr. Lawrence Katz on April 26,

[4]1991.

[5]I want you to further assume that the

[6]patient continued to be seen by Dr. Katz intermittently

[7]over the next two years for back problems and for other

[8]problems unrelated to why we're here today, for other

[9]parts of her body for treatment, that in October of 1992,

[10]she stumbled at work and had an injury to her right side,

[11]her right shoulder, her right knee and her right hip,

[12]which resolved after some treatment, and that on December

[13]24, 1992, while at work, her foot gave way and her ankle

[14]rolled over so that the ankle rolled -- the foot rolled

[15]in with the flat underside of the foot, **[*43]** the plantar

[16]surface, facing in. She did not fall but wrenched

[17]herself.

[18]I want you to assume further that there has

[19]been testimony that there was swelling about the ankle

[20]and foot and pain which developed in that area, that she

[21]did not seek immediate medical attention but rather sat

[22]in what is known as a geriatric chair for most of her

[23]shift that night, Christmas Eve, applied ice to the ankle

[24]intermittently, that the next day she remained at home,

[25]applied ice and remained -- kept it elevated, returned to
46

[1]
[2]work the next night, again elevated her ankle, the

[3]swelling increased, the pain increased.

[4]I want you to assume that there's been

[5]testimony from both the plaintiff and from Dr. Katz and

[6]from his records that on December 26, 1992, Dr. Katz saw

[7]the plaintiff in the emergency room of the Good Samaritan

[8]Hospital. I want you to assume further that Dr. Katz

[9]wrote a note in the chart which consists of the words:

[10]X-ray, negative; impression, sprained left lateral ankle;

[11]plan, ankle lacer, rest, return as needed.

[12]I want you to assume further that there has

[13]been testimony from **[*44]** Carol Garber that Dr. Katz performed

[14]no examination at the time of that emergency room visit,

[15]that Dr. Katz has no independent recollection of that

[16]emergency room visit, and there is nothing in the

[17]hospital chart to indicate any examination or findings

[18]other than x-ray, negative; impression, sprain.

[19]I want you to assume further that there has

[20]been testimony from both the plaintiff and Dr. Katz from

[21]his records that the patient was next seen in his office

[22]on December 28, 1992, and at that time Dr. Katz reports

[23]in his records that the patient complained of increased

[24]pain in the ankle, no increase in swelling and now

[25]complains of cramping pain in the calf and in the thigh.

47

[1]

[2]I want you to also assume that Dr. Katz prescribed

[3]codeine number -- excuse me -- Tylenol No. 4 with codeine

[4]and rest, that in one of two separate notes dictated for

[5]that day he suggested that she begin physical therapy in

[6]a week if no improvement, in the other he said rest, and

[7]that she complied with every one of his instructions.

[8]I want you to assume further that following

[9]that office visit of December 28th, **[*45]** she was not seen and

[10]examined by a physician until January 11, 1993. I also

[11]want you to assume that it is the testimony of the

[12]plaintiff that at that time she saw Dr. Katz in his

[13]office on December 28th, he examined her calf but did not

[14]examine her thigh.

[15]I want you to assume further that in the

[16]period between December 28th and January 11th, the

[17]plaintiff testified that her problems continued to

[18]increase, the pain continued to increase, that the pain

[19]increased to the point where she had complete pain for

[20]the entire left lower extremity from hip and thigh down

[21]to her toes, that motion of the ankle was restricted and

[22]that gradually by the 8th of January she noted locking of

[23]the ankle and she observed some weakness in dorsiflexion

[24]and plantar flexion which increased on January 9th and

[25]January 10th, but she was still able to move the foot.

48

[1]

[2]I want you to assume further that she has

[3]testified and Dr. Katz has also testified from his

[4]records that she presented at his office on January 11th

[5]with a complete left foot drop. I also want you to

[6]assume that she has testified that she made **[*46]** three

[7]telephone calls to Dr. Katz's office on January -- on

[8]December 31st, January 4th and January 8th, seeking an

[9]appointment but was not seen. I want you to assume

[10]further that the defendants dispute that there were three

[11]phones call, concede one phone call on January 4th, and

[12]say it had to do only with a medication change.

[13]I want you to assume further that an MRI

[14]was performed on January 11, 1993 at MRI Diagnostics of

[15]Rockland, that the physician who interpreted that MRI

[16]compared it with the prior MRI of 4/26/91. I want you to

[17]assume further that the following were his findings:

[18]Since the prior examination, there has developed a new

[19]L5-S1 herniated disc, which is left of the midline and

[20]extending superiorly behind the body of L5. At L3-4,

[21]again noted is the small central herniated disc

[22]projecting slightly to the left of midline. This was

[23]present on the prior examination and has not

[24]significantly changed. At L4-5, degenerated disc is

[25]noted. There is no evidence of recurrent disc
49

[1]
[2]herniation. The impression was the same as those

[3]findings, with a new left of midline disc herniation **[*47]** at

[4]L5-S1, extending superiorly behind the body of L5.

[5]I want you to assume further that the

[6]patient was admitted to the Good Samaritan Hospital by a

[7]neurosurgeon, Dr. Daniel Spitzer, who performed surgery

[8]on her on January 12, 1993, a lumbar laminectomy at L5 --

[9]a L5-S1 discectomy, removal of herniated disc fragments,

[10]a foraminotomy and neuroplasty. I want you to assume

[11]further that Dr. Spitzer, in his operative report,

[12]described a free fragment of the L5-S1 disc, which had

[13]migrated superiorly and was encroaching upon the L5 nerve

[14]root at the L5 foramen. And I want you to assume further

[15]that Dr. Spitzer reported that he removed that fragment

[16]and was able to free the nerve and free it within the

[17]foramina.

[18]I want you to assume further that post

[19]operatively the patient saw Dr. Katz on one occasion and

[20]his note reports only findings referable to the right

[21]side with no findings referable to the left lower

[22]extremity. I want you to assume further that the

[23]patient, Carol Garber, the plaintiff, reports that she

[24]did demonstrate her left-sided problems to Dr. Katz at

[25]that time.

50

[1]
[2] **[*48]** I want you to assume further, as you know,

[3]that the foot drop remains to this day.

[4]I want you to assume further that

[5]Dr. Spitzer saw the patient and followed her following

[6]surgery, that he saw her on January 27, 1993 and rendered

[7]a report to Dr. Katz and that with regard to the left

[8]side he found clear-cut, dysesthetic pain involving the

[9]left leg. She describes this in a classic manner stating

[10]that it is worse at night and it feels like burning,

[11]throbbing, with deep pain and tingling and is

[12]exacerbated, for instance, by having the bed sheets touch

[13]it. She tends to sleep with the left leg exposed and,

[14]therefore, sleep with the right side down. As indicated,

[15]this is classic for dysesthesias. Examination reveals

[16]that the left foot is still paretic.

[17]I want you to assume further that

[18]Dr. Spitzer spoke with Carol Garber on January 29, 1993,

[19]a day after she had seen Dr. Katz, and that his office

[20]records disclosed the following notes: I just got off

[21]the telephone with the patient. Much confusion about

[22]what happened. She went to see Larry Katz, more

[23]specifically about the left foot to try to **[*49]** get exercises

[24]to keep it from atrophying. This is actually a very good

[25]idea, which he evidently was against, so I am giving her

[51]
[1]
[2]a prescription for physical therapy. She also has

[3]persistent pain in the right sacroiliac area and the hip,

[4]probably unrelated to any surgery. This is soft tissue

[5]reproducible as noted in my office notes by direct

[6]palpation over the area. I will ask physical therapy to

[7]give some local heat massage, et cetera, to that area.

[8]I want you to assume further that

[9]Dr. Spitzer saw the patient again on March 4, 1993 and

[10]reported that while she was doing very well in many ways,

[11]not well in others. Her back pain by that time was

[12]completely resolved. She has some dysesthesias involving

[13]the left foot, especially at night and stroking the

[14]dorsum of the foot elicited this. There was also

[15]dysesthesias involving the left calf to a degree. He

[16]found motor strength to be essentially zero to trace

[17]range involving the left foot. He found a complete foot

[18]drop still and complete absence of EHL strength. The

[19]compartment of the tibialis anterior on the left is

[20]sunken with no muscle **[*50]** tone present. The patient had a

[21]complete foot drop preoperatively and it certainly seems

[22]possible this will now remain as a fixed deficit.

[23]I want you to assume further that he saw

[24]her on June 22, 1993 and found that she has persistent

[25]problems as one would expect, specifically she had

[52]
[1]
[2]hypersensitivity of the lateral aspect of the foot, which

[3]is quite suggestive of a neuropathic type picture related

[4]to the damage to the nerve root from the disc

[5]herniation. Additionally, she sometimes gets lancinating

[6]pain in the foot. Finally, she has had some orthopedic

[7]problems which are being appropriately addressed. The

[8]patient is extremely eager to return to work. I am aware

[9]of the fact that she intends to minimize her complaints

[10]for the examination of the Good Samaritan Hospital

[11]physician in order to expedite her return to work. I can

[12]understand this but for the record I must say that she

[13]does have persistent and long-term problems including, of

[14]course, the foot drop and EHL weakness on the left and,

[15]therefore, personally consider her partially, permanently

[16]disabled.

[17]I want you to assume **[*51]** further that on May 5,

[18]1993, Dr. Spitzer wrote a prescription for a referral to

[19]a physiatrist.

[20]Now, assuming all of those facts, Doctor, I

[21]have a series of questions for you. Doctor, do you have

[22]an opinion with a reasonable degree of medical certainty

[23]as to when the L5-S1 disc herniation first occurred?

[24]MR. KLEIDMAN: Objection.

[25]THE COURT: Overruled.

53

[1]

[2]MR. KLEIDMAN: Your Honor, may we approach?

[3]THE COURT: No.

[4]MR. KLEIDMAN: Your Honor, it's beyond the

[5]scope --

[6]THE COURT: I said no.

[7]MR. KLEIDMAN: May I be heard? This is

[8]critical to the defense case.

[9]THE COURT: You may be heard at the next

[10]recess.

[11]MR. KLEIDMAN: Your Honor, if the witness is

[12]permitted to testify --

[13]THE COURT: I said no.

[14]A May I answer?

[15]Q Do you have an opinion?

[16]A I do.

[17]Q And what is your opinion?

[18]MR. KLEIDMAN: Objection.

[19]THE COURT: Overruled.

[20]A Based upon the history that I heard, the

[21]type of pain, the experience of cramping sensation in the

[22]calf and thigh indicates three possibilities, either it's

[23] **[*52]** a deep-vein thrombosis or a sprain to the calf and

[24]hamstring muscles or a nerve root compression. These are

[25]the three possibilities that a clinician has to rule out
54

[1]
[2]and take into account, the patient's history of having

[3]disc herniations, a prior laminectomy, prior

[4]radiculopathy. My opinion, my first -- the first thought

[5]would be the common -- the most common, obvious cause of

[6]the problem, the radiculopathy. From what? From a

[7]possible disc herniation and that must be checked out.

[8]THE COURT: I'm sorry. Would the reporter

[9]read the question back?

[10](Tne requested question was repeated by the

[11]reporter.)

[12]MR. KLEIDMAN: The answer was yes, your

[13]Honor. Then I asked him what his opinion was.

[14]THE COURT: All right. I'd like the answer

[15]to that question read back, please.

[16](The requested answer was repeated by the

[17]reporter.)

[18]THE COURT: All right. Thank you very

[19]much.

[20]MR. KLEIDMAN: Move to strike as

[21]nonresponsive.

[22]THE COURT: Motion is granted.

[23]Q Dr. Guy, let me ask the question again,

[24]very simple question, what, in your opinion -- do you

[25]have an **[*53]** opinion as to when the disc herniated?
55

[1]
[2]A Yes, I do.

[3]Q And when do you say the disc herniated?

[4]A Approximately -- around -- shortly after

[5]12/24/92, on or about 12/24/92, shortly after, within the

[6]first 48 hours.

[7]Q And what is the basis for your opinion that

[8]the disc herniated on or about December 24th of 1992?

[9]A The history.

[10]Q Okay. The history which you have

[11]previously given us?

[12]A Yes, the history and the complaints of the

[13]cramping-ness in the calf and thigh areas.

