TESTIMONY OF ALI GUY, MD; 1997 Trial Trans. LEXIS 791

New York Supreme Court, Queens County

16187/94

August 28, 1997

Reporter
1997 Trial Trans. LEXIS 791 *

JENNIFER DAVEY, Plaintiff v. EUGENE KRAMER, Defendant

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

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Proceedings

THE COURT: Be seated. Thank you. The

[21]juror we have been waiting for has just arrived.

[22]She was in an auto accident. I am just going

[23]let her have a few moments to calm down and

[24]relax. I just don't want to rush her for a lot

[25]of reasons. It was trial juror number four.
I

[2](Recess taken. After the recess.)

[3]THE COURT: If you think they're ready,

[4]Jose, bring them in.

[5]There was something you wanted to mark.

[6]Show it to him, then we can go. Okay.

[7]MR. JORDAN: Okay. It's **[*2]** not in sequence.

[8]COURT OFFICER: Jury entering.

[9]Jury entered. Case on trial continues.

[10]Let the record indicate that all counsel are

[11]present, that the jury is present and properly

[12]seated in the jury box.

[13]THE COURT: Good morning.

[14]COURT OFFICER: Counsel stipulate to the

[15]presence and proper seating of the jury?

[16]MR. JORDAN: So stipulated.

[17]MR. CAROLA: So stipulated.

[18]THE COURT: I regret the delay I had in

[19]getting you all here, and the circumstances of

[20]that, but thank you very much for making ever

[21]effort to be here on time.

[22]Again, thank you very, very much on behalf

[23]of everybody in the courtroom.

[24]Call your witness.

[25]MR. JORDAN: He will be back shortly.

[2]THE COURT: Yes, Counsel.

[3]MR. JORDAN: Your Honor, plaintiff calls

[4]Dr. Ali Guy to the stand.

[5]THE COURT: Doctor, please.

[6]COURT OFFICER: Please step up. Raise your

[7]right hand. Face the clerk of the court, so you

[8]may be sworn in.

[9]A L I G U Y, M. D., having first been duly sworn by

[10]the clerk of the court was examined and

[11]testified as follows:

[12]THE COURT: Thank **[*3]** you. Please be seated.

[13]THE CLERK: In a loud clear voice, please

[14]state yourr name.

[15]THE WITNESS: My name is Dr. Ali Guy, A L

[16]I. Last name is G U Y. My office address is 15

[17]Jericho Turnpike, Jericho, New York 11573.

[18]THE CLERK: Thank you, Doctor.

[19]THE WITNESS: You're welcome.

[20]MR. JORDAN: Your Honor, may I proceed?

[21]THE COURT: Please.

[22]DIRECT EXAMINATION

[23]BY MR. JORDAN:

[24]Q Good morning, Dr. Guy.

[25]A Good morning.

[2]Q Dr. Guy, are you licensed to practice medicine

[3]in the state of New York?

[4]A Yes, I am.

[5]Q And when did you receive your license?'

[6]A 1985.

[7]Q And prior to that you received a medical

[8]education; correct?

[9]A Yes.

[10]Q Would you briefly go over your medical education

[11]with us?

[12]A Undergraduate, I went to Queens College.

[13]Medical School, I went to the University of North Eastern

[14]in the Dominican Republic. I graduated in June of 1981.

[15]Afterwards I did three separate residencies. I did my

[16]first residency in the field of internal medicine **[*4]** at Mount

[17]Sinai School of Medicine -- Mount Sinai Medical Center for

[18]a period of eighteen months, then I did one year of

[19]general surgery at Cabrini Medical Center. Then I did

[20]three years of physical medicine and rehabilitation at

[21]Mount Sinai Medical Center. I am Board certified in the

[22]field of physical medicine and rehabilitation. I am the

[23]chief of rehabilitation at Maimonedes Medical Center in

[24]Brooklyn. I am the director of neuromuscular diseases and

[25]orthopedics at the Center for Joint Diseases and

[2]Orthopedics. I am a clinical instructor to the residents

[3]from NYU in that same field. I am also on the staff of

[4]Cabrini Medical Center.

[5]Q And can you tell the jury what board

[6]certification means?

[7]A Board certification is a degree which you can

[8]obtain in your level of specialty. It's the equivalent

[9]of a PhD. to a non-medical person. In order to achieve

[10]board certification in any specialty you have to fulfill

[11]the following requirements: First you have to have at

12 least one year of a prior training in a different

[13]specialty, **[*5]** other than physical medicine rehabilitation.

[14]You have to have at least three years in a physical

[15]medicine rehabilitation residency training program. You

[16]have to have passed your examination that you are given by

[17]the department. You have to have scored at least 70

[18]percent or higher each year. You must then sit in for an

[19]eight-hour written examination when the residency training

[20]period is over. You must pass that examination. Then you

[21]must be in private practice for a period of no less than

[22]eighteen months. Then you take your Boards, part two,

[23]which is an oral examination. Then you go to the Mayo

[24]Clinic in Minnesota where all the research is done, and

[25]they go over all the texts -- where all the text books are

[2]written. You are tested orally 'by the doctors in the

[3]fields of orthopedics, in physical medicine,

[4]interpretation of X-rays, MRI's, CAT scans, EMG's, known

[3]
[5]as electromyopathy. You get tested on the principles of

[6]physical medicine and rehabilitation. If those doctors

[7]agree that you're up to par, then they pass you, and then

[8]you become Board **[*6]** certified, and you are given a title of a

[9]Diplomat and Fellow of the American Board of Physical

[10]Medicine and Rehabilitation. I obtained that degree in

[11]May of 1989.

[12]Q And, Doctor, are you a clinical instructor in

[13]any major teaching hospitals?

[14]A Yes, Hospital for Joint Diseases and

[15]Orthopedics, and Maimonedes Medical Center, and also at

[16]Cabrini Medical Center.

[17]Q And what are the requirements to became a

[18]clinical instructor?

[19]A You have to be Board certified first. You have

[20]to possess that. You have to possess knowledge that can

[21]be vouched for by at least two other doctors that know you

[22]within that hospital.

[23]Q And can you tell us what the field of physical

[24]medicine and rehabilitation involves?

[25]A Another name for physical medicine would be
r

[2]orthopedic medicine and non-surgical orthopedics.

[3]Physical medicine rehabilition, we are not considered

[4]orthopedic surgeons and we are not considered

[5]neurologists. Our title is physiatrist, a, specialty -- a

[6]medical speciality that was started shortly **[*7]** after World

[7]War 1 by Dr. Howard Rusk. He found there was a great need

[8]for treating patients with different injuries, whether it

[9]was gunshot wounds from the war, from polio, birth

defects, trauma cases, cardiac problems, pulmonary problems, so on and so forth. And he established this field. It's a field that deals with traumatic injuries, a field that overlaps to orthopedics and neurology. Neurology concentrates more on the disorders of the central nervous system, which is the brain diseases like Parkinson's disease and muscular diseases, Alzheimer's, strokes; things of that nature. A physiatrist concentrates more on diseases of the spine. A phsyiatrist concentrates on those specialties, and they refer one to the other. The difference between a physiatrist and an orthopedic surgeon is that a physiatrist avoids surgery. He is mostly holistic oriented to treat the whole body. We have training in other fields besides the orthopedic and neurological fields. We have training in internal medicine as well. We treat the internal organs as well.

[*8] And we try to avoid surgery, and will resort to physical therapy. We avoid medications if we can, and deal with the whole body, whereas the orthopedic surgeon deals primarily with the skeletal or the bone system.

Q Now, in your practice as a physiatrist, do you regularly lecture?

A I do.

Q And -- okay. And who do you lecture to?

A Just about all walks of life. I give lectures to medical students, residents, lay-people. I give lectures to attorneys. I give lectures to rehabilitation nurses; just about everybody.

Q When you give lectures to medical residents, do you do it for compensation?

[16]A When I give lectures, I am not compensated. I

[17]agree to do it free on a voluntary basis.

[18]Q And as a physiatrist do you consider yourself to

[19]be an expert in the field of trauma?

[20]A Yes.

[21]Q And why is that?

[22]A Well, to require rehabilitation one must have

[23]been injured, whether they have been hurt in a skiing

[24]accident, whether it's from a car accident, whether it's

[25]from a fall; any kind of injury that requires **[*9]**
[2]rehabilitation. A person that is not injured does not

[3]require rehabilitation.

[4]Q And as somebody who treats people who have been

[5]involved in accidents and other forms of trauma have you

[6]had occasion to be called as an expert witness in the

[7]courts of the State of New York?

[8]A Yes, many, many times.

[9]Q And how many times?

[10]A I can't give you an exact number, but

[11]approximately 40 to 45 times, give or take a couple of

[12]times.

[13]Q And over what period of time was that?

[14]A Well, I have been practicing medicine since

[15]1985, so since 1985.

[16]Q And have you ever been qualified as an expert in

[17]any supreme court in the State of New York?

[18]A Yes, just about every supreme court.

[19]Q And what about federal courts?

[20]A Also.

[21]Q What percentage of your practice is devoted to

[22]treating patients?

[23]A The majority, 90 percent or more.

[24]Q And what percentage would you say is devoted to

[25]teaching?

[1]
[4]
[2]A I would say an **[*10]** additional ten to fifteen

[3]percent.

[4]Q What percentage of your practice do you act as a

[5]consultant to other doctors?

[6]A Out of the remaining percentage, I would say an

[7]additional 20 to 25 percent.

[8]Q And do you do hospital consultations?

[9]A I do.

[10]Q Have you ever been denied or turned down as an

[11]expert in any court in your field?

[12]A Never.

[13]MR. JORDAN: Your Honor, at this point I

[14]would like Dr. Guy to be qualified as an expert.

[15]THE COURT: He is deemed an expert.

[16]Q Now, for the time that you have taken away from

[17]your practice to come to court and testify in this case

[18]are you being compensated?

[19]A I am.

[20]Q And how much are you being compensated?

[21]A In the area of $ 4, 000. for half a day. That

[22]includes my preparation, meetings with you, studying of

[23]the case with you prior to me coming here.

[24]Q And I did meet with you before you came here to

[25]testify today?

[2]A Yes.

[3]Q When did we meet for the first time?

[4]A Tuesday in my office.

[5]Q **[*11]** Had you and I ever met before that?

[6]A Never heard your name until Tuesday.

[7]Q And did we meet again this morning?

[8]A Yes, we did.

[9]Q Okay. Now, at this point I want to refer you to

[10]the patient Jennifer Davey.

[11]Did you bring your records with you with

[12]reference to that patient?

[13]A Yes.

[14]Q If I ask you any questions, please feel free to

[15]refer to those records?

[16]A Yes.

[17]Q Do you recall who referred her?

[18]A I'm sorry.

[19]Q Do you recall who referred Miss Davey to you?

[20]A I believe it was her attorney, for the first

[21]case. It was Dr. Mustafi for her second case.

[22]Q All right. Now, when was the first time that

[23]you saw Jennifer Davey?

[24]A July 12th, '94.

[25]Q Okay. And at that time did you take a history

[2]from her?

[3]A Yes.

[4]Q And what did that history entail, what did she

[5]say?

[6]A That she was -- well, on 10-6-91 when she was

[7]driving her car she became involved in a motor vehicle

[8]accident, and she sustained an **[*12]** injury. The impact was

[9]from the rear. She injured her neck and her lower back.

[10]She went to Booth Memorial Hospital where she was treated

[11]and released. And she had to go back because she had

[12]recurrent pain.

[13]She then went to receive treatment from a Dr.

[14]Leon Sultan and Dr. Ellen Bodner. And she received

[15]several months of physical therapy. She had an MRI of her

[16]lumbar spine, which was taken, and revealed three disk

[17]herniations. And she had an MRI of her cervical spine, of

[18]the neck, which was negative.

[19]When she came to see me she complained to me of

[20]lower back pain radiating down to both lower extremities.

[21]The pain was worse in the morning.

[22]Past medical history is essentially

[23]unremarkable, no history of any significant past medical

[24]problems or any prior injuries.

[25]Current. medication consisted of Motrin, 600

[2]milligrams, three times daily as needed. That was

[3]basically the history.

[4]Q And after obtaining a history from Miss Davey,

[5]did you examine her?

[6]A I did.

[7]Q Okay. And could you tell us, first of all,

[8] **[*13]** approximately how long that examination took?

[9]A Well, the history generally takes about ten to

[10]fifteen minutes; the exam, also ten to fifteen minutes.

[11]And then I spent about fifteen minutes talking with the

[12]patient regarding her treatment plan, what was exactly

[13]wrong, the different treatments available, her treatment

[14]options and what treatment treatment options to take.

[15]Q Now, when you did examine Miss Davey after

[16]receiving the history from her, could you describe that

[17]examination and any findings that you made?

[18]A Yes. She was given a gown to put on. The neck

[19]was slightly tender with moderate spasm and prolonged

[20]involuntary contraction of the muscles. The patient had

[21]absolutely no control over the tightness of the muscles.

[22]When you have a normal muscle it is supposed to be soft to

[23]the touch, and with a muscle spasm it's hard, and you lose

[24]range of motion, because the fibers are shortened. If a

[25]muscle is hard, it can be felt, it is hard as this board

[2]here. So in her neck there was a moderate spasm, range of

[3]motion was **[*14]** shortened with no muscle power, and there was

[4]tenderness with spasm, and decreased range of motion. It

[5]was half the normal range of motion in every direction, on

[6]forward flexion, backward extension, lateral bending and

[5]
[7]lateral rotation to the left and to the right, that was

[8]one half normal.

[9]THE COURT: Would you describe what the

[10]doctor just did? Could you describe that?

[11]MR. JORDAN: Yes. For the record, the

[12]doctor was demonstrating forward flexion by

[13]bending backward and forward, and also

[14]demonstrating rotation with a twisting motion of

[15]the upper part of the body.

[16]THE COURT: Continue with your answer,

[17]Doctor.

[18]A Also I tested her for straight leg raising. The

[19]test was 60 degrees laterally with complaints of lower

[20]back pain on straight leg raising. Straight leg raising
[21]is an objective test, which checks nerve rotation. You
[22]have the patient laying on the table. You have the
[23]patient flex their ankle and bring it all the way up.
[24]Normally for a 27 year old in good shape it should be at
[25]least 90'to 110 degrees without any complaints of lower

n **[*15]**

[2]back pain. So when you raise the patient's foot and the
[3]ankle is in your hand, you check for resistance from the
[4]achilles tendon, because it will hurt the muscle in the
[5]achilles tendon, and also the patient will tell you it
[6]hurts. And you then measure the ankle. In this case
[7]there was a 60 degree extention. The rest of the
[8]examination was significant for diminished sensation to
[9]pin pricking, and to the left lateral thigh. And the
[10]patient walked with a limp, with a sensory deficit in the
[11]left lateral thigh indicating a nerve root 'injury from the
[12]lower back. All the nerves that go to your legs come out
[13]of the lumbar spine and they branch off, each nerve root,
[14]and they go up and down to different areas of the leg.
[15]For instance, the calf is supplied by the nerve root
[16]between the fifth lumbar vertebrae and the sacral
[17]vertebrae known as the L5, S1 nerve root. The thigh is 2,
[18]3 and 3, 4. The lateral posterior thigh is the L5 nerve
[19]root from the lower back.
[20]Q Doctor, let me stop you right there because you
[21]described this. Can you just describe what you are
[22]talking about and **[*16]** give a demonstration?
[23]A I take a patient and I touch different parts of
[24]her leg to the feet to make sure she has normal sensation.

[25]And I touch each portion of the leg with contact, and I

[2]say do you feel that, and the patient says yes or no.