[14]Q Okay. Now, Doctor, assuming that the L5-S1

[15]disc herniation had been diagnosed and properly treated

[16]before the foot drop development on January 11th, do you

[17]have an opinion with a reasonable degree of medical

[18]certainty as to whether or not the foot drop could have

[19]been avoided?

[20]MR. KLEIDMAN: Objection.

[21]THE COURT: Overruled.

[22]Q It calls for a yes or no.

[23]A Yes, I do have an opinion.

[24]Q Okay. And what is your opinion?

[25]A That if you have the history that you

[56]
[1]
[2]obtained with this patient's previous history and a

[3]complaint of that **[*54]** throbbing-ness, cramping-ness, and in

[4]the calf and thigh area if you had detected the nerve

[5]root compression at the L5 root, you have a good chance

[6]of preventing the foot drop, but a failure to early

[7]diagnose the problem and effectively treat it can cause

[8]the foot drop and perhaps permanent irreversible damage

[9]to the foot drop.

[10]Q Okay. Now, Doctor, do you have an opinion

[11]with a reasonable degree of medical certainty as to

[12]whether or not, in addition to the foot drop, any of

[13]Mrs. Garber's other L5 neurological deficits that you

[14]found when you examined her could have been avoided by an

[15]earlier diagnosis and appropriate treatment of the L5-S1

[16]disc herniation?

[17]MR. KLEIDMAN: Objection to the form.

[18]THE COURT: Overruled.

[19]A Yes, I do have an opinion.

[20]Q What is your opinion?

[21]A The key is early detection and early,

[22]effective treatment. If you detect early and you

[23]effectively eradicate the compression at the nerve root,

[24]you, in over 90 percent of the cases, eradicate the

[25]complication, namely, the foot drop.
57

[1]
[2]Q And what about the numbness and other

[3] **[*55]** neurological deficits?

[4]A Well, that goes --

[5]MR. KLEIDMAN: Objection as to the form.

[6]THE COURT: I will sustain the objection as

[7]to the form.

[8]Q Doctor, in addition to the foot drop, would

[9]your answer apply as well to the numbness and other

[10]neurological deficits you have described along the L5

[11]nerve root distribution?

[12]MR. KLEIDMAN: Objection to the form.

[13]THE COURT: Overruled.

[14]A The answer is yes. When you have the foot

[15]drop, that's an L5 nerve root compression. Once a nerve

[16]root compression occurs, for a certain period of time,

[17]you can and will have permanent, irreversible damage to

[18]the nerve root and the hallmark is, as you noticed, a

[19]foot drop, the altered fashion of the gait, the

[20]alteration of the normal biomechanics and stress to the

[21]knee joints and hip joints, lack of sensation and atrophy

[22]and you get the whole picture of complications.

[23]Q Now, Doctor, are these -- do you have an

[24]opinion with a reasonable degree of medical certainty as

[25]to whether Mrs. Garber's conditions are permanent?
58

[1]
[2]A Yes, these conditions are permanent.

[3] **[*56]** Q Are they progressive?

[4]A Yes, they are progressive.

[5]Q Now, Doctor, do you have a position --

[6]excuse me -- do you have an opinion as to whether

[7]Mrs. Garber's condition today, secondary to the L5-S1

[8]disc herniation and resulting L5 nerve root injury --

[9]withdrawn.

[10]Doctor, do you have an opinion with a

[11]reasonable degree of medical certainty as to whether any

[12]tests other than those that you've seen or I have

[13]described to you should have been performed on Carol

[14]Garber between October 2, 1990 and January 12th of 1993?

[15]A Yes.

[16]MR. KLEIDMAN: Objection.

[17]THE COURT: Overruled.

[18]Q What is your opinion?

[19]A Well, one of the most important tests

[20]besides an MRI should have been an EMG to find the cause

[21]of that foot drop to see if it's coming from a peroneal

[22]compression on the tibial head or if it's coming from the

[23]nerve root, and if you guess and it's one or the other,

[24]the results, and you're wrong, the results can be

[25]detrimental. And so an EMG, in my opinion, is essential
59

[1]
[2]to know how to appropriately treat.

[3]Q Doctor, do you have an opinion with **[*57]** a

[4]reasonable degree of medical certainty as to whether

[5]Carol Garber's injuries are disabling?

[6]A Yes, I have an opinion.

[7]Q And what is your opinion?

[8]A They are very disabling.

[9]Q Are they permanently disabling?

[10]A Yes, they are.

[11]Q Will her disability increase, decrease or

[12]remain the same over the rest of her life?

[13]A They would get progressively worse.

[14]Q Doctor, do you have an opinion with a

[15]reasonable degree of medical certainty as to whether

[16]Carol Garber's condition of permanent disability and

[17]increasing and progressive disability as you've just

[18]described to us could have been affected in any way by an

[19]earlier diagnosis and appropriate treatment of the disc

[20]herniation?

[21]MR. KLEIDMAN: Objection to the form.

[22]THE COURT: Overruled.

[23]A Yes, I do have an opinion.

[24]Q And what is your opinion?

[25]A The opinion is if you have --
60

[1]
[2]effectively -- if you effectively pick up that L5 nerve

[3]root compression and relieve the compression at the nerve

[4]root, you could prevent a lot of these complications,

[5]especially the foot **[*58]** drop. The foot drop and L5 nerve

[6]root damage is the major cause of this patient's residual

[7]problems to this date and that will progressively worsen

[8]as time goes by.

[9]Q Dr. Guy, do you have an opinion with a

[10]reasonable degree of medical certainty as to whether or

[11]not Carol Garber's condition is productive of pain?

[12]A Yes, I do have an opinion.

[13]Q What is your opinion?

[14]A When you have nerve root irritation -- my

[15]opinion is yes, it is productive of pain, and pain can be

[16]subjective. When you have nerve root damage, that is

[17]painful. When you have stiffness, that is painful. When

[18]you have trigger points, that is painful. When you have

[19]arthritis setting it with chondromalacia with increased

[20]skin breakdowns, that is painful. When you put the whole

[21]picture together, that is more painful.

[22]Q Doctor, do you have an opinion with a

[23]reasonable degree of medical certainty as to whether

[24]Carol Garber can ever return to nursing?

[25]A No, nursing, never. For a very good

[61]
[1]
[2]reason.

[3]Q What's the reason?

[4]A I'm familiar with what a nurse does. My

[5]wife is a nurse. **[*59]** And a nurse needs to respond very

[6]quickly and effectively in cases of an emergency. If a

[7]patient -- you saw how she was walking. Her gait is very

[8]slow, is very unsteady. She can't help herself, let

[9]alone another patient in a critical situation where time

[10]is of the essence. In my opinion, she should never work

[11]as a nurse, especially in a critical setting. Perhaps

[12]she could do some light sedentary work, but no more than

[13]a couple of hours a day because she cannot sit or stand

[14]for any length of time, and spasms or cold weather will

[15]aggravate the condition.

[16]Q Doctor, do you have an opinion with a

[17]reasonable degree of medical certainty as to whether

[18]Carol Garber will continue to require treatment in the

[19]future?

[20]A Oh, yes. She will require treatment for

[21]the rest of her life.

[22]Q What kind of treatment?

[23]A Well, she needs to be seen by a physiatrist

[24]on a monthly basis to assess her overall condition to

[25]make sure there's no skin breakdown in the left foot,
62

[1]
[2]ankle, to monitor the PLSO, to monitor her overall

[3]condition. She will require paraspinal injections,

[4]medications **[*60]** for the spine. She will require an EMG test

[5]once every two to three years to assess the condition of

[6]radiculopathy, the nerves. She may perhaps require an

[7]MRI every two for three years to assess the condition of

[8]the discs in her lumbar spine. A time will come that

[9]traumatic arthritis will set in with osteophytes

[10]compressing into the -- compressing into the nerve from

[11]the neuro-foramen affecting an area that's already

[12]compromised. And she may require another surgery in the

[13]form of a laminectomy foraminotomy because when you have

[14]a disc herniation, the disc itself has an open sack. The

[15]leakage of nucleus pulposus will continue to come out. A

[16]time will come where another laminectomy may have to be

[17]done. This causes a tremendous amount of stiffness. So

[18]these are the problems that she will encounter in the

[19]future.

[20]Q Now, Dr. Guy, is there any cost of this

[21]future treatment?

[22]A Well, she will require physical therapy on

[23]an as-needed basis of approximately 30 sessions per year,

[24]that will cost approximately $ 75 to $ 100 per session,

[25]EMG's cost approximately $ 1,200, MRI's cost approximately
63

[1]
[2] **[*61]** $ 950, lumbar laminectomy, foraminotomy will cost $ 11,000

[3]to $ 15,000.

[4]Q Dr. Guy, do you have an opinion as to

[5]whether Carol Garber, with a reasonable degree of medical

[6]certainty, as to whether Carol Garber's condition as it

[7]exists today, will, in the future, improve, remain the

[8]same or get worse over the balance of her life?

[9]A No further improvement is expected at this

[10]point. The -- the condition is that of a progressive,

[11]worsening condition.

[12]Q And what's the purpose then to have that

[13]treatment?

[14]A To decrease the pain, to decrease the

[15]spasms, get rid of the trigger points, get rid of

[16]bursitis from the altered biomechanics, pain medication

[17]to relieve her symptoms of pain.

[18]MR. MARCUS: I have nothing further, your

[19]Honor.

[20]THE COURT: We'll take a short recess before

[21]the cross examination.

[22](Recess taken.)

[23](Jury present.)

[24]THE COURT: You may examine.

[25]MR. KLEIDMAN: Your Honor, I would just like
64

[1]
[2]to reserve my right to be heard on my earlier

[3]objection.

[4]THE COURT: Yes.

[5]CROSS EXAMINATION MR. KLEIDMAN:

[6] **[*62]** Q Good morning, Dr. Guy.

[7]A Good morning.

[8]Q We've never met, have we?

[9]A No.

[10]Q Never been requested by my office or anyone

[11]from my office to review a case?

[12]A I don't believe so.

[13]Q Have you ever been requested by my office

[14]to examine a patient?

[15]A What's the name of your firm?

[16]Q Feldman & Kleidman in Fishkill, New York.

[17]A I don't recognize the name.

[18]Q Did you bring with you your original office

[19]records?

[20]A Yes, they're right here.

[21]MR. KLEIDMAN: Could we please have those

[22]marked for identification?

[23]THE COURT: Certainly.

[24](Office chart marked defendants' E for

[25]identification.)

65

[1]
[2]Q Doctor, does your file reflect that a

[3]request was received from my office by facsimile

[4]transaction on June 13, 1996 enclosing an authorization

[5]requesting a complete copy of your records regarding

[6]Carol Garber?

[7]A I believe it was, and I believe it was

[8]responded to on 7/96.

[9]Q And do you have an individual by the name

[10]of Marion that works in your office?

[11]A Yes.

[12]Q And does her last name begin **[*63]** with an M?

[13]A Yes.

[14]MR. KLEIDMAN: Could we have this mark for

[15]identification, please?

[16](Folder marked defendants' F for

[17]identification.)

[18]MR. KLEIDMAN: Just hand it to the doctor

[19]for the moment.

[20](Document submitted.)

[21]Q Doctor, if you look on the top of the first

[22]page, there's a pink Stick-um on there. I believe it's

[23]dated July 22, 1996.

[24]A Yes.

[25]Q Does that look like the handwriting of
66

[1]
[2]Maryann -- Marion M. from your office?

[3]A Yes, it does.

[4]Q And does that indicate to send the records

[5]to my office?

[6]A Yes.

[7]Q And the records that were received in there

[8]in response to that, does that represent a complete copy

[9]of your office records?

[10]MR. MARCUS: Objection, your Honor. No

[11]foundation.

[12]THE COURT: I'm overruling the objection.

[13]You may answer the question.

[14]A No, it does not.

[15]Q Now, Doctor, I'd like to start with your

[16]background and education a little bit. You indicated

[17]that you went to Queens College; is that correct?

[18]A Yes.

[19]Q And you then went to medical school in the

[20] **[*64]** Dominican Republic?

[21]A Yes.

[22]Q And did you first attend the Universidad

[23]Central Del Este? And excuse me for my Spanish

[24]pronunciation.

[25]A Yes, that's correct.

[67]
[1]
[2]Q And you attended there for approximately

[3]nine and a half months?

[4]A One and a half years.

[5]Q One and a half years?