[3]Then I touch the other side for comparison. I say, do you

[4]feel this, and see if there is any difference from the one

[5]side to the other, which she felt more, which she felt

[6]less. The one that is felt less is documented in the

[7]record. And in this case it was the left lateral thigh.

[8]And it is noted, diminished sensation of the left lateral

[9]thigh.

[10]Q Doctor, how does that relate if at all to the

[11]findings regarding the straight leg raising?

[12]A When I put the whole picture together; the

[13]history, the physical examination, the MRI results, the

[14]straight leg raising, the diminished range of motion and

[15]sensory deficit, everything points to a problem -- a major

[16]problem in the lumbar region.

[17]MR. CAROLA: Objection. Beyond the scope

[18]of the question. The question was specifically

[19]as to straight leg **[*17]** raising.

[20]THE COURT: I appreciate that. I will let

[21]him continue.

[22]Next question.

[23]Q Doctor, is there any further significance, or

[24]have you completed that portion of your answer?

[25]A My physical exam findings -- basically the rest

[2]was unremarkable.

[3]Q Now, following your physical examination

[4]findings, which you stated you put together with the

[5]history of the patient, indicating a problem in the lower

[6]back, did you perform any tests at that time to further

[7]investigate that problem?

[8]A Yes.

[9]Q Okay. What tests did you perform?

[10]A An electromyography, an EMG.

[11]Q Would you tell the jury what that test involved?

[12]A An EMG is an objective test, it is slightly

[13]painful. It has four parts; you have the motor

[14]conduction, the sensory nerve conduction study, the actual

[15]nerve root -- if I can use the model to demonstrate some

[16]anatomy -- perhaps the jury can bear with me -- and the

[17]jury can understand me better.

[18]Q Okay.

[19]MR. CAROLA: Objection.

[20]THE COURT: Yes. You can't use it **[*18]** unless

[21]it is marked in evidence, because you're showing

[22]it to the jury now.

[23]MR. JORDAN: I would like this marked as

[24]Plaintiff's 13, your Honor.

[25]THE COURT: Mark it Plaintiff's Exhibit 13

[1]
[2]for identification.

[3](Plaintiff's Exhibit 13 received and marked

[4]for identification only.)

[5]COURT OFFICER: Plaintiff's 13 marked for

[6]identification only.

[7]THE COURT: Counsel, take a look to see if

[8]you want it to go in.

[9]MR. CAROLA: It's fine.

[10]THE COURT: Do you have any objection to it

[11]going in?

[12]MR. CAROLA: No, Judge.

[13]THE COURT: Thank you. Mark it in evidence

[14]please.

[15](Plaintiff's Exhibit 13 received and marked

[16]into evidence.)

[17]COURT OFFICER: Plaintiff's 13 marked in

[18]evidence.

[19]THE COURT: Thank you.

[20]THE WITNESS: May I stand, your Honor?

[21]THE COURT: Why do you have to stand?

[22]THE WITNESS: To demonstrate.

[23]THE COURT: You can't do it from here?

[24]THE WITNESS: I can do it from here

[25]standing.

[2]MR. JORDAN: Your Honor, may we approach

[3]for one second?

[4]THE COURT: You want **[*19]** to approach?

[5]MR. JORDAN: Yes.

[6]THE COURT: Okay.

[7](Sidebar conference out of the hearing of

[8]the jury and the court reporter.)

[9](In open court.)

[10]Q Doctor, could you demonstrate using the model

[11]what the EMG test involves?

[12]A Yes. I want to refer to several different

[13]terms, so I am just going to basically review some basic

[14]anatomy, so when I explain these different terms you

[15]understand what I am talking about. Before I do that, can

[16]everybody see the model? Okay.

[17]In the neck we have what is known as the

[18]cervical portion of the spine. In the neck we have seven

[19]vertebrael bodies known as the thoracic spine.

[20]We have 12 vertebrael bodies in the lower back

[21]known as the lumbar spine. We have five vertebrael bodies

[22]in the lumbar spine ending with this which is the tail

[23]bone. If I say L5, Si it means the space between the

[24]fifth lumbar vertebrae and the first sacral vertebrae. If

[25]1 say L1, L2, it means the space between the first and

[2]second lumbar vertebrae.

[3]Between each vertebrae we have a disk. The

[4]function of a disk is to **[*20]** serve as a shock absorber to the

[5]disk, and that's analagus to gelatin. It has two parts.

[6]The outside is the cartilage, the inside is the annulous,

[7]it's called the annulous pulposis.

[8]Now, there are three different pathological

[9]conditions relating to a disk, the mildest of all forms is

[10]the buldge. A buldge simply means that the disk is

[11]slightly pushed out, but it is not torn, it is not

[12]herniated. The most severe form of a disk problem is a

[13]disk herniation. The word herniation means a tear, a

[14]rupture. So the outer portion tears and the gelatinous

[15]material leaks out, and it goes backward and it hits

[16]either the spinal cord or the nerve root or a combination

[17]of both, or none of them depending on how severe the

[18]herniation is.

[19]In between we have a condition known as a

[20]protrusion. A protrusion is in between a buldge and a

[21]herniation, or if a radiologist doesn't know exactly what

[22]it is he calls it a protrusion.

[23]Many different radiologists disagree on the

[24]interpretation between a buldge, a protrusion or a

[25]herniation. So sometimes you get different phrases by **[*21]**
[2]different radiologists.

[3]To continue. Right behind the vertebrae is the

[4]spinal canal where the spinal cord runs. The spinal cord

[5]at the level of L2, L3 in the spine entwines with the

[6]cord. Then the nerve roots would come out of the spinal

[7]cord and gives rise to nerve roots on the right and left

[8]side. Each nerve root has two branches, one for motor --

[9]for movement, one for sensory -- sensation, so you can

[10]feel. And each one branches off into another and that's

[11]how you get the motor and sensory supply to the muscles in

[12]the legs, for the lower extremities.

[13]The upper part is L2, L3, lower is L5, S1. The

[14]lower top portion is L5, S1 and the bottom is S1, S2. So

[15]if you have radiating pain to the extremities it comes

[16]from high up here.

[17]So when you do a straight leg raising test you

[18]are bringing the patient's leg all the way up, you're

[19]irritating this nerve root. It's like a stress test, a

[20]cardiac study. If a person has angina that stresses the

[21]heart, and similarly straight leg raising stresses the

[22]nerve root in the lumbar spine.

[23]THE COURT: Now, continue with your answer.

[24]A **[*22]** With an EMG, you check three portions of the

[25]nervous system -- of the nerve root. You check the

[7]
[2]peripheral nerve, the motor and sensory portion, and you

[3]check the actual nerve root by way of a needle EMG. The

[4]way the test is done, the first part, you have a

[5]stimulator. You place electrodes over the patient's foot

[6]and ankle. You stimulate the posterior tibial nerve, that

[7]is the nerve right here in the inner portion of the ankle,

[8]and then you stimulate the peripheral nerve, which is the

[9]outer portion of your foot and ankle. By stimulating it,

[10]you get a response on your screen known as latency, that's

[11]the -- when you are stimulating, the type of nerve

[12]response you get. Then you measure its size, how high or

[13]tall it is. You measure the distal latency, and then you

[14]measure the speed by which it travels from one point to

[15]the other in the radiculopathy root. The words

[16]radiculopathy, R A D I C, means nerve root. The word

[17]opathy, O P A T H Y, means any type of pathological

[18]condition relating to a nerve root. So a radiculopathy

[19]could mean a pinched nerve, **[*23]** a damaged nerve, an inflammed

[20]nerve, irritated nerve. So the actual function of the EMG

[21]is to check the nerve roots. And the way that that's

[22]done.

[23]Q Before you go into that --

[24]MR. JORDAN: I would like this marked as

[25]Plaintiff's 14 for identification.

[2]MR. CAROLA: May I see it, your Honor?

[3]THE COURT: Certainly.