[6]A Yes.

[7]Q And then did you transfer to another

[8]medical school?

[9]A Yes.

[10]Q Where did you attend?

[11]A Universidad Nordestana, which means

[12]University of Northeast, Dominican Republic.

[13]Q And how long did you attend the second

[14]institution?

[15]A It was a ten-semester program. I finished

[16]four semesters at the first medical school. I finished

[17]the six semesters at the other medical school, total of

[18]ten semesters.

[19]Q And then you returned to the United States?

[20]A Yes.

[21]Q And you went for your first year of

[22]postgraduate training approximately a year later?

[23]A Yes.

[24]Q And some people refer to it as an

[25]internship and some people refer to it as first year of
68

[1]
[2]residency?

[3]A Correct, yes. There's internship. **[*65]** It's

[4]residency now.

[5]Q But that first postgraduate year started

[6]the first year after you graduated from medical school?

[7]A I graduated at a time where medical school

[8]enrollment was too late. I graduated in June of 1981.

[9]Medical school, you have to apply at least nine months

[10]earlier. So I didn't qualify -- I missed the deadline

[11]for the 1982, so I applied for it after '81.

[12]Q The answer to my question is yes?

[13]A Yes.

[14]Q The first postgraduate training you

[15]received was in internal medicine?

[16]A Yes.

[17]Q That did not include any rotation through

[18]orthopedics; is that correct?

[19]A No.

[20]Q And you then did an additional residency or

[21]additional postgraduate training in surgery, general

[22]surgery?

[23]A Yes.

[24]Q And that only included approximately two

[25]months of a rotation through orthopedics, correct?
69

[1]
[2]A Two months rotation through orthopedics by

[3]day, but my night just about every third night you're on

[4]call to scrub in on orthopedics cases.

[5]Q In prior testimony, did you ever testify to

[6]that?

[7]A As to?

[8] **[*66]** Q As to the fact that you would scrub in on

[9]orthopedic cases?

[10]A If the question was put forth to me.

[11]Q If the same question was put forth to you

[12]in the past, do you recall giving the same answer that

[13]you gave?

[14]A I have testified several times. I don't

[15]recall exactly what I said in every individual case.

[16]Q Doctor, your formal training in orthopedics

[17]was limited to two months, correct?

[18]A Yes.

[19]Q You then did three years of residency in

[20]physical and rehabilitation medicine?

[21]A Yes.

[22]Q And, again, your formal training in

[23]orthopedics during that period of time was two or three

[24]months, correct?

[25]A Two or three months? No, it was a little
70

[1]
[2]bit more than two or three months.

[3]Q At this time how much did you claim it was?

[4]A Maybe six to nine months.

[5]Q Do you recall testifying in June of 1989 in

[6]the matter of Harry and Selma Stone against Dr. Peter

[7]Langan, Dr. Carl Weiss and Garden City Orthopedics

[8]Associates?

[9]A I do.

[10]Q And do you recall in that case being asked

[11]these questions and giving these answers, starting **[*67]** on

[12]page 82, line 21:

[13]QUESTION: And that was in general

[14]surgery?

[15]ANSWER: Yes.

[16]QUESTION: And how long was that program?

[17]ANSWER: Twelve months.

[18]Let me strike that. Let me go to the next

[19]page, page 83, line 16:

[20]QUESTION: Your three-year residency in

[21]physical medicine and rehabilitation didn't

[22]include any rotation through orthopedic surgery,

[23]did it?

[24]ANSWER: Yes, it did

[25]QUESTION: How long?

[71]
[1]
[2]ANSWER: Approximately two or three months.

[3]Does that refresh your recollection as to

[4]the amount of training that you've previously testified

[5]to receiving in orthopedics?

[6]A You get two- or three-month rotations per

[7]year. It's a three-year program. You have a lot of

[8]clinics, you have an arthritis clinic, you have the

[9]clinic for arthritis, rheumatology. You also have the

[10]orthopedics clinic. A lot of physical medicine is

[11]nonsurgical orthopedics. So if I said two or three

[12]months, that was much less than the training we get.

[13]Q Doctor, was that prior answer the same, yes

[14]or no?

[15]A I have no personal recollection of it. **[*68]**
[16]Q Now, you mentioned that you're affiliated

[17]with the Hospital for Joint Diseases?

[18]A Yes.

[19]Q You have not admitted any patients there

[20]for approximately over a year; is that true?

[21]A That is correct.

[22]Q And is the same thing true with Cabrini

[23]Medical Center?

[24]A I have treated -- I have admitted a couple

[25]of patients there in the past year, yes. Most of rehab,
72

[1]
[2]you deal with outpatient. You don't admit patients too

[3]often.

[4]Q So your affiliation is not as attending in

[5]the sense that you're constantly admitting patients,

[6]rather it's an affiliation, you're on the staff there and

[7]you have the right to admit patients?

[8]MR. MARCUS: Objection to the form, your

[9]Honor.

[10]THE COURT: I'll sustain the objection.

[11]Q You have the right to admit patients to the

[12]Hospital for Joint Diseases?

[13]A Yes.

[14]Q You have not admitted any patients for the

[15]past year?

[16]A Correct.

[17]MR. MARCUS: Objection. It was asked and

[18]answered.

[19]THE COURT: Overruled.

[20]Q And Cabrini Medical Center, you have the

[21]right to admit patients? **[*69]**
[22]A Yes.

[23]Q But you've only admitted a few over the

[24]past year?

[25]A That's right, for the reason I indicated
73

[1]
[2]earlier.

[3]MR. KLEIDMAN: Move to strike the portion

[4]that's not responsive.

[5]THE COURT: Motion denied.

[6]Q Now, you've mentioned that you have

[7]testified a number of times per year.

[8]A Yes.

[9]Q You don't testify in every case that you're

[10]involved in, do you?

[11]A No.

[12]Q Is it fair to say that you're requested to

[13]review cases on behalf of attorneys in order to render

[14]opinions?

[15]A Sometimes, yes.

[16]Q And in those cases that you're asked to do

[17]so, you don't always testify, do you?

[18]A That is correct.

[19]Q Okay. So is it fair to say that you review

[20]more cases per year than you end up testifying in?

[21]A That is correct.

[22]Q And are you also called upon to examine

[23]individuals that are involved in litigation?

[24]A Yes.

[25]Q And you don't end up testifying in every
74

[1]
[2]such case, do you?

[3]A That is correct.

[4]Q So is it fair to say that you have examined

[5]a greater number of **[*70]** individuals per year that are

[6]involved in litigation that you end up testifying for?

[7]A That is correct.

[8]Q Now, earlier today you've told us in

[9]response to questions by Mr. Marcus that you testified

[10]approximately five to six times per year?

[11]A Sometimes more, sometimes less. This year,

[12]a little bit more than the average.

[13]Q Do you recall testifying in 1995 in a case

[14]called Brooks?

[15]A I don't recall that case, no.

[16]Q It was a case in Kings County, Stephen

[17]Brooks against Catholic Medical Center of Brooklyn and

[18]Queens, Inc. and John Roe Denton, MD, before the

[19]Honorable Spodek?

[20]A Was that the case with osteomyelitis?

[21]MR. MARCUS: What year?

[22]MR. KLEIDMAN: June 15, 1995.

[23]A I believe that was an osteomyelitis. Yes.

[24]Q And do you recall being asked these

[25]questions and giving these answers last year, line 19:
75

[1]
[2]QUESTION: How much have you testified in the

[3]last five years?

[4]ANSWER: On the average I testify about seven

[5]to ten times a year.

[6]QUESTION: Seven to ten times a year?

[7]ANSWER: That's right.

[8] **[*71]** Is that more accurate as to the number of

[9]times per year than the five to six?

[10]A Five to six, seven to ten, to me it's the

[11]same. I don't keep a count. It's in the same vicinity.

[12]In my opinion, it's close enough. If you ask me next

[13]year, I might give you a different answer, but it's still

[14]in the ball park.

[15]Q It's not important to be precise in giving

[16]testimony?

[17]A I didn't say that.

[18]MR. MARCUS: Objection.

[19]THE COURT: Objection sustained.

[20]Q Doctor, is it important to be precise when

[21]you give testimony?

[22]MR. MARCUS: Objection. Argumentative.

[23]THE COURT: Objection sustained.

[24]Q Doctor, it's your testimony that five to

[25]six times is the same as seven to ten times a year?
76

[1]
[2]MR. MARCUS: Objection.

[3]THE COURT: Again, the objection is again

[4]sustained.

[5]Q Did you give those answers to those

[6]questions in the testimony before Judge Spodek?

[7]A I always answer approximately because I

[8]have no personal recollection of the exact amount.

[9]Q Doctor, if you wish, I'll read to you the

[10]testimony again. If you'd like, I'll hand **[*72]** it to you.

[11]Did you use the word approximately when you testified

[12]before Judge Spodek last year when you testified?

[13]A I don't recall. Generally, my answer is

[14]approximate because -- that's -- that's the answer.

[15]Q Doctor, whether it's five to six or seven

[16]to ten times a year, you testify frequently, do you not?

[17]A Same -- same frequency, between five to

[18]six, five to seven, seven to ten, in the same area.

[19]Q But you testify frequently in the

[20]courtroom --

[21]MR. MARCUS: Objection as to the -- what

[22]does the word frequently mean? The doctor's

[23]defined it. Aren't we going over the same

[24]ground?

[25]MR. KLEIDMAN: I'll rephrase it.

77

[1]
[2]Q You've testified often in a courtroom?

[3]A Within the same frequency I mentioned

[4]earlier, yes.

[5]Q And each of those times that you testified,

[6]you get reimbursed for your time in the courtroom,

[7]correct?

[8]A Yes.

[9]Q And I believe you told us that today you're

[10]getting paid $ 350 per hour?

[11]A Yes.

[12]Q And does that include travel from your home

[13]to wherever you were coming from and until you get back

[14] **[*73]** home?

[15]A Yes.

[16]Q And does it also include the time that you

[17]spent reviewing this case?

[18]A Yes.

[19]Q And approximately how many hours did you

[20]spend reviewing to testify here today?

[21]A Approximately one and a half to two hours.

[22]Q And that was a review of your office

[23]records?

[24]A Yes.

[25]Q Other than your office records, did you

[78]
[1]
[2]review anything else before you came here to testify?

[3]A The records I mentioned, the past medical

[4]records.

[5]Q Now, we'll come back to that in a moment,

[6]the records that you reviewed.

[7]Earlier today in response to some

[8]questioning by Mr. Marcus, I believe you told us that you

[9]spend 98 percent of your time treating patients.

[10]A Yes.

[11]Q And the other 2 percent of the time, how is

[12]that spent, sir?

[13]A Testifying in court.

[14]Q Do you recall testifying in case by the

[15]name of Elsie Eminez(ph) against State Side Construction

[16]Corp. and Cosmopolitan Decorating Company in Bronx County

[17]on December 1, 1992 in front of the Honorable Jerry L.

[18]Crispino?

[19]A No. That's a four-year-old case. **[*74]** I have

[20]no personal recollection of that case.

[21]Q Do you recall giving this testimony at that

[22]time at page 6, starting at line 11:

[23]QUESTION: What percentage, if you know, is --

[24]deals with having to come to court to testify on

[25]behalf of patients?

79

[1]

[2]ANSWER: Well, because of the nature of my

[3]specialty, dealing with traumatic injuries,

[4]whenever there is a trauma, there is accidents,

[5]there are lawsuits, there are lawyers and

[6]litigation, and I would have to say about roughly

[7]less than 10 percent.

[8]A 98 percent, 10 percent, 90 percent, to me,

[9]it's the same ball park. The difference between 90

[10]percent and 98 percent to me is the same. I gave you,

[11]again, a ball park figure.

[12]Q So 98 percent is the same as 90 percent or

[13]roughly to you?

[14]A To me it is the same ball park figure.

[15]Q Now, is it true that a majority of the

[16]times you've testified for plaintiffs?

[17]A I indicated to you earlier that I do

[18]because these are the patients that I treat.

[19]MR. KLEIDMAN: Move to strike as

[20]nonresponsive.

[21]THE COURT: Motion is denied.

[22]Q Doctor, **[*75]** if you can't answer my question

[23]that I ask you, please tell me and I'll try to rephrase

[24]it. You've been in the courtroom long enough to know if

[25]I ask you a question --

80

[1]
[2]MR. MARCUS: Objection, your Honor. Can we

[3]not have a speech to the witness?