[4](Complied.)

[5]THE COURT: Let's mark it as. Plaintiff's 14

[6]in evidence.

[7](Plaintiff's Exhibit 14 received and marked

[8]into evidence.)

[9]Q Doctor, can you just describe what Plaintiff's

[10]14 is and how it relates to the EMG that you have

[11]described?

[12]A You have a sterile disposable needle with an

[13]electrode connector that is connected to the amplifier box

[14]on the EMG part. And when you insert the sterile needle

[15]into a muscle, you hear the actual nerve sounds in the

[6]Muscle fibers. You actually see the contractions and the

[17]e ectrical activity in the muscle fibers. And from

[18]anatomy and physiology you know what is normal and what is

[19]abnormal. And you insert the sterile needle into several

[20]muscles in the legs **[*24]** and several muscles in the lower back,

[21]and you look for the electrical activity on the screen.

[22]For the record, I will tell you how long that

[23]needle is. It is approximately three inches.

[24]THE COURT: What is three inches, the

[25]needle?

[2]THE WITNESS: The tip. The needle part is

[3]actually three inches approximately.

[4]MR. CAROLA: I think it's a little shorter

[5]than three inches.

[6]THE COURT: We will measure it later.

[7]THE WITNESS: It's three inches, two or

[8]three.

[9]THE COURT: Okay.

[10]A So you insert this needle into several muscles,

[11]the muscles in the leg and the muscles in the lower back,

[12]check for the electrical activity in the muscles; first,

[13]if the electrical activity is silent, you don't see

[14]increased activity present; secondly, a muscle that has

[15]injury, you don't see this large downward flexion,

[16]so-called positive sharp waives. And you record what you

[17]see. Then whatever abnormality you find, you get a

[18]tracing of it.

[19]And the EMG was performed on Miss Davey on

[20]7-26-94, and it showed increased activity. I am going to

[21]show it **[*25]** to the jury at this time.

[22]THE COURT: Sustained.

[23]Q Doctor, is that the original tracing that is

[24]part of your hospital -- part of your medical chart of

[25]Jennifer Davey?

[2]A Yes.

[3]MR. JORDAN: I would like this marked.

[4]MR. CAROLA: Judge, I object to that

[5]document going into evidence.

[6]THE COURT: On what basis?

[7]MR. CAROLA: On the basis that I don't know

[8]if that is the original.

[9]THE COURT: You want a voir dire on it?

[10]MR. CAROLA: Yes. May I see it, Doctor?

[11]VOIR DIRE EXAMINATION

[12]BY MR. CAROLA:

[13]Q Doctor, was this sheet generated from the

[14]computer --

[15]A Yes.

[16]Q -- after you stuck the needle into Miss Davey's

[17]extremities?

[18]A Correct.

[19]Q Okay. Could you just tell me what the

[20]handwriting on this is?

[21]A This is my handwriting. This is -- this says

[22]left EHL, which is the muscle at the left L5, S1 level.
Q) Okay. Now, the red markings, the lines that are

[2]how/on that page, do those lines also show up on the
computer?

.. ._ .?.T tk ilt, y **[*26]**
[2]A Yes, they are markings indicating various

[3]levels.

[4]Q As to where the lines are going?

[5]A Yes. For example, there are numbers

[6]corresponding to -- there are numbers for the motor and

[8]
[7]the sensory conduction, but not for the needle EMG.

[8]Q So for the needle EMG, as you look at that sheet

[9]of paper generated by the computer --

[10]A Correct.

[1]Q -- there is no way to tell -- there is no way to

[1]identify if there are any numbers or any kind of limits,

[13]or the actual losses from that chart?

[14]MR. JORDAN: Objection.

[15]THE COURT: I appreciate that.

[16]Do you understand the question?

[17]THE WITNESS: Yes, I do.

[18]THE COURT: Answer it.

[19]A The electromyography -- you never asked that

[20]question. The way you phrased the question makes no sense

[21]in a medical context to a physician trained in

[22]interpretation.

[23]THE COURT: You can't show that to the

[24]jury.

[25]THE WITNESS: I'm sorry.

[2]Q A physician is trained in interpreting EMG's.

[3]But by looking at the electromyography, the computer **[*27]** does

[4]not give a printout. You don't have numbers or anything

[5]else with represents the needle portion.

[6]MR. CAROLA: Just based on that, Judge, I

[7]would on object to this.

[8]I am a lay-person just as this jury is.

[9]There is nothing on that document that the
-10 doctor himself cannot give this jury.

[11]THE COURT: Counsel, if there is an issue

[12]to be had from it, I will discuss it later with

[13]both of you.

[14]You can continue, Counsel.

[15]CONTINUED DIRECT EXAMINATION

[16]BY MR. JORDAN:

[17]Q Doctor, is that tracing the same type tracing

[18]that you use when you conduct EMG studies on various

[19]patients?

[20]A Yes, it is.

[21]Q And is the range in that tracing for Jennifer

[22]Davey in her chart?

[23]A Yes.

[24]MR. JORDAN: On that basis I would like to

[25]mark it in evidence.

[2]MR. CAROLA: Subject to the original being

[3]produced.

[4]THE COURT: Mark it as Plaintiff's 15 in

[5]evidence.

[6](Plaintiff's Exhibit 15 received and marked

[7]into evidence.)

[8]COURT OFFICER: Plaintiff's 15 marked in

[9]evidence.

[10]THE COURT: Show it to the doctor.

[11](Complied. **[*28]**)

[12]Q Doctor, just explain the significance of the

[13]tracing and the findings that were found via the EMG test?

[14]A When you do a normal EMG -- if you can help me

[15]by holding this.

[16]Q Sure.

[17]A A normal tracing -- everybody has a base line.

[18]Like in an EKG of the heart, everybody has a base line.

[9]When you see these large downwards deflections, this is

[20]ailed a positive sharp waive. This indicates damage to a

[21]nerve. This is at the left flexor digitorum longus.

[22]That's the muscle right above the ankle.

[23]Everybody has a baseline normal.

[24]Then we go to the left, L5, S1. When you touch

[25]the iliac crest, you go straight across, at the L4, L5,

[2]and the L5, S1, which is the spade between the L5, S1.

[3]Then you begin to record a abnormal pattern, which shows a

[4]positive finding, another positive situation, with three

[5]downward spikes, as you can see; one, two, three more

[6]sharp waves, which is a total of one, two, three, four,

[7]five positive sharp waves indicating a nerve root injury

[8]at the level of L5, S1.

[9]Q Doctor, based on **[*29]** your history, the patient's

[10]complaints and your examination of her, including the

[11]straight leg raising, and your notations that she lacked a

[12]full range of motion on her backward flexion, and your EMG

[13]test of Jennifer Davey, did you arrive at a diagnosis for

[14]her?

[15]A I did.

[16]Q And what is that?

[17]A Lumbar sacral radiculopathy, left -- L5,

[18]herniated lumbar disk L3-4, L4-L5, L5-S1, and traumatic

[19]fibromyitis, also traumatic myofascial pain syndrome.

[20]Q And the diagnosis of herniated disk, how did

[21]that diagnosis relate to the EMG findings?

[22]A May I use that model, so I can explain it

[23]better?

[24]Q Okay.

[25]MR. JORDAN: I would like this marked as

[2]Plaintiff's -- I think we're up to 16.

[3]THE COURT: Plaintiff's Exhibit 16.

[4](Plaintiff's Exhibit 16 was marked for

[5]identification.)

[6]COURT OFFICER: Marked as Plaintiff's 16

[7]for identification.

[8]Q Doctor, is this from a text?

[9]A Yes.

[10]Q What text is this from?

[11]A The Clinical Supplement in the Management of

[12]Lower Back **[*30]** Pain, C I B A - G E I G Y O.

[13]MR. CAROLA: Your Honor, he is not supposed

[14]to show that to the jury.

[15]Q Is this an accurate illustration of the anatomy?