[4]THE COURT: Objection is sustained.

[5]Q Doctor, just try to answer my question, if

[6]you can. Do you recall testifying in Stephen Brook's

[7]case, as I asked you before?

[8]A I don't recall the name. If you tell me

[9]the case, what the injury was, I might remember.

[10]Q Well, do you recall responding to questions

[11]by Justice Spodek as to the number of times you had

[12]testified for defendants as of June of 1995?

[13]A Again, I don't remember the case. I don't

[14]have any personal recollection of all the questions that

[15]were put me. Many questions were asked of me. I have no

[16]way of knowing every answer I gave.

[17]Q Can you tell me approximately how many

[18]times you've testified for defendants as of today?

[19]A Very small percentage at a time.

[20]Q Can you give us a number, two, twenty?

[21]A I would say maybe under five, under six, **[*76]**
[22]could be less, could be more, but around the same ball

[23]park figure.

[24]Q Since last June, how many times have you

[25]testified --

[81]
[1]
[2]A Since last June, of 1995?

[3]Q Yes.

[4]A Melissa Price was one case. Maybe two.

[5]Maybe two cases.

[6]Q So if you had testified that you had only

[7]testified in two cases for defendants as of June of 1995,

[8]plus the additional two, that would be four cases in

[9]total that you have testified?

[10]A In 1995?

[11]Q Yes.

[12]A Altogether?

[13]Q Altogether.

[14]A Again, you're asking me for something that

[15]I don't remember. I've been testifying since 1988

[16]or '89. That's a seven-year span. I don't have an exact

[17]recollection, but I would say altogether, probably under

[18]six times.

[19]Q As a matter of fact, the first time you

[20]testified, you testified for Mr. Marcus, did you not?

[21]A Yes, that was the first time I ever

[22]testified.

[23]Q Have you testified for Mr. Marcus on any

[24]other occasions?

[25]A That was the first time and last until now.
82

[1]
[2]Q Have you testified for anyone else from the

[3]firm of Kelner **[*77]** & Kelner?

[4]A Yes, I have.

[5]Q As a matter of fact, did you testify as

[6]recently as May of this year for Robert Kelner?

[7]A Yes. That was a patient, for a

[8]quadriplegic.

[9]Q So you've testified for the firm before, as

[10]well?

[11]A I believe there was one or two other times

[12]before, besides that, yes, that's correct.

[13]Q In addition to testifying for Kelner &

[14]Kelner, have you been represented by the firm of Kelner &

[15]Kelner?

[16]A Yes, I have.

[17]Q As a matter of fact, Mr. Marcus represented

[18]you in a lawsuit that you commenced, did he not?

[19]A Yes.

[20]Q And just for the record, what was the name

[21]of the case, if you know?

[22]A Metro North.

[23]Q And John Harrin, MD?

[24]A Yes.

[25]Q Now, Dr. Guy, have you ever advertised your
83

[1]
[2]services as someone available to come to court to

[3]testify?

[4]A Advertised, meaning where?

[5]Q Have you ever advertised in any

[6]professional journals?

[7]A Professional journals? I don't recall.

[8]Certainly magazines. Doctors are allowed to advertise.

[9]I may have advertised, yes.

[10]Q I'm **[*78]** not talking about your services to

[11]provide care and treatment to patients. I'm talking

[12]about advertising your services to attorneys to examine

[13]their patients in anticipation of coming to court to

[14]testify.

[15]A I may have, yes.

[16]Q And have you likewise advertised to tell

[17]attorneys that you're available to review cases and to

[18]come to court to give opinions to testify?

[19]A Yes.

[20]Q And have you also attempted to solicit

[21]business to give opinions and to review cases for

[22]attorneys by way of sending letters directly to

[23]attorneys?

[24]A I don't believe -- the word solicitation,

[25]that's -- that means -- solicitation is against the
84

[1]
[2]medical ethics.

[3]Q Let me change the phrase.

[4]A Yes.

[5]Q Have you sent letters to attorneys advising

[6]them that you have services available including the fact

[7]that you can examine patients involving cases that are in

[8]litigation?

[9]A Me, personally? I don't believe I, myself,

[10]personally have. A time came where I had a marketing

[11]person that may have been doing that.

[12]Q And did those letters go out on your

[13]letterhead? **[*79]**
[14]A I believe they did, yes.

[15]MR. KLEIDMAN: Could we have this marked for

[16]identification, please?

[17](Letter marked defendants' G for

[18]identification.)

[19]Q Doctor, you're being shown what's been

[20]marked as defendants' G for identification.

[21](Document submitted.)

[22]Q And is that a representative sample of the

[23]type of letter that went out on letterhead of your office

[24]signed by a director of marketing?

[25]A Yes. In 1992.

85

[1]

[2]Q Have you continued to send out such letters

[3]since then?

[4]A No.

[5]Q Now, was one of the representations that

[6]you made in -- such a letter that it was, quote,

[7]successful in finding appropriate pathologies that may

[8]result from the, quote, injuries, is that one of --

[9]A Yes.

[10]Q What was meant by appropriate pathologies?

[11]A Whatever the injuries are. My training is

[12]in three different areas. I have training in

[13]orthopedics. I have training in neurology. I have

[14]training in internal medicine. Being trained in three

[15]different specialties, your specialties overlap into

[16]different areas. That makes you more trained **[*80]** and more

[17]able to find pathologies in more than one area.

[18]Q Doctor, you're board certified only in

[19]physical rehabilitation?

[20]A That's correct.

[21]Q And the letter that you're holding is to a

[22]firm by the name of Brady, Martin, Clearwater & Bell; is

[23]that correct?

[24]A Yes, that's correct.

[25]Q And that's well-known medical malpractice
86

[1]
[2]defense firm?

[3]MR. MARCUS: Objection, your Honor.

[4]A I don't know who the firm is. I've never

[5]heard of Brady, Martin, Clearwater & Bell. That's a name

[6]probably my marketing person found and sent a letter to.

[7]I have -- I don't know who they are. I don't recall

[8]working with them.

[9]Q You had no control over what your director

[10]of marketing was doing?

[11]A In terms of sending it out to different

[12]people, no.

[13]Q She acted on her own authority?

[14]A That was her job, yes.

[15]Q But the job was to develop additional

[16]business for your practice, is that true?

[17]A Yes.

[18]Q Even if that meant engaging or being

[19]engaged by a defense firm in order to examine a patient

[20]in conjunction with litigation?

[21] **[*81]** A Yes.

[22]Q Does the document also represent that it,

[23]quote, documents all reports meticulously specific to

[24]pathology, treatment course, diagnosis and patients, fees

[25]for narrative report are reasonable, close quote?

87

[1]
[2]A Yes.

[3]Q And is that important in preparing a

[4]report?

[5]A Accurate diagnosis, meticulous diagnosis,

[6]yes, it is important.

[7]Q And would it be important in doing so to

[8]obtain a meticulous history?

[9]A Yes.

[10]Q That would be important, correct?

[11]A Yes.

[12]Q Now, if we could turn to your records for a

[13]moment, the red folder, I believe, on the left-hand side

[14]of the folder, as you open it up, does it have some

[15]preliminary information?

[16]A Yes.

[17]Q And amongst the preliminary information

[18]that it contains on that folder, does it have who the

[19]patient was referred by?

[20]A Referred by blank, and underneath it has an

[21]attorney's name, attorney's firm. Where it says

[22]attorney's name, it says Robert Marcus. Where it says

[23]attorney's firm, it says Weiss, blank. Doctor's name,

[24]Dr. Spitzer.

[25]Q May that I see, please?

88

[1]
[2] **[*82]** A Yes.

[3](Document submitted.)

[4]Q And I'm correct, am I not, when I give you

[5]this back, and by all means I will do that, that the date

[6]that appears on the top of the patient information form

[7]is May 13, 1993?

[8]A May I see my chart?

[9](Document submitted.)

[10]A Yes.

[11]Q And that's the first date you saw this

[12]patient?

[13]A Yes.

[14]Q And that form is completed at the time that

[15]you initially see the patient?

[16]A Yes.

[17]Q So at that time you were aware that this

[18]was a patient whose attorney was Mr. Marcus?

[19]A Yes.

[20]Q Is that correct?

[21]A She had two attorneys. It says Robert

[22]Marcus is one and Mr. Weiss, another. I don't know who

[23]Mr. Weiss is.

[24]Q But you knew who Mr. Marcus was?

[25]A Yes.

[89]
[1]
[2]Q At any time after Mrs. Garber came under

[3]your care on May 13, 1993 up until the present, have you

[4]ever spoken to Mr. Marcus about this case?

[5]A I believe I may have spoken to him once or

[6]twice.

[7]Q When for the first time?

[8]A The exact first time, I don't recall. It

[9]may have been 1993, may have been **[*83]** 1994 or 1995.

[10]Q When did you last speak to him about this

[11]case?

[12]A Last night and this morning.

[13]Q Now, before you came here to court to

[14]testify, other than reviewing your office records, did

[15]you review anything else?

[16]A No. Basically the records I have in my

[17]possession and MRI's.

[18]Q Did you review, for instance, the Good

[19]Samaritan Hospital chart for the admission of January 11,

[20]1993?

[21]A I don't believe so.

[22]Q Did you ever review that?

[23]A I don't believe so.

[24]Q Did you ever review the office records of

[25]Dr. Katz?

90

[1]
[2]A No.

[3]Q Did you ever review the office records of

[4]Dr. Spitzer?

[5]A Some. I have some records that I have in

[6]my possession of the surgical procedure.

[7]Q Other than those records of Dr. Spitzer,

[8]did you ever review his office records?

[9]A No.

[10]Q Did you ever review the records of

[11]Dr. Zeitlin?

[12]A No.

[13]Q Did you ever review the records of

[14]Dr. Starace?

[15]A No.

[16]Q Did you ever review the records of

[17]Dr. Pappalardo?

[18]A I did not.

[19]Q You're aware, are **[*84]** you not, that during the

[20]course of discovery, the parties are entitled to take

[21]examinations before trial or depositions?

[22]A I guess, yes.

[23]Q Have you ever, in your involvement in

[24]litigation, ever reviewed a transcript?

[25]MR. MARCUS: In this case or in any case?

[91]
[1]
[2]MR. KLEIDMAN: In any case. I just want to

[3]know his familiarity.

[4]A May have, maybe once.

[5]Q In this case, did you review the testimony

[6]of Mrs. Garber?

[7]A I did not.

[8]Q Did you review the testimony of Mr. Garber?

[9]A I did not.

[10]Q Did you review the testimony of Dr. Katz?

[11]A I did not.

[12]Q Or the testimony of Dr. Kryger?

[13]A I did not.

[14]Q So other than your records and what's

[15]contained in your records, you reviewed nothing else in

[16]reaching your opinions; is that correct?

[17]A That's correct.

[18]Q Now, if we could turn to your May 1993

[19]report, in the first paragraph it makes some mention to

[20]records or materials you did review, does it not?

[21]A Yes, it does.

[22]Q And one thing that you reviewed was past

[23]medical records obtained from Sports **[*85]** and Physical Therapy

[24]Center signed by Joel Rosenstein, correct?

[25]A Correct.

[92]
[1]
[2]Q And you reviewed an operative report from

[3]Good Samaritan Hospital?

[4]A Yes.

[5]Q And you reviewed a report of the MRI done

[6]on January 11, 1993, correct?

[7]A Yes.

[8]Q Your report reflects that you did not

[9]review anything else; is that true?

[10]A Whatever my report indicates I reviewed,

[11]that's what I reviewed.

[12]Q Well, does it indicate that you reviewed

[13]anything else?

[14]A It does not.

[15]Q Now, you then obtained a history from this

[16]patient, did you not?

[17]A Yes.

[18]Q And the history that you report in the

[19]second paragraph of your report just involved the

[20]particular incident in question, correct?

[21]A The particular incident?

[22]Q In other words, the events starting with

[23]December 24th and going through until the patient had

[24]seen you, correct?

[25]A Correct.
93

[1]
[2]Q That paragraph did not deal with anything

[3]involving her past medical history, that is events before

[4]December 24th, correct?

[5]A No. The next paragraph does. **[*86]**
[6]Q Okay. Now, the next paragraph starts with

[7]the heading, past medical history, correct?

[8]A Yes.

[9]Q And that makes reference to the fact that

[10]she has slight hypertension, correct?

[11]A Yes.

[12]Q And history of injuries to her back in 1974

[13]and '76?

[14]A Yes.

[15]Q And an L4-5 disc herniation requiring a

[16]laminectomy in March of 1979, correct?

[17]A Yes.

[18]Q Now, does the past medical history continue

[19]onto the second page of your report?

[20]A Yes.

[21]Q And that reports history of bilateral

[22]carpal tunnel syndrome?

[23]A Yes.

[24]Q And status post total abdominal

[25]hysterectomy, correct?
94

[1]
[2]A Correct.

[3]Q That's the sum total of the past medical

[4]history that you reported at that time, correct?

[5]A Correct.

[6]Q So the report that you told us which should

[7]be meticulous contains nothing regarding Mrs. Garber's

[8]medical condition, regarding her back at any time from

[9]1979 following the lumbar laminectomy until December 24,

[10]1992 when she had the incident at Good Samaritan

[11]Hospital, correct?

[12]MR. MARCUS: Objection **[*87]** to the form.

[13]Q Is that correct?

[14]THE COURT: I'll sustain the objection.

[15]Q Does this report contain any information

[16]regarding the patient's status regarding her lower back

[17]at any time following the laminectomy in March of 1979 up

[18]until the incident of December 24, 1992, yes or no?

[19]A Yes.

[20]Q Where, Doctor?

[21]A It says history of injuries to back in 1974

[22]and 1976 resulting in L4-L5 disc herniation requiring

[23]laminectomy performed in 3/79 with good results. Good

[24]results indicates to me that she was doing fine.

[25]Q After the March 1979 --

95

[1]
[2]A Yes.

[3]Q laminectomy --

[4]A Correct.

[5]Q there is no indication as to any

[6]incidents that may have occurred after March of 1979

[7]which affected her back, is there?

[8]A It does not.

[9]Q There's no reference to any motor vehicle

[10]accidents that she had after 1979 and before December of

[11]1992 in which she may have exacerbated her low back

[12]condition, is there?

[13]A I don't have that information, no.

[14]Q There's no information in this report

[15]regarding any consultation she may have had **[*88]** with

[16]Dr. Pappalardo between 1979 and 1992 regarding

[17]exacerbation for continuing problems with her lower back,

[18]is there?

[19]A No.

[20]Q There's no reference in here as to whether

[21]or not she consulted with Dr. Starace, an orthopedist, at

[22]any time between 1979 and 1992 regarding her lower back?

[23]A No.

[24]Q There's no reference in here, is there, as

[25]to any consultation with Dr. Katz at any time between
96

[1]
[2]1979 and December 1992 regarding her lower back?

[3]A No.

[4]Q There's no information in here regarding

[5]any consultation with Dr. Zeitlin during that period of

[6]time, is there?

[7]A No, there is not.

[8]Q There's no indication in here, is there,

[9]regarding any EMG or nerve conduction studies that were

[10]done during that period of time?

[11]A That is correct.

[12]Q Nor is there any information in here

[13]regarding the MRI that was done in early 1991, is there?

[14]A I have that in my records, but in my report

[15]it is not mentioned, no.

[16]Q in questioning a patient, is it important

[17]to establish a thorough and complete past medical

[18]history?

[19]A To **[*89]** the best you can and to the best of the

[20]patient's recollection.

[21]Q Well, as a matter of fact, when you

[22]testified here earlier today regarding opinions, part of

[23]the hypothetical that you were given, the assumptions

[24]that you were given, had to do with medical problems

[25]between 1979 and 1992, correct?

97

[1]
[2]A Correct.

[3]Q Now, in the second paragraph of your report

[4]of May 13, 1993, you discuss the event of December 24,

[5]1992, did you not?

[6]A Yes.

[7]Q And I quote, and tell me if I am quoting

[8]correctly, please, Doctor: She was well until 12/24/92

[9]when, while working on the job, she was walking on

[10]rounds, apparently her left foot and ankle twisted and

[11]she developed lower back pain, closed quote. Is that a

[12]correct quotation?

[13]A Yes.

[14]Q And where did you obtain the history that

[15]she developed lower back pain at that time?

[16]A I don't know if that's at that exact time

[17]or afterwards. The history is obtained from the patient,

[18]but I don't recall if the lower back pain started at the

[19]time of the ankle injury or shortly afterwards.

[20]Q And when you say shortly **[*90]** afterwards, would

[21]that be a day, two days?

[22]A A few days afterwards.

[23]Q A few days afterwards. Are you aware that

[24]Mrs. Garber testified here in the courtroom yesterday

[25]that she had no complaints of low back pain at any time
98

[1]
[2]after December 24, 1992 until maybe a day or two before

[3]January 11, 1992?

[4]A I wasn't here yesterday. I have no idea

[5]what she testified to.

[6]Q But that's different than the history that

[7]you have in this record here, recorded here in your

[8]report of May 13, 1993?

[9]A Don't forget, I saw the patient May 13,

[10]1993. That's about five months after the 12/24/92

[11]event. So patients may sometimes remember certain things

[12]or not remember certain things or maybe I understood

[13]certain things the way I put it down. But, at any rate,

[14]I do not elaborate on when the lower back pain started,

[15]immediately or shortly after. It says developed lower

[16]back pain. I did not indicate when.

[17]Q Well, Doctor, would it be important for you

[18]in reaching an opinion as to the idealogy of this

[19]patient's complaint that developed on December 24th to

[20]know when the back pain **[*91]** started?

[21]A Maybe, yes.

[22]Q By the way, when you testified earlier this

[23]morning regarding the assumptions, we talked about

[24]radicular pain developing at that time, didn't you?

[25]A I said what?
99

[1]
[2]Q Did you talk about radicular pain

[3]developing at that time?

[4]A At the time of the ankle injury?

[5]Q Yes.

[6]A I don't remember how that was mentioned.

[7]Q In the history that you obtained, did you

[8]obtain any history of radicular pain at that time?

[9]A May 13, 1993?

[10]Q In your May 13, '93 report.

[11]A There's no elaboration or mention of that,

[12]no.

[13]Q Now, as a matter of fact, in your report of

[14]May 13, 1993, do you report that the patient advised you

[15]that as a result of the events on 12/24/92 she had a torn

[16]ligament in the left foot and ankle?

[17]A Yes, that's mentioned.

[18]Q Did you ever review any of the records, the

[19]medical records, with regard to this patient which

[20]indicated that such a diagnosis had been made?

[21]A No.

[22]Q Now, the assumption that you were asked

[23]earlier this morning, you were told to assume that on

[24] **[*92]** December 24, 1992, Mrs. Garber's foot gave way, her foot

[25]rolled, and although she did not fall, she wrenched
100

[1]
[2]herself.

[3]A Yes.

[4]Q Do you recall being given that assumption?

[5]A Yes.

[6]Q In your report of May 13, 1993, do you have

[7]anything to reflect the fact that she advised you that

[8]she wrenched herself?

[9]A No.

[10]Q What about your report of October 19, 1993,

[11]any such indication?

[12]A October '93 or '96?

[13]Q I'm sorry. '96.

[14]A No. That was just a summary of the

[15]patient's condition. No, that would not reflect that.

[16]Q How about your October 31st report of this

[17]year?

[18]A '96?

[19]Q Yes.

[20]A That's the one that I was talking to you

[21]about. That's a summary of the patient's diagnosis and

[22]treatment.

[23]Q Could I see it, Doctor? Are there two

[24]separate reports, one of October 9th and one of October

[25]31st?

101

[1]
[2]MR. MARCUS: I don't know of any October

[3]31st report.

[4]MR. KLEIDMAN: There may have been some

[5]testimony earlier. Maybe I misunderstood.

[6]MR. MARCUS: I think you did.

[7](Document **[*93]** submitted.)

[8]A I was asked when was the last time I saw

[9]the patient. That was October 31, '96.

[10]Q I misunderstood. Could I see the October

[11]19th report?

[12](Document submitted.)

[13]MR. KLEIDMAN: Your Honor, may we approach

[14]one moment?

[15]THE COURT: Well, I'd like to continue with

[16]the examination.

[17]MR. KLEIDMAN: I just have to make your

[18]Honor aware of something, if I may.

[19]THE COURT: I'd prefer that you don't.

[20]Q In any event, are you aware of whether or

[21]not Mrs. Garber ever gave any testimony of having

[22]wrenched her back?

[23]A Me, personally?

[24]Q You, personally.

[25]A Before today, no.

102

[1]
[2]Q So the first time you heard anything about

[3]her wrenching her back on December 24, 1992 is when you

[4]were asked to assume?

[5]MR. MARCUS: Objection, your Honor. I never

[6]said she wrenched her back.

[7]THE COURT: I'll overrule the objection.

[8]I'm sorry. I'm changing that. The

[9]objection is sustained. The record speaks for

[10]itself.

[11]MR. KLEIDMAN: Let me rephrase it.

[12]Q Did Mrs. Garber ever use the word wrench in

[13]describing **[*94]** her incident of December 24, 1992 to you?

[14]A Not to my recollection, nor my records.

[15]Q And that would be something that if she had

[16]said to you would be important and would be reflected in

[17]your records, would it not?

[18]A Generally, yes.

[19]Q Now, in your records, did you sometimes use

[20]shorthand for yourself to understand something?

[21]A In the progress notes?

[22]Q In your notes, yes.

[23]A Yes.

[24]Q And sometimes using a certain word lets you

[25]know that you found certain findings?

103

[1]
[2]A If you have a specific example, I can be

[3]more precise.

[4]Q Okay. If we could turn for a moment to

[5]your October 19th report.

[6]A Yes.

[7]Q Second page, end of the paragraph, where it

[8]says altered biomechanics. When you use that term,

[9]you're telling yourself that based upon your observation

[10]and examination of the patient you made certain findings;

[11]is that correct?

[12]A Yes.

[13]Q Okay. And that would include the fact that

[14]you determined that her gait was abnormal when you

[15]observed her on that occasion?

[16]A Yes.

[17]Q And that would include **[*95]** the fact that you

[18]observed the callous formations on the top of her foot on

[19]that occasion?

[20]A That's one of many, yes.

[21]Q And that would include the fact that the

[22]bottom of her foot had these changes you described for us

[23]earlier?

[24]A That doesn't indicate altered

[25]biomechanics.

104

[1]
[2]Q That would be one the findings that you

[3]would make in conjunction to this?

[4]A That would be a contributing factor, the

[5]alteration of biomechanics.

[6]Q And that would be something that would

[7]result from it, correct?

[8]A What would result from it?

[9]Q The abnormal bottom of the foot from the

[10]PLSO.

[11]A What would that -- what would be the

[12]altered biomechanics?

[13]Q That would change the --

[14]A I'm trying to understand your question.

[15]Q I'll rephrase it, Doctor.

[16]A Okay.

[17]Q You were aware on October 19th that she was

[18]wearing a PLSO?

[19]A Yes.

[20]Q And in conjunction, you would expect, as

[21]you told us earlier, that she would have changes to the

[22]bottom of the foot?

[23]A Yes.

[24]Q And you told us earlier that as a result **[*96]** of

[25]wearing that and as a result of her foot drop and the
105

[1]
[2]altered biomechanics of her gait, you would expect that

[3]would develop the change on the top of the foot that you

[4]showed us earlier today, correct?

[5]A Yes.

[6]Q So when you make a note such as this in

[7]your records saying altered biomechanics, those other

[8]findings, although not specifically enunciated in the

[9]report, are known to you to exist?

[10]A Yes.

[11]Q And, as a matter of fact, if we turn to the

[12]first page of your October 19th report, you don't

[13]specifically make any notations, do you, with respect to

[14]the condition of the bottom of the foot?

[15]A The purpose of this report is not to

[16]reflect that. The purpose of this report is to summarize

[17]her diagnosis, her treatment course and my opinion.

[18]That's all the purpose and purview of this report is.

[19]Q Doctor, regardless of what the purpose was,

[20]does it say anywhere that you noticed any abnormality on

[21]the bottom of her foot?

[22]A If it's not supposed to say that, the

[23]answer is no.

[24]Q Doctor, is the answer yes or no?