[16]A Yes.

[17]Q And what is this, Doctor?

[18]THE COURT: Doctor, I appreciate what

[9]
[19]you're trying to do, but counsel has to see it

[20]too, and that's why we're holding that.

[21]Can everybody see it now?

[22](All jurors answered affirmatively.)

[23]THE COURT: Okay.

[24]A This is a diagram of a disk.

[25]THE COURT: Why don't you come on this

[2]side, Doctor, that way'you won't interfere with

[3]any of them.

[4]A That's a diagram of a disk. It shows the disk

[5]and the surrounding structure. What you're looking at

[6]right now is actually from the top down. This is a view

[7]from the top. You're looking at it like so. This

[8]vertebrae is moved, and this is all of the disk, right

[9]here. This is a nerve root on the right and left side.

[10]This is the spinus process. This is --

[11]Q Doctor, let me stop you right there. Is that

[12]facing towards -- the spinus process, towards the back or

[13]the front? **[*31]**

[14]A The spinus process is the back, back here. This

[15]is the back, towards the back. See, you are looking at it

[16]like so. Okay.

[17]A disk, as I mentioned earlier, has two

[18]portions; outside is the end of the annulous fibrosis and

[19]the cartilage, inside is the gelatinous material called

[20]the nucleous pulposis, and that's the gelatinous portion.

[21]Once the nucleous fibrosis tears or herniates, it is a

[22]permanently irreversable injury, because the cartilage

[23]does not have the ability to repair itself; bone does,

[24]muscle does, peripheral nerves do to a degree. When a

[25]bone breaks callous forms. If, in fact, it breaks, this

[2]portion of the leg, the tibia, and it heals, a callous

[3]forms, and you can tell the sight that was broken because

[4]there is a callous there. But when a disk and cartilage

[5]decays it is permanent irreversable damage, it cannot

[6]correct itself.

[7]So the outer portion of the annulous fibrosis

[8]has nerve endings, and we have these tiny branches called

[9]N 0 C I C E P T 0 R S, and the big branches of nerves on

1-0 the outer portion are called **[*32]** the sino, S I N 0, vertebrael

[11]nerve. And once a disk breaks or tears, the gelatinous

[12]portion leaks out like so. This is the portion that leaks

[13]out, and what is behind that is nerve roots. You don't

[14]have to have direct contact with the nerve root to cause a

[15]radiculopathy. You can get a radiulopathy by two

[16]mechanisms. When a disk tears you have release of certain

[17]chemicals. Once a disk is torn or herniated all those

[18]chemicals are released. Once these chemicals are released

[19]you're ripe for damage to the nerve. And once this nerve

[20]root gets irritated or damaged it swells up, becomes

[21]inflammed, and it doesn't function properly. Any

[22]condition that lasts one year or more is considered

[23]permanent.

[24]Q When did you do this EMG on this patient?

[25]A I believe three years after the time of the

[2]accident, and it still was positive and indicated a

[3]permanent injury. So basically the herniation -- you got

[4]a microscopic leak also in the outer portion that causes

[5]this inflammation as well. You also got a radiculopathy

[6]from the rotational **[*33]** force working on the nerve root. And

[7]the flexion or rotational force actually injures a nerve

[8]root. It takes a minimum of ten to 21 days for a nerve

[9]injury to manifest itself, sometimes longer. It never, I

[10]repeat, it never happens immediately. The pain doesn't

[11]happen immediately. You don't have to have immediate pain

[12]to have a herniation or a radiculopathy. Radiculopathy

[13]takes two weeks to form, and sometimes months.

[14]So in answer to your question, the

[15]radiculopathy -- the nerve root at the level of L5, S1

[16]that got injured on the left side formed the disk

[17]herniation from the release of chemicals and from the

[18]rotational forces working on the spine.

[19]THE COURT: Was everything before that part

[20]of the answer, Doctor?

[21]THE WITNESS: I was explaining.

[22]He asked me a specific question, what was

[23]the significance of the radiculopathy at L5, and

[24]that's a nerve root injury, both disk and nerve

[25]root injured by the disk herniation.

[2]Q Doctor, what was the significance of the fact

[3]that there is a disk herniation?

[4]THE COURT: Sit down, Doctor. **[*34]**
[5]A In Miss Davey's case at L5, S1, and also L4, L5,

[6]and L2, L3 -- let me use the model. The L5, S1 is your

[7]foundation, your support. The lumbar ending with the

[8]sacrum, so L5, S1, is where the lumbar spine ends and the

[9]sacrum begins. What happens is, if the foundation -- it's

[10]like building a building. If it is going to stand up

[11]properly the foundation has to be solid. If the

[12]foundation is damaged, breaks or cracks, you are going to

[13]have a problem, and the building will probably fall.

[14]MR. CAROLA: Judge, we are going beyond the

[15]scope of the question.

[16]THE COURT: Sustained.

[17]Are you going to use that anymore?

[18]THE WITNESS: That depends on the question.

[19]I am not sure, your Honor.

[20]Q Okay. Now, we can take this down and stay with

[21]the model.

[22]What is the significance of the herniation at

[23]the base of the lumbar spine, L5, S1?

[24]A L5, S1, is the foundation. If the foundation is

[25]strong, the whole support of the skeletal system will be

[2]strong. The skeletal system is formed of concavities and

[3]convexities of the cervical spine, **[*35]** and the concavities of

[4]the thoracic spine spine and the convexities of the lumbar

[5]spine. The spine has curves that support the spine in a

[6]proper alignment. If the foundation becomes unstable the

[7]whole spine -- the stability is altered, and weakness sets

[8]in and instability continues. And so the L5, S1 is the

[9]most important portion.

[10]So if the last three levels have been weakened

[11]and damaged with a herniation then --

[12]Q Let me stop you there.

[13]Now, Doctor, at some point did you receive an

[14]MRI report regarding the three disk herniations of Miss

[15]Davey?

[16]A Yes.

[17]Q And can you tell the jury what the findings were

[18]according to that report in terms of --

[19]MR. CAROLA: Objection to the doctor

[20]reading from the report, Judge.

[21]THE COURT: Ask him in testimony. Ask him

[22]a direct question.

[23]Q Okay. Doctor, which levels according to the MRI

[24]in the report were herniated?

[25]MR. CAROLA: Objection, Judge. It is not

[2]in evidence.

[3]THE COURT: Doctor, he wants you to testify

[4]based on your review of the MRI.

[5]THE WITNESS: **[*36]** I have no problem with that.

[6]MR. JORDAN: I will ask the foundation

[7]questions, your Honor.

[8]Q Doctor, were you a treating physician for

[9]Jennifer Davey at this point in time?

[10]A Yes.

[11]Q Okay. And as a treating physiatrist do you

[12]customarily rely on MRI reports that are conducted by

[13]other doctors or read by radiologists when you are

[14]treating the patient?

[15]A Yes.

[16]Q And did you rely on that report in your

[17]treatment of Jennifer Davey?

[18]A Yes.

[19]Q Now, which levels of herniation of the lumbar

[20]disks were indicated for Miss Davey?

[21]THE WITNESS: May I answer?

[22]THE COURT: Yes.

[23]A The last three levels, L3-L4, L4-L5, L5-S1, with

[24]loss of normal lordosis of the lumbar spine.

[25]Q Now, that's what I want to ask you, Doctor. The

[2]findings on the MRI regarding the curve, not just the

[3]herniations, but the curve of Miss Davey's spine, can you

[4]explain the significance of that finding to the jury?

[5]A It indicates muscle spasm. The lumbar

[6]vertebrae, the back, is pretty strong compared **[*37]** to the

[7]cervical spine, so when a muscle goes into spasm it pulls.

[8]A muscle that goes into spasm, the fibers shorten, so when

[9]the fibers shorten you lose range of motion, you lose

[10]flexion ability, and you lose the natural lordotic

[11]curvature, which is a permanent injury. Normally if the

[12]spine is properly kept and is in a proper position --

[13]Q Doctor, generally after a disk becomes

[14]herniated, that means the outside cartilage is torn, and

[15]the nucleous pulposis, the gelatinous material leaks out,

[16]what is the natural progression of the disk after that

[17]point?

[18]A Inside the disk you have the contents. When the

[19]disk herniates and is ruptured where the contents leak

[20]out, once it leaks out what happens is the disk shrivels

[21]up like this and becomes degenerated like this. This is a

[11]
[22]normal disk and this is a shrivelled up disk. It

[23]degenerates. And no one knows exactly how long it takes

[24]from the actual trauma to the actual deterioration

[25]process. There is no study. There are no studies that
+r'?

[2]have been done. It can take days, weeks **[*38]** or months.

[3]Q Now, in addition to a diagnosis made of three

[4]herniated disks in Jennifer Davey supported by the MRI

[5]report, and in addition to your diagnosis of a lumbar

[6]radiculopathy as supported by an EMG report, is there

[7]another diagnosis mentioned?

[8]A Yes, I think it traumatic fibromyosis.

[9]Q What is that?

[10]A That is an injury to the muscle, to the soft

[11]tissue structures. When you have tenderness at pressure

[12]points in two or more areas, that causes myofascial pain

[13]where there is scarring in the muscle and there is

[14]ischemia and degeneration to the muscle fibers.

[15]Q At some point, Doctor, did you do a report

[16]regarding Miss Davey referring to the MRI showing buldges?

[17]Not your initial report. I think it was on a subsequent

[18]report.

[19]A I believe it was my report of January 7th, 1995.

[20]No. It was 1-18-95. I'm sorry.

[21]MR. JORDAN: I will clear it up if you

[22]don't understand the question.

[23]THE COURT: No, I don't understand his

[24]answer.

[25]MR. JORDAN: I think I understand.

[2]I will ask the **[*39]** question again.

[3]Q Doctor, when you made reference to the MRI

[4]report in the January report which MRI were you referring

[5]to?

[6]A Um, the right lumbar spine by way of the

[7]patient's history.

[8]Q Okay. All right. And how do you describe the

[9]findings of the MRI report then?

[10]A How was it described on my January 18, 1995

[11]report?

[12]Q Yes.

[13]A I didn't have the MRI report at my disposal at

[14]that time. That was based on the patient's history.

[15]Q Okay. All right. So I just want to know how it

[16]was described at that point?

[17]A It was described as bulges.

[18]Q Okay.

[19]A As opposed to herniations.

[20]Q Okay. So that the description here completely

[21]refutes that report?

[22]A No.

[23]MR. CAROLA: Objection to the form of the

[24]question as to the history given to him by a

[25]client -- patient.

[2]THE COURT: Sustained.

[3]Q Doctor, do you have the actual MRI report in

[4]your file?

[5]A I do.

[6]Q Does it say that those disks are bulging first

[7]off?

[8]A **[*40]** It does.

[9]Q Does it say something in addition to them

[10]bulgind?

[11]A Bulges and central herniations. -

[12]Q Okay. Thank you. And what percentage of the

[13]disks in Jennifer Davey's lumbar spine according to this

[14]report have herniations?

[15]A Three out of five, that would be 60 percent.

[16]Q Three out of five. Okay.

[17]Now, doctor, in addition to your findings -- I

[18]am going to ask you a question. I am going ask to you

[19]assume certain facts that we have in evidence from

[20]testimony -- either through testimony or through records

[21]or subject to connection.

[22]I want you to assume that on October 6th, 1991

[23]there was an accident that took place that Miss Davey was

[24]involved in, a rear-end collision, whereby the vehicle

[25]that Jennifer Davey was struck from behind by was a white

[2]Cadillac, and that there was a heavy impact, and that she

[3]saw the car coming before the impact, and, therefore,

[4]braced herself, and the car hit her, with the left rear of

[5]her car being struck by the front right of the car behind

[6]her, and that her car, therefore, **[*41]** was pushed forward an

[7]spun somewhat to the right, and that she went to the

[8]emergency room at Booth Memorial that day, and she

[9]returned three days later on October 9th, and returned

[10]then five days later on October 14th, and that there was a.

[11]report on the last visit of, in addition to neck and arm

[12]pain, back pain, that she saw the first doctor, that she

[13]saw her private doctor, who was Dr. Leon Sultan, an

[14]orthopedist, and when she saw him she complained of her

[15]neck, her lower back and her arm, and that that was on

[16]October 17th, 1991. And Dr. Leon Sultan made a diagnosis

[17]of cervical strain and a lumbar strain. And that through

[18]April of 1993, six months after the accident continued to

[19]have a working diagnosis of Jennifer Davey involving

[20]symptoms to her lumbar region.

[2]
[21]I want you to assume she went to a physical

[22]therapist referred to her by Dr. Sultan for physical

[23]therapy from a doctor named Ellen Bodner, and that she

[24]went for treatments there for approximately nine months,

[25]and that the primary treatment was to her neck, but that

[2]during the **[*42]** visits to Dr. Ellen Bodner she received moist

[3]heat to her lower back.

[4]And I want you to assume that she complained of

[5]low back pain to her family doctor on November 15th, of

[6]1991, approximately five weeks after the accident.

[7]I want you to further assume that during that

[8]time her primary complaint was her neck.

[9]I want you to assume she stopped treatment

[10]approximately July of 1992 with Ellen Bodner, that that

[11]treatment was discontinued, and that for the next year and

[12]a half after that the neck continued to improve while her

[13]back -- lower back symptoms worsened, and that in January

[14]of 1994 following a complaint of continuing pain in her

[15]lower extremities to her family physician, Dr. Weg, she

[16]received a referral for the lumbar MRI that is in your

[17]file which showed the three herniated disks.

[18]I want you to assume that before that accident

[19]she worked in an office doing mostly administrative work

[20]and that she attended school at night, and that prior to

[21]October 6th, of 1991 she had no accident involving her

[22]neck and back, had done no regular or heavy lifting, had

[23]received no treatment for **[*43]** her neck and back and had no

[24]symptoms relating to those areas of the body, that the

[25]exercise which she engaged in at that time when she was 24

[2]years old was jogging twice week, lifting light weights

[3]for toning a couple of times a week, some aerobics and

[4]exercise tapes. She exercised on most days. And that

[5]according to your history she was well up until the time

[6]of the accident?

[7]I want you to further assume that after the

[8]accident up until the day of the MRI in January of 1994

[9]that she had no other MRI of the lumbar spine, that that

[10]was the first one taken of the lumbar spine, and I want

[11]you to assume she had no accident in that time and had

[12]engaged in no strenuous activity and had taken only as

[13]part of school a slimnastics class involving walking

[14]around a gym and a swimnastics class involving kicking her

[15]legs in a pool.

[16]I want you to further assume that she was

[17]involved in a second accident on January 18th, of 1995 and

[18]that the a second MRI was taken after that accident

[19]showing bulging disks to L4-L4, L4-L5, an also, L5-S1.

[20]1 want to ask you based **[*44]** on these facts and on

[21]your findings, and your tests, and your time with the

[22]patient, do you have an opinion to a reasonable degree of

[23]medical certainty as to whether the accident on October

[24]6th, of 1991 was the competent producing cause of the

[25]herniated disks that you diagnosed in Jennifer Davey?
. A'Y.._:!:.

[2]A In my opinion, yes.

[3]Q What is the basis for that opinion?

[4]A The patient was 27 years of age, in fairly good

[5]heath, no prior problems, had a bad accident. Sustained

[6]injury to her neck and back.

[7]Q Doctor, if I may make reference to -- I think

[8]that the MRI was taken when she was 26 going on 27, and as

[9]of the date of the accident she was 24.