[25]A No. The answer is no. **[*97]**
106

[1]
[2]Q Does this report show any of the findings

[3]that you showed us today with respect to the top of the

[4]foot, the callous?

[5]A It does not.

[6]Q Does it show anything -- does it report

[7]anything with respect to the swelling in the knee that

[8]you stated that you observed?

[9]A In this report, no. Other reports, yes.

[10]Q I'm asking about this report.

[11]A No.

[12]Q You knew this report was being prepared for

[13]the purpose of being exchanged in conjunction with this

[14]litigation, did you not?

[15]A That is correct.

[16]Q And yet significant findings or findings

[17]that you believe are significant were not reported in

[18]that; is that correct?

[19]A Again, the purpose of this report is not to

[20]report physical exam findings but to report her treatment

[21]course, her diagnosis and her future prognosis. That is

[22]it.

[23]Q Doctor, you knew that you'd be called here

[24]to testify regarding this case?

[25]A I knew there might be a possibility, as
107

[1]
[2]with every case that goes into litigation.

[3]Q And you knew that you would be questioned

[4]about this report, **[*98]** did you not?

[5]A Yes.

[6]Q And you knew that your physical findings

[7]would be important, did you not?

[8]A Yes.

[9]Q And yet your findings regarding the knee

[10]are not contained in this report, correct?

[11]A Again, same answer.

[12]Q Is that correct, Doctor, your findings

[13]regarding the knee are not in this report?

[14]A Again, the purpose of this report is not to

[15]report my findings of the exam. If you want my findings,

[16]you can refer to my progress notes and my initial report.

[17]MR. KLEIDMAN: Move to strike as

[18]nonresponsive.

[19]THE COURT: Motion is granted.

[20]Q Are the findings reported regarding the

[21]knee in the report?

[22]A No.

[23]Q Are the findings regarding the

[24]chondromalacia in this report?

[25]A No.

108

[1]

[2]Q Are the findings that you told us about

[3]here in the courtroom and felt in the courtroom regarding

[4]the grinding of the knee --

[5]MR. MARCUS: Your Honor, objection. There

[6]are no findings at all in this report. He's

[7]already said that.

[8]THE COURT: The objection is overruled.

[9]A There were no findings in this report **[*99]** at

[10]all, whatsoever.

[11]THE COURT: That's what he said.

[12]A But that's what I'm trying to say. There

[13]are no findings, so if you ask me 50 more questions,

[14]there are no findings, it would still be no.

[15]Q I will ask you 50 more questions if you

[16]don't answer the question. It will be a lot quicker.

[17]Did you make any findings in there regarding clicking or

[18]grinding of the knee, yes or no?

[19]A No.

[20]Q But you knew they were present and you had

[21]an understanding they were present based upon the

[22]notations that you did make in here such as altered

[23]biomechanics, correct?

[24]A Yes.

[25]Q And you knew, did you not, upon reviewing
109

[1]
[2]this report, by your findings regarding altered

[3]biomechanics were present that you had to have done a

[4]physical examination, correct?

[5]A Yes.

[6]Q And that you had to have obtained a history

[7]from the patient, correct?

[8]A Yes.

[9]Q And you had to make findings which, to you,

[10]suggested altered biomechanics?

[11]A Yes.

[12]Q And the findings that you believe are

[13]attendant to that?

[14]A As well as the observation. **[*100]**
[15]Q And, again, the observations are not

[16]recorded in here but those are observations that you

[17]would have made?

[18]A As well as the ones we saw here this

[19]morning.

[20]Q But I'm talking about just the report.

[21]A That's correct.

[22]Q So this note, altered biomechanics, also

[23]means to you that you made certain observations?

[24]A Yes.

[25]Q Now, you said that if a patient came in
110

[1]
[2]with complaints of cramping, that there were more than --

[3]cramping in the calf or the thigh, there was more than

[4]one possibility, correct?

[5]A Yes.

[6]Q And medical professionals refer to that as

[7]a differential diagnosis?

[8]A Yes.

[9]Q And that would include the different

[10]possibilities, correct?

[11]A Yes.

[12]Q And in considering what different

[13]possibilities may be present under any given

[14]circumstances, you have to consider a number of factors,

[15]correct?

[16]A Yes.

[17]Q You have to consider past medical history,

[18]correct?

[19]A Yes.

[20]Q You also have to consider the history of

[21]the onset of the present complaints, do you not?

[22]A Yes. **[*101]**
[23]Q And you also have to consider the actual

[24]complaints being made by the patient, correct?

[25]A Yes.

111

[1]
[2]Q As well as your findings upon examination,

[3]correct?

[4]A Yes.

[5]Q Now, you indicated that one of the possible

[6]differential diagnoses would be deep-vein thrombosis,

[7]correct?

[8]A Yes.

[9]Q And another one would be a strain to the

[10]muscle in the calf?

[11]A Calf and hamstrings.

[12]Q Calf and hamstrings. And you also felt

[13]that that differential diagnosis would include a nerve

[14]root compression, correct?

[15]A Yes.

[16]Q Now, in giving that testimony, part of it

[17]was based upon your understanding that this patient had

[18]lower back pain following the incident on December 24,

[19]1992, correct?

[20]A Yes, the overall picture.

[21]Q But part of that --

[22]A Yes.

[23]Q part of that overall picture is the

[24]presence of lower back pain?

[25]A Yes.

112

[1]
[2]Q And part that overall picture is your

[3]understanding that she wrenched herself when the ankle

[4]rolled?

[5]A You mean this morning, based on the

[6]hypothetical situation **[*102]** that was put to me?

[7]Q Yes.

[8]A Yes.

[9]Q By the way, Doctor, when were you first

[10]requested to provide opinions with respect to the onset

[11]of the herniated disc, when were you first --

[12]A You mean by report?

[13]Q Well, your report doesn't indicate, does

[14]it, when you believe the disc developed, does it?

[15]A No, it does no.

[16]Q So when you were first asked by Mr. Marcus

[17]or someone from the firm of Kelner & Kelner to give an

[18]opinion as to when that herniated disc developed?

[19]A I don't -- I don't recall any conversations

[20]in the past. Discussion was held last night by telephone

[21]and this morning.

[22]Q So last night was the first time you ever

[23]offered an opinion as to when you believe the disc

[24]developed?

[25]A I may have given that opinion in the past,
113

[1]
[2]but I don't have any personal recollection of the

[3]discussions held until the discussion last night and this

[4]morning.

[5]Q Do you recall if you ever offered any

[6]opinions before last night?

[7]A I don't recall.

[8]Q Now, are you aware that when Mrs. Garber

[9]was seen in the emergency room **[*103]** on December 29, 1992 that

[10]there was swelling present?

[11]A Through -- through the past records, yes.

[12]Q What past records did you review to

[13]determine that?

[14]A The records that were pointed out to me

[15]this morning.

[16]Q Okay. Did you, yourself, ever review the

[17]Good Samaritan Hospital records of December 26, 1992?

[18]A I don't believe so.

[19]Q Did you ever specifically review the triage

[20]note prepared on that date?

[21]A Prior to today?

[22]Q Prior to today.

[23]A I don't believe so.

[24]Q Did you review it today?

[25]A Yes.

114

[1]
[2]Q That would have been this morning before

[3]coming into this courtroom?

[4]A Yes.

[5]Q Then you were aware, were you not, that

[6]upon reviewing that note it indicates that there was

[7]swelling, correct?

[8]A Yes.

[9]Q And that's a local phenomenon, is it not?

[10]A Yes.

[11]Q And you're also aware that there was

[12]ecchymosis, are you not?

[13]A Yes.

[14]Q And that's a black and blue?

[15]A Yes.

[16]Q And that was also confined to the left

[17]ankle, correct?

[18]A Yes.

[19]Q Are you **[*104]** aware as you sit here today whether

[20]there were any complaints of pain, cramping or thigh

[21]cramping at that time?

[22]A I don't remember seeing it.

[23]Q Are you aware as you sit here today when

[24]those complaints first developed?

[25]A I have no -- no accurate recollection or
115

[1]
[2]records as to when it first occurred.

[3]Q Are you aware as you sit here today what

[4]the progression of those complaints were?

[5]A Other than what was given to me this

[6]morning by Mr. Marcus, no.

[7]Q Did you review any phone logs or phone

[8]messages?

[9]A I did not.

[10]Q Now, you're not involved in surgical

[11]intervention, are you?

[12]A No.

[13]Q Never performed back surgery?

[14]A Assisted by not performed, personally.

[15]Q And that would have been during your

[16]training?

[17]A Yes.

[18]Q The presence of pain alone is not an

[19]indication for surgery, correct?

[20]A That is correct.

[21]Q An indication for surgery in a patient with

[22]a herniated disc would be loss of bladder or bowel

[23]function, correct?

[24]A Yes, that's one.

[25]Q Or the complete presence or I should **[*105]** say
116

[1]
[2]the absence of any muscle function?

[3]MR. MARCUS: Objection to the form.

[4]THE COURT: I'll sustain it.

[5]MR. KLEIDMAN: I'll rephrase it.

[6]Q Another indication would be the presence of

[7]a dropped foot?

[8]A Yes, that would be another indication for

[9]surgery.

[10]Q A complete dropped foot?

[11]A Yes.

[12]Q So the presence of some weakness in the

[13]muscles that affect the foot would not be an indication

[14]for surgery, correct?

[15]A It would be a very, very close call. You

[16]would have 24 to 48 hours to make that decision. What is

[17]causing the muscle weakness, is it coming from a disc

[18]herniation. That must be watched extremely carefully.

[19]If there's a fragment that's loose, it requires surgery

[20]immediately in my opinion.

[21]Q But you're not a surgeon?

[22]A I'm not a surgeon and generally the

[23]supervision of such is undertaken by an orthopedist or

[24]neurosurgeon, also by a physiatrist who has training in

[25]spinal pathology.

117

[1]
[2]Q To do the surgery?

[3]A No, to make a determination that it's

[4]done. You don't have to be a radiologist to diagnosis **[*106]** a

[5]fracture. Any doctor can diagnose a fracture, even a

[6]layperson can see it. You don't have to be a

[7]neurosurgeon to do the diagnosis. The first thought to

[8]your mind should be is there a loose fragment in the

[9]spine and how do you do that, with an MRI. And what you

[10]do you do, early intervention.

[11]Q And early intervention in your opinion is

[12]surgery?

[13]A With that kind of a history, with that kind

[14]of a picture, you have to make a decision within the

[15]first 48 hours.

[16]Q So your opinion would be that it would have

[17]to be surgical intervention with this history?

[18]A You watch it. You watch it. If it

[19]progresses and leads to a foot drop, you have no choice

[20]at that point but to do surgery.

[21]Q So until it -- until it leads -- so until

[22]it leads to a foot drop, a patient with just pain is not

[23]a candidate for surgery, true or not true?

[24]A I'm saying -- pain is not the issue here.

[25]It's the weakness with this type of history. For

118

[1]
[2]instance --

[3]Q Doctor, please try to answer my question.

[4]MR. MARCUS: Can he be allowed to finish his

[5]answer?

[6]THE COURT: **[*107]** Yes, he certainly may.

[7]Did you finish your answer?

[8]THE WITNESS: No.

[9]THE COURT: You may finish with your

[10]answer.

[11]A If, for instance, you have a patient with

[12]diabetes and they're coming to you complaining of

[13]atypical chest pain, what do you do? Do you admit the

[14]patient? You admit the patient, observe the patient.

[15]You make sure 100 percent that there is no myocardial

[16]infarction settling in. Once you're 100 percent sure,

[17]then you send the patient out because if you're wrong you

[18]could lose the patient.

[19]To continue with my answer, if you have a

[20]history with multiple disc herniations, prior surgery,

[21]beginning formation of muscle weakness, you have to be

[22]very careful not to make a mistake. How do you make that

[23]careful decision? You do an immediate MRI or myelogram

[24]and decide whether to do surgery or not.

[25]Canal stenosis is one indication with this
119

[1]
[2]type of a history. Also a fragment is another

[3]indication. An EMG that's positive showing L5

[4]compression is another indication.

[5]MR. KLEIDMAN: Move to strike as

[6]nonresponsive.

[7]THE COURT: The motion **[*108]** is denied.

[8]Q Doctor, you came here to court today to

[9]offer your opinion as to early intervention, correct?