[10]A Okay. A normal, healthy 24 year old person does

[11]not have disk herniations, not where there is a tear. You

[12]don't see that with a normal aging process at age 24. You

[13]may see that when you are in your late 60's, bulges,

[14]degeneration and osteophytes, but not in a 24 year old

[15]person? The history of trauma; no history of any prior

[16]injuries and a negative history **[*45]** of doing any kind of

[17]activities which would cause a disk herniation like

[18]horseback riding, skiing; anything that would aggravate

[19]the spine, a negative history as to that. So by process

[20]of elimination, by history, by the MRI, it is indicated

[21]only the accident of 10-91.

[22]Q The fact that the MRI shows three herniated

[23]disks, is that a factor in your opinion?

[3]
[24]A Yes. It shows there was severe force on the

[25]lumbar spine to cause these disk herniations.

[2]Q And when you said earlier that a person of her

[3]age, 24 to 26, when the MRI was taken, it would not be

[4]likely that a 24 year old would have a herniated disk,

[5]that it would be highly unlikely without any sort of

[6]trauma, that would be even more the case with three disks;

[7]is that correct?

[8]A Yes.

[9]Q Now, the fact that the first report of back pain

[10]was eight days after the accident, does that in any way

[11]indicate that the accident was not the competent producing

[12]cause of the herniated disks?

[13]MR. CAROLA: Objection as to the form of

[14]the question.

[15]THE **[*46]** COURT: Overruled.

[16]A The answer is no for a very good reason.

[17]Q What is the reason?

[18]A When you get injured in an accident or traumatic

[19]injury, you don't have the full impact of all the injuries

[20]right away. In fact, you have a lot of endorfins being

[21]produced that decreases -- masks a lot of the pain until

[22]about 21 days later, sometimes longer, the full nerve

[23]damage. I repeat, it generally never shows up right

[24]away, generally it takes weeks or months. So many times

[25]patients get injured and they have pain in one area and

[2]then days or months later they have pain in another area

[3]in the back or neck from getting hit.

[4]MR. CAROLA: Objection.

[5]THE COURT: Sustained.

[6]A In fact, boxers when they get hit --

[7]MR. CAROLA: Objection.

[8]THE COURT: Sustained as to boxers, unless

[9]Miss Davey is a boxer.

[10]Q Is the fact that no MRI was ordered until

[11]January of 1994, does that fact in any way indicate that

[12]the accident was not the competent producing. cause of the

[13]herniated disks?

[14]MR. CAROLA: Objection to the form of **[*47]** the

[15]question.

[16]THE COURT: Do you understand the question?

[17]THE WITNESS: I do.

[18]THE COURT: You may answer.

[19]A The answer is no, that proves nothing.

[20]Q Okay. Why is that?

[21]A Because if I was a treating physician --

[22]THE COURT: If you can rephrase your answer

[23]without referring to what you personally would

[24]have done in terms of someone else.

[25]A The only indication for an MRI is persistent

[2]pain lasting four weeks or more; that is an indication for

[3]an MRI. So if you follow that indication, if somebody

[4]would have done an MRI you would have expected to see

[5]these findings.

[6]Q Now, Doctor, could the fact that the patient's

[7]primary feelings of pain initially were in her next, do

[8]you believe that that could have factored into why there

[9]was no MRI taken until January of 1994?

[10]MR. CAROLA: Objection, your Honor.

[11]THE COURT: Sustained.

[12]Q Doctor, are you familiar with something called

[13]an aggregate theory of pain?

[14]A Yes.

[15]Q Could you explain what that is to the jury?

[16]A Yes. **[*48]** When you have a painful source of

[17]irritation, in two or more parts of the body, the brain

[18]will -- the thalamus portion of the brain processes the

[19]pain from only one area, the one that has the highest

[20]amount of intensity, it doesn't process the other. If you

[21]have a bad toothache and you have a thorn in your finger,

[22]you may not feel that. I am going to an extreme. If you

[23]have areas that hurt you, three or four areas, one in the

[24]area of the heart, the most pain you will feel is from

[25]that one area and not the others, or not as much.

[2]Q Doctor, do you have an opinion with a reasonable

[3]degree of medical certainty as to whether the accident of

[4]October 6th, of 1991 was the competent producing cause of

[5]lumbar radiculopathy of the patient?

[6]A - Yes.

[7]Q What is the basis for that opinion?

[8]A Based on the history, the physical examination,

[9]the MRI findings and the EMG findings.

[10]Q And do you have an opinion to a reasonable

[11]degree of medical certainty as to whether the accident was

[12]a competent producing **[*49]** cause of the myofascial pain?

[13]A Yes, it was.

[14]THE COURT: What was your answer?

[15]THE WITNESS: Yes.

[16]Q And, Doctor, do you have an opinion to a

[17]reasonable degree of medical certainty as to whether the

[18]accident of October 6th, of 1991 was a competent producing

[19]cause of the significant limitation of the use of a body

[20]function?

[21]MR. CAROLA: Objection as to asking for a

[22]judgment from the Doctor for a legal

[23]interpretation.

[24]MR. JORDAN: I am asking for a medical --

[25]THE COURT: I appreciate that. If you can

[2]respond in medical terms, Doctor.
-L. Iz

[3]A Yes. The patient has a permanent damage to

[4]three disks in her lumbar spine, three out of five, and

[5]that's a permanent injury for the reason I mentioned

[6]earlier. Once a disk is torn, it never repairs itself, it

[7]cannot repair itself. Once a nerve is injured that lasts

[8]one year from the time of an accident, that also is

[9]considered a permanent injury as per my recent examination

[10]of the patient.

[11]MR. CAROLA: Objection, your Honor

[12]THE COURT: Sustained.

[13]MR. CAROLA: I don't **[*50]** understand the answer.

[14]Q Doctor, your answer -- by referring to your most

[15]recent examination of the patient, what findings in your

[16]most recent examination of the patient relates to a

[17]limitation of the use of a part of her body?

[18]A On 6-12-97 she was examined in my office. The

[19]range of motion of the back was one half normal extension,

[20]straight leg raising still is 75 degrees bilaterally.

[21]There is back pain, and the muscle power of the left lower

[22]extremities are two grades weaker in four muscles out of

[23]five. The lower extemities are one grade weaker, just

[24]five minus -- over five. As I indicated to you earlier,

[25]any deficit finding one year after an jury in the medical

[2]arena, that is considered permanent.

[3]Q And what is Jennifer Davey's prognosis with

[4]these herniated disks?

[5]A Prognosis, meaning future outcome?

[6]Q Yes.

[7]A This is a permanent injury. Her prognosis

[8]remains guarded. There is no chance of any improvement

[9]for the condition. The pain will wain and she will have

[10]good days and she will **[*51]** have bad days, but the condition

[11]itself is permanent.

[12]Q And are there any events in her life as a woman

[13]in the future that would impact upon that condition, the

[14]condition she has now?

[15]MR. CAROLA: Objection. The question is

[16]too broad and speculative.

[17]THE COURT: He is an expert. He can make

[18]a determination as to an expert opinion.

[19]A She is afemale still in the pregnant potential

[20]age group. If and when she becomes pregnant that will be

[21]have a very bad adverse affect on those disks, because

[22]when you're pregnant the abdominal muscles, they lose

[23]their strength, the back muscles they lose their strength.

[24]MR. CAROLA: I would just note my objection

[25]at this point as being beyond the scope.

[2]THE COURT: No. I will let him answer.

[3]If you know.

[4]A So pregnancy will adversely aggravate that

[5]condition and will cause more increased pain on those

[6]disks for the reason I explained, because the uterus would

[7]be distended and you have less strength in the abdominal

[8]muscles and the back muscles, with less anterior and

[9]posterior **[*52]** force holding the neck in place. So when a disk

[10]has to bear more pressure it causes more herniation to the

[11]herniations in the back. It's like if you have a break --

[12]a crack --

[13]MR. CAROLA: Objection, your Honor.

[14]THE COURT: Overruled.

[15]A When you have a break -- a crack -- once there

[16]is one crack the structure weakens and then you get

[17]another crack and another crack, and another crack, and it

[18]gets progressively worse.

[19]Q And, Doctor, you mentioned that this is a

[20]permanent condition.

[21]And I want you to assume that there has been

[22]testimony from Jennifer Davey that she is fearful and has

[23]no plans for surgery to address this problem. Could you

[24]tell me what type of surgery would be required to address

[25]a problem such as this?

[2]A Yes? You would do a laminectomy. You cut out a

[3]portion of the lamina, which is this portion, to have

[4]better exposure to the herniations. You remove the part

[5]of the herniation that is sticking on the spinal cord

[6]and/or whatever surrounding area is on the nerve root that

[7]is causing **[*53]** the problem. And once you remove that, you

[8]have an open sack. As time goes by more leakage

[9]continues. It doesn't cure the problem. That is why in

[10]medicine most herniations should not be operated on.

[11]Unless it causes loss of power and weakness or it causes

[1]some sort of neurological abnormality and is getting
13: progressively worse, you leave it alone. The cure is far

[14]worse than the actual disease.

[15]Q And, Doctor, as a phsyiatrist with substantial

[16]experience with patients with herniated disks, some of who

[17]have had surgery --

[18]A Tens of thousands.

[19]Q -- are you familiar with something known as

[20]failed back syndrome?

[21]A Yes.

[22]Q What is that?

[23]MR. CAROLA: Objection. We're really going

[5]
[24]into a specific area now?

[25]THE COURT: Overruled.

[2]MR. CAROLA: There has been no testimony --

[3]THE COURT: Overruled.

[4]A There is no indication that she should have

[5]surgery. She would certainly suffer from failed back

[6]syndrome.

[7]MR. CAROLA: Okay. We're going on

[8]speculation now.

[9]THE COURT: I appreciate that. **[*54]**
[10]MR. CAROLA: We're going on pure

[11]speculation now.

[12]THE COURT: I appreciate that. You will

[13]have a chance to question the actual doctors

[14]when they are available.

[15]A The failed back syndrome is a condition where

[16]the lower back pain persists despite surgery, and

[17]sometimes these patients have more than one surgery and

[18]the condition worsens, so that's called the failed back

[19]syndrome; the back is failing despite aggressive means and

[20]measures.

[21]Q And, Doctor, I assume that means -- failed back

[22]syndrome refers to when the operation was a success at the

[23]conclusion, and there is also a risk having this kind of

[24]surgery.

[25]A There is a risk.

[2]Q What are the risks of this type of surgery?

[3]A It can cause injury to the nerve roots, injury

[4]to the spinal cord, paralysis, infection, post-traumatic

[5]aggravation, damage to the membranes, damage to the nerve

[6]roots and the spinal cord. You can have inflammatory

[7]process to those membranes as well, and it causes pain in

[8]itself also, and it's can cause laceration. Generally **[*55]**
[9]when you put the body to sleep you can have adverse

[10]effects from that as well.

[11]Q And, Doctor, you also treated Jennifer Davey

[12]after the second accident she had on January 18th, 1995;

[13]is that correct?

[14]A Yes.

[15]Q Just so we're clear, the MRI report that you

[16]have referred to showing the three herniated disks, and

[17]the EMG test that you did which showed radiculopathy, that

[18]was done as a result of the October 6th, accident?

[19]A Yes.

[20]Q Doctor, in your opinion what affect did -- after

[21]having treated her after the second accident, what effect

[22]did the second accident have upon her s:

[23]her lower back or the condition of her 1

[24]A Based on her history, only a s,

[25]of the neck and upper back, that was thell,

[2]Q In that regard, Doctor, I would like you to

[3]assume that there was testimony from Jennifer Davey that

[4]by the time of the accident -- second accident her back

[5]had become -- her lower back had become her primary -

[6]complaint, and her neck had pretty much gotten better, and

[7]after the second accident **[*56]** her back became somewhat worse,

[8]and then her back seemed to go back to where it was before

[9]the second accident, but that her neck condition did

[10]worsen after the second accident. Is that testimony from

[11]her consistent with your findings in treating her?

[12]A Yes.

[13]Q Okay. Oh, Doctor, is there any outstanding

[14]balance owed to you by Jennifer Davey from her treatment

[15]she received following the first accident?

[16]A Yes.

[17]Q Okay. And what is that balance she owes?

[18]A Approximately $ 2, 000.

[19]Q Just so we're clear, Doctor, have you ever

[20]recommended surgery to Jennifer Davey?

[21]A I have discussed different treatment options

[22]with the patient. The patient makes the decision, not I.

[23]MR. JORDAN: I didn't hear the answer to

[24]the question.

[25]THE COURT: He discussed it with her.

[2]MR. CAROLA: Did he ever recommend surgery

[3]was the question.

[4]THE COURT: I know what the question is. I

[5]appreciate that. I will allow it to stand.

[6]MR. JORDAN: I have no more questions.

[7]Thank you.

[8]MR. CAROLA: May we approach, Judge? **[*57]**
[9]THE COURT: Sure.

[10](Sidebar conference out of the hearing of

[11]the jury and the court reporter.)

[12](In open court.)

[13]THE COURT: Members of the jury, we will

[14]take a recess now. Do not discuss the case

[15]amongst yourselves or with anyone else.

[16](Recess taken. After the recess.)

[17]MR. JORDAN: Judge, after Dr. Guy, I have

[18]another doctor.

[19]THE COURT: Do you have anything else

[20]ready?

[21]MR. JORDAN: I may just read portions of

[22]the depositions.

[23]THE COURT: I mean as far as a testifying

[24]witness.

[25]MR. JORDAN: No, that's it.

[2]MR. CAROLA: I will have the doctor or

[3]somebody from his office perhaps.

[4]THE COURT: Ready.

[5]COURT OFFICER: Jury entering.

[6](Jury entered.)

[7]THE COURT: You may be seated, Doctor.

[8]COURT OFFICER: Trial continues. Let the

[9]record reflect that all counsel are present,

[10]both sides are present, the jury is present and

[11]properly seated in the jury box.

[12]MR. JORDAN: So stipulated.

[13]MR. CAROLA: So stipulated.

[14]THE COURT: Be seated. Thank you.

[15]Thank you everyone for your promptness.

[16]Mr. Carola, you may go on with **[*58]** your cross

[17]now.

[18]MR. CAROLA: Thank you, Judge.

[19]CROSS EXAMINATION

[20]BY MR. CAROLA:

[21]Q Dr. Guy, would you agree that nobody can tell

[22]from merely seeing an MRI whether a herniation has been

[23]caused by trauma?

[24]A I agree.

[25]Q Is that yes?

[2]A I'm sorry. I agree with that, yes.

[3]Q Now, would you also agree that you have to put

[6]
[4]the whole picture together; you have to take a history,

[5]physical examination findings, other diagnostic tests?

[6]A Yes.

[7]Q Now, would you agree that the history you would

[8]need to guide you in the right direction; isn't that

[9]right?

[10]A Yes.

[11]Q And tell you what to treat for?

[12]A Yes.

[13]Q What medicine to give, what other tests should

[14]be done?

[15]A I agree, yes.

[16]Q Now, with respect to treating your patient, the

[17]majority of a diagnosis is from taken from a history from

[18]the patient, and from the examination and tests?

[19]A Yes, 70 percent.

[20]Q 70 percent?

[21]A 70 percent.

[22]Q Okay. The **[*59]** first time you saw Jennifer Davey in

[23]connection with this motor vehicle accident was

[24]approximately three years and nine months after t

[25]accident; isn't that right?

[2]A Yes.

[3]Q Now, when you obtain 70 percent of a working

[4]diagnosis from a history alone provided to you by the

[5]plaintiff or your patient, is that a risk?

[6]A That's correct. The patient may not be

[7]accurate, forget something.

[8]Q Perhaps not even be telling the truth; isn't

[9]that correct --

[10]A Yes.

[11]Q -- to the extent that relates