[10]A I came to -- here to answer whatever

[11]questions that fall into my area of expertise.

[12]Q And one of the areas of questions that you

[13]were prepared to testify to was that in your opinion was

[14]there should have been early intervention?

[15]A Yes.

[16]Q And you told us just now in part that's

[17]based upon this lady's past history, correct?

[18]A Correct, yes.

[19]Q But you were unaware of anything regarding

[20]her past medical history after 1979 and up until 1992,

[21]true or not true?

[22]A I have significant history to warrant me to

[23]be extra careful, to take extra precautionary measures.

[24]The more history you hear, the more you need to be

[25]careful and take extra precautions.

120

[1]
[2]Q Doctor, please answer my question.

[3]A I'm trying.

[4]Q True or not true, you were prepared to

[5]offer that opinion even though you were unaware, as

[6]documented in your reports, of the patient's history

[7]between 1979 and December of 1992, true or not true?

[8]MR. MARCUS: Objection. **[*109]**
[9]THE COURT: Overruled.

[10]You may answer the question.

[11]A That wouldn't change my opinion. It would

[12]make my opinion even stronger.

[13]Q So based upon the events up to 1979, it's

[14]your opinion that that alone would have warranted

[15]surgical intervention in this patient?

[16]A Yes. Would you like to know why?

[17]Q I'm sure Mr. Marcus will ask you.

[18]Are you aware of how, during these

[19]exacerbations between 1979 and 1992, Mrs. Garber

[20]presented herself?

[21]A In terms of function?

[22]Q In terms of what complaints she had when

[23]she had exacerbations of her low back problem.

[24]A She told me.

[25]Q When did she tell you about that?

121

[1]
[2]A Through the time I was treating her.

[3]Q Is it documented in any of your reports?

[4]A It might be, it may not.

[5]Q Is it documented in the October 13th report

[6]of this year?

[7]A No. That report, again, is only a summary

[8]of the patient's treatment, diagnosis and prognosis.

[9]That's it.

[10]Q Is it documented in your May 13, 1993

[11]report?

[12]A No, not completely.

[13]Q We went through that before. **[*110]** Do you have

[14]any indication in here after March of 1979, other than,

[15]quote-unquote, good results?

[16]A No, that's all I have.

[17]Q Are you aware if, when she presented with

[18]exacerbations of her low back problems after March of

[19]1979 and up until December of 1992, she had low back

[20]pain?

[21]A She did have low back pain intermittently.

[22]Q But on each of the occasions that she had

[23]an exacerbation, she had low back pain, correct?

[24]A Yes.

[25]Q And on each of the exacerbations when she
122

[1]
[2]had low back pain, she also had what she described

[3]yesterday as sciatic pain, correct?

[4]A That information, I don't recall. She may

[5]have told me, but I don't recall that information.

[6]Q Well, are you aware of any of the records

[7]reporting that prior to December of 1992 that she had

[8]experienced sciatic pain?

[9]A There may have been some records indicating

[10]that, yes.

[11]Q Now, by the way, it's your opinion that

[12]based upon this patient's history, that once she

[13]developed these symptoms she should have been immediately

[14]hospitalized and observed, is that what you're saying? **[*111]**
[15]A In 1992?

[16]Q Yes.

[17]A That particular, exact date, no, but as

[18]time went on, as her symptoms progressed, yes, the first

[19]few days afterwards.

[20]Q Are you aware if she ever developed

[21]weakness at any time before December of 1992 related to

[22]her low back problems?

[23]A Weakness in where?

[24]Q In the legs.

[25]A She may have. I have no personal

123

[1]
[2]recollection, nor have any records indicating it, but it

[3]may have been possible.

[4]Q Are you aware if she ever developed

[5]weakness in the arm as a result of cervical back

[6]problems?

[7]A Well, she went -- I know she had carpal

[8]tunnel. That would give you weakness. I know she had

[9]problems with her shoulder before. That can possibly

[10]give you weakness as well.

[11]Q Do you know if she was ever treated for

[12]cervical disc disease?

[13]A I believe she may have been from a prior

[14]motor vehicle accident.

[15]Q Do you know if she ever developed weakness

[16]as a result of that prior episode?

[17]A She may have.

[18]Q Do you know if, as a result of developing

[19]weakness in that setting, she was hospitalized **[*112]** and

[20]observed?

[21]A She may have.

[22]Q Do you know one way or the other?

[23]A For sure, no.

[24]Q Do you know if an emergent or urgent MRI

[25]was done when she developed those symptoms?

124

[1]
[2]A I have no recollection or records to that

[3]effect.

[4]Q Do you know if she had an emergent EMG or

[5]the nerve conduction study when she had those symptoms?

[6]A I know she had an EMG, the only one she had

[7]prior to seeing me, and that was normal.

[8]Q So the answer is no, you don't know; is

[9]that correct?

[10]A I just told you know about the EMG of the

[11]lower extremities that was performed.

[12]Q Not the upper extremities?

[13]A The upper extremities, I guess the carpal

[14]tunnel was diagnosed by the upper extremity EMG.

[15]Q Are you aware that in 1990 Dr. Zeitlin

[16]found this patient or noted that this patient reported

[17]increased low back pain with severe burning on the left

[18]leg, posterior thigh and calf, more severe distally?

[19]A I believe this morning Mr. Marcus mentioned

[20]that, yes.

[21]Q And that was based upon an evaluation that

[22]was done in November of 1990, **[*113]** is that your recollection?

[23]A I don't remember the exact date but --

[24]MR. MARCUS: Your Honor, objection. Counsel

[25]is misreading the evidence.

125

[1]
[2]THE COURT: Would the reporter read the

[3]question back, please?

[4]MR. KLEIDMAN: I'll rephrase the question

[5]just so it's clear.

[6]Q Are you aware that when this patient

[7]consulted with Dr. Zeitlin on November 1, 1990, she

[8]reported that following the episode of bending down to

[9]pick up the soap that she had increased low back pain and

[10]severe burning down the left leg, posterior thigh and

[11]calf pain, more severe distally?

[12]A Other than what was said this morning, no.

[13]Q Are you aware of the physical findings that

[14]were made at that time?

[15]A I am not.

[16]Q Would a diminished left knee jerk be

[17]significant?

[18]A That could be part of the prior L4-L5

[19]surgery.

[20]Q But you wouldn't know that without

[21]evaluating her, correct?

[22]A That's correct.

[23]Q And the fact that the patient had a limping

[24]gait, that would be significant, would it not?

[25]A It could be.

126

[1]

[2]Q And that would **[*114]** warrant further evaluation,

[3]would it not?

[4]A It could.

[5]Q Are you aware of when the MRI that was

[6]ordered as a result of this visit was performed?

[7]A 1/12/93.

[8]Q I believe there was one in April of '91,

[9]Doctor.

[10]A Prior to this?

[11]Q Yes.

[12]A '91, yes, and then 1/12/93.

[13]Q So that MRI to evaluate the symptomatology

[14]was not done until some four plus months after this

[15]evaluation by Dr. Zeitlin, correct?

[16]A If the timing is correct, then the answer

[17]is yes.

[18]THE COURT: Mr. Kleidman, will your cross

[19]examination continue for a while longer? The only

[20]reason I'm asking the question is I have to decide

[21]when to break for lunch.

[22]MR. KLEIDMAN: If we could approach, I could

[23]tell your Honor what my situation might be. I

[24]don't know how much longer I'm going to be until I

[25]have an opportunity to review my notes and confer
127

[1]
[2]with my client.

[3]THE COURT: Perhaps we should break for

[4]lunch now. We'll recess until 2 o'clock.

[5](Lunch recess.)

[6](Jury present.)

[7]THE COURT: You may continue.

[8]MR. KLEIDMAN: Thank **[*115]** you, your Honor.

[9]Q Good afternoon, Dr. Guy.

[10]A Good afternoon.

[11]Q Now, with respect to your findings with

[12]regard Mrs. Garber, you determined that she has an

[13]abnormal gait; is that correct?

[14]A Yes.

[15]Q And that's in part because of the foot

[16]drop?

[17]A Yes.

[18]Q It's also in part of because of the low

[19]back problems?

[20]A Mostly from the foot drop.

[21]Q But in part from the low back problems?

[22]A Small part, yes.

[23]Q Well, can low back problems in an of

[24]themselves cause an abnormal gait?

[25]A Temporarily, yes.

128

[1]
[2]Q And in the past, had Ms. Garber, to your

[3]knowledge, had episodes or periods of time where she had

[4]an abnormal gait as a result of her low back problems?

[5]A Yes, intermittently which corrected later

[6]on.

[7]Q Is that reflected in any of your reports?

[8]A No.

[9]Q And you didn't review the records from the

[10]past, correct?

[11]A Correct.

[12]Q Bursitis, could you tell the jury what that

[13]is?

[14]A In a hip joint, you have a pouch or a

[15]cushion which separates the femur or the femoral head. **[*116]**
[16]In the hip it's called the bursa. From any kind of

[17]increased stress to the hip joint, whether it's from

[18]prolonged standing, walking or abnormal gait, you stress

[19]that bursa. It gets inflamed, swollen. It hits the bone

[20]around the hip joint and it causes pain.

[21]Q And you found Mrs. Garber to have bursitis?

[22]A Yes, both sides.

[23]Q Do you know if she had ever previously been

[24]diagnosed with bursitis?

[25]A No, I do not.

129

[1]
[2]Q Would it be of significance to you to know

[3]that as early as 1974 Dr. Pappalardo diagnosed her with

[4]chronic bursitis?

[5]MR. MARCUS: Objection, your Honor. It

[6]assumes facts not in evidence.

[7]THE COURT: I'll sustain the objection as to

[8]the form of the question.

[9]Q Do you know if she had chronic bursitis

[10]dating back as early as 1974?

[11]A No.

[12]Q Do you know if Dr. Pappalardo ever

[13]diagnosed her as having bursitis?

[14]A No, I do not.

[15]Q Do you know if Dr. Starace ever diagnosed

[16]her as having bursitis?

[17]A No.

[18]Q Do you know if either physician treated her

[19]for bursitis, that is either Dr. Pappalardo or

[20] **[*117]** Dr. Starace?

[21]A I do not know.

[22]Q Now, you indicated that you also found

[23]chondromalacia of the patella.

[24]A Yes.

[25]Q And also you felt that that was due to the
130

[1]
[2]altered biomechanics.

[3]A Made it worse.

[4]Q Do you know if that was a preexisting

[5]condition?

[6]A Chondromalacia is part of the natural aging

[7]process. It can be worsened by abnormal gait, abnormal

[8]biomechanics.

[9]Q Do you know if she had been diagnosed with

[10]that condition as early as 1982?

[11]A I'm not surprised.

[12]Q Now, the MRI done on January 11, 1993

[13]revealed an L5-S1 herniation, correct?

[14]A January '93?

[15]Q '93.

[16]A Correct.

[17]Q And that would normally impinge upon the SI

[18]nerve root?

[19]A Normally.

[20]Q Yes?

[21]A Or in this case?

[22]Q Normally.

[23]A It depends. Sometimes it could, sometimes

[24]no. Sometimes you can have a herniation with no

[25]impingement whatsoever.
131

[1]
[2]Q But usually when there's impingement of the

[3]L5-S1 disc, it's on the SI nerve root, is that a fair

[4]statement?

[5]A It could be on others, L5. **[*118]** It could be on

[6]the SI. It depends.

[7]Q In this case it was on the L5?

[8]A Yes.

[9]Q Once this disc herniated, this patient was

[10]going to have permanent sequela from the disc herniation,

[11]true or not try?

[12]A When you say permanent sequela, you need to

[13]explain to me what you mean by permanent sequela.

[14]Q Well, once this disc herniated, this

[15]patient was going to have changes because of the disc?

[16]A Some, yes.

[17]Q And some of those changes would be the

[18]development of osteoarthritis over time, correct?

[19]A Yes.

[20]Q In fact, when she herniated the disc at

[21]L4-L5, she had subsequent development of degenerative

[22]changes?

[23]A Yes.

[24]Q And those degenerative changes following

[25]that laminectomy in 1979 had produced, over the years,
132

[1]
[2]problems for this woman, correct?

[3]A When you say problems, what kind of

[4]problems?

[5]Q Problems with gait.

[6]A Intermittently, yes.

[7]Q Intermittent episodes of low back pain?

[8]A Yes.

[9]Q Intermittent episodes of altered gait?

[10]A Yes.

[11]Q Intermittent episodes of bursitis? **[*119]**
[12]A Bursitis, from radiculopathy or disc

[13]herniation.

[14]Q It comes from the altered gait?

[15]A Yes, it could, it could.

[16]Q Well, once this disc herniated at L5-S1 in

[17]December or January of 1992 or '93, this lady was going

[18]to develop osteoarthritic change secondary to that,

[19]correct?

[20]A Yes, to some degree.

[21]Q And you also mentioned that following a

[22]herniation, there could be osteophyte development?

[23]A Yes.

[24]Q And that that may be -- that may produce,

[25]in the future, additional problems?
133

[1]
[2]A Yes.

[3]Q And that's true regardless of when this

[4]disc herniation occurred and was diagnosed, correct?

[5]A Yes.

[6]Q And you also mentioned that once there is a

[7]disc herniation, there's a risk of reherniation, correct?

[8]A Yes.

[9]Q And that's true regardless of when this

[10]disc herniation was diagnosed, correct?

[11]A Yes.

[12]Q Now, you mentioned earlier today some

[13]future treatment that you believe will be necessary for

[14]Mrs. Garber.

[15]A Yes.

[16]Q And amongst the things you mentioned were

[17]an EMG for the future.

[18] **[*120]** A Yes.

[19]Q And I believe you told us one every two to

[20]three years.

[21]A Yes.

[22]Q Mrs. Garber was first seen by you in

[23]January -- in May of 1993?

[24]A Yes.

[25]Q More than three years ago, correct?

134

[1]
[2]A Yes.

[3]Q Have you performed a repeat EMG to date?

[4]A No, but she will be scheduled for a repeat

[5]EMG very soon.

[6]Q But to date, more than two or three years

[7]later, you have not done so, correct?

[8]A No, I have not done so.

[9]Q You also mentioned that she may require

[10]physical therapy in the future, correct?

[11]A Yes.

[12]Q And that too is documented in your report

[13]of October 19, 1996, correct?

[14]A Yes.

[15]Q Now, you mentioned this morning that there

[16]may be the need for future MRI's, correct?

[17]A Yes.

[18]Q Is that in your October 19th report?

[19]A MRI's, I don't believe so.

[20]Q Do you want to check and make sure?

[21]A I see no mention of a repeat MRI.

[22]Q And you also mentioned this morning that

[23]you thought there would be the need for possible further

[24]surgery?

[25]A Yes.

135

[1]

[2]Q Do **[*121]** you mention that in your report of

[3]October 19, 1996?

[4]A No.

[5]Q And lastly, you mentioned that you believe

[6]that she needs to be reevaluated by yourself or another

[7]physician specializing in physical and rehabilitation

[8]medicine on a monthly basis, correct?

[9]A Yes.

[10]Q Is that mentioned in your report of October

[11]19, 1996?

[12]A No.

[13]Q Now, Doctor, this morning you mentioned,

[14]when giving some testimony of your opinions, that you

[15]felt that if the foot drop had been detected earlier,

[16]there is a good chance of preventing a permanent foot

[17]drop, is that a fair statement?

[18]A If the compression on the L5, which is

[19]causing the foot drop, is detected early, yes, there

[20]would be a good chance that the foot drop would not have

[21]occurred or remained to this capacity.

[22]Q Do you know when Mrs. Garber first

[23]developed complaints of the ability to raise her foot or

[24]to put her foot down?

[25]A On -- on or about January 8, '93.
136

[1]
[2]Q And based upon what -- withdrawn.

[3]What were you just looking at when you made

[4]that statement?

[5]A Date of the accident, **[*122]** shortly after the

[6]date of the accident.

[7]Q And what were the complaints that she

[8]offered on January 8, 1993 that suggested to you the

[9]inability to dorsiflex or plantar flex the foot?

[10]A The history obtained subsequent to that and

[11]the history that was given forth by Mr. Marcus.

[12]Q And when you say history, what are you

[13]specifically referring to?

[14]A The hypothetical questions that were put

[15]forth to me.

[16]Q Now, you concluded this morning, did you

[17]not, that Mrs. Garber has a permanent disability?

[18]A Yes.

[19]Q Have there been occasions in the past where

[20]you've been called upon to testify as to whether or not a

[21]patient has a permanent disability?

[22]A Yes.

[23]Q And have there been occasions when you've

[24]offered an opinion that the patient does have a permanent

[25]disability?
137

[1]
[2]A Yes.

[3]Q Has there ever been an occasion where,

[4]after you've offered such an opinion, you've later

[5]changed your opinion as to whether or not the patient has

[6]a permanent disability?

[7]A There was one case -- my opinion never

[8]changed. The patient did have **[*123]** a permanent disability but

[9]the patient went -- wanted to go back to work because of

[10]financial needs. That was a patient that was involved --

[11]it was a Metro North case. He was involved in an

[12]on-the-job injury. He had a torn meniscus and disc

[13]protrusion in his lower back. And he begged me to let

[14]him go back to work despite my advice. I did so, yes.

[15]Q So you prepared a report clearing that

[16]patient to go back to work even though it was contrary to

[17]your opinion?

[18]A Yes. I -- I can't force a patient not to

[19]go back to work. I can only recommend what my opinion

[20]is.

[21]Q But you had to write a letter in that case,

[22]did you not, clearing the patient for work?

[23]A Yes.

[24]Q And advising his employer that you felt

[25]that he was capable of returning to work?

138

[1]

[2]A Yes. With the -- with the advice to the

[3]patient that if his condition gets worse, he must stop.

[4]Q But still, contrary to your opinion, you

[5]cleared a patient to return to work --

[6]A It was not contrary to my opinion. It was

[7]against my better judgement. The person -- what are you

[8]going to do when a patient **[*124]** has to feed himself? What

[9]could you tell a patient when a patient has to sustain

[10]himself and his family and he must work and he can't go

[11]back to work unless the doctor gives him a clearance

[12]note?

[13]Q Okay. You're still putting a patient at

[14]danger when you do so?

[15]A I am not. I advise the patient what his

[16]limitations are. He's free to chose whatever he wants

[17]to.

[18]Q Doctor, that was an instance that despite

[19]an opinion that you held at the time of trial, you later

[20]authored a letter within several months clearing him to

[21]return to work, correct?

[22]A Again, the answer is correct. My opinion

[23]did not change of the permanent disability.

[24]Q But you stated that it changed in that

[25]letter, correct?

139

[1]

[2]A I cleared him for work, yes, for the reason

[3]I gave you.

[4]Q Now, just a couple last questions, Doctor.

[5]In your report of October 19, 1996, you indicated that

[6]you felt that she should not return to work in a critical

[7]care setting, correct?

[8]A Yes.

[9]Q But she could go back to work in another

[10]setting, correct?

[11]A In a sedentary setting for **[*125]** two to three or

[12]under four hours per day, in a sedentary position, if she

[13]can tolerate that position.

[14]Q Well, Doctor, referring to your report of

[15]October 19, 1996, your sole comments in that regard are,

[16]and I quote, the patient can do other light sedentary

[17]work, but not acute care work, correct?

[18]A Correct.

[19]Q Nothing as far as the hours?

[20]A I'm sorry?

[21]Q Nothing as far as the hours, correct?

[22]A Correct.

[23]MR. KLEIDMAN: Your Honor, if I could just

[24]have a moment.

[25]That's all. Thank you.

140

[1]
[2]THE COURT: You're welcome.

[3]Is there any redirect?

[4]MR. MARCUS: Yes, your Honor, just a few

[5]things.

[6]REDIRECT EXAMINATION BY MR. MARCUS:

[7]Q Dr. Guy, you gave a clearance note to a

[8]Metro North employee to go back to work?

[9]A Yes.

[10]Q Did Carol Garber go back to work briefly

[11]despite your recommendation that she not work?

[12]A She did.

[13]Q Is that what you encounter from time to

[14]time with patients where they really feel the need to

[15]work?

[16]A Yes.

[17]Q Now, you were asked if once a disc

[18]herniated, this **[*126]** disc herniated, whether the plaintiff

[19]would have some problems regardless of the subsequent

[20]course, would a delay in diagnosis and treatment affect

[21]the severity of the postherniation problems that would

[22]develop?

[23]A Yes, big time. In fact, in this case, it

[24]did.

[25]Q Now, just before lunch, you were questioned
141

[1]
[2]about a report of Dr. Zeitlin of November 1, 1990 in

[3]which you were told that the patient came in and

[4]complained of increased low back pain with severe burning

[5]pain down the left leg, posterior thigh and calf pain,

[6]more severe distally, and you were then -- and a

[7]diminished left knee jerk and a limping gait, and you

[8]were then told that the MRI was not ordered on an

[9]emergency basis. Would it have made any difference in

[10]terms of whether those symptoms warranted an emergency

[11]intervention if you also knew that Dr. Zeitlin stated,

[12]left lumbosacral radiculopathy, perhaps SI distribution,

[13]patient has improved to a degree, mechanical signs are

[14]not striking, however, an account of marked increased

[15]symptoms at onset would recommend further workup to

[16]include MRI scan of the lumbosacral **[*127]** spine?

[17]MR. KLEIDMAN: Objection to the form.

[18]Q Doctor, in light of that --

[19]THE COURT: Wait. I'll overrule the

[20]objection.

[21]MR. MARCUS: Excuse me, your Honor.

[22]Q In light of that, would you agree that in

[23]that circumstance where the conditions had already

[24]started to improve at the time the physician saw the

[25]patient, you wouldn't need an emergency MRI?

142

[1]

[2]A That's the key to what I just said. If you

[3]have an improvement, not a gradual worsening, the

[4]clinical picture changes. You now go from a nonemergent

[5]situation to a situation where you can continue to

[6]observe carefully and safely.

[7]Q By the way, an ankle sprain, that involves

[8]an injury to the ligaments of the ankle, correct?

[9]A Yes.

[10]Q And depending on the degree of the ankle

[11]sprain, that's the degree of tearing of the ligament

[12]fibers, correct?

[13]A Yes, a sprain is the microscopic wear on

[14]the tendon and the ligament.

[15]Q So that's another word for sprain, is it

[16]not?

[17]A Yes, it is.

[18]Q Your October 19, 1996 report, does it

[19]contain any findings at all of any kind **[*128]** whatsoever?

[20]A Does not.

[21]Q Does it contain any section of the report

[22]that says findings?

[23]A Does not.

[24]Q Okay. Your earlier report had a section

[25]for findings, correct?

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[1]
[2]A Yes.

[3]Q Did the January 11, 1993 MRI show canal

[4]stenosis?

[5]A 1/11/93, all I have in -- my report says

[6]that there's a development of the new L5-S1 disc

[7]herniation which is left of the midline and extending

[8]superiorly behind the body of L5. I don't see any word

[9]of stenosis.

[10]Q Okay. Now, given Carol Garber's history as

[11]I outlined it for you this morning, should she have been

[12]worked up either in the hospital or as an outpatient to

[13]rule out a herniated disc when she developed the cramping

[14]pain in her thigh and calf on December 28, 1992?

[15]MR. KLEIDMAN: Objection.

[16]THE COURT: I'll overrule the objection.

[17]A I'm sorry. The question is…

[18]MR. MARCUS: Could I have it read back, your

[19]Honor, or do you want me to do it again?

[20]THE COURT: Read the question back.

[21](The requested question was repeated by the

[22]reporter.)

[23]A The answer is yes, **[*129]** all three possible

[24]causes should have been ruled out.

[25]Q To your knowledge, was anything done other
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[1]
[2]than physical palpation of the calf to rule out anything?

[3]A To my knowledge, that's all that was done.

[4]MR. MARCUS: Okay. I have nothing further,

[5]your Honor.

[6]THE COURT: Is there any recross?

[7]MR. KLEIDMAN: No, your Honor.

[8]THE COURT: All right. Thank you very much,

[9]Doctor.

[10](Witness excused.)

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[1]
[2]PLAINTIFFS' EXHIBITS
Exhibit Description Page

[6]ankle-foot orthosis 26
deemed

[7]DEFENDANTS' EXHIBITS
Exhibit Description Page
E Dr. Guy's Office chart
of Carol Garber
for identification 64
F Folder
for identification 65
G Two-page letter
for identification 84

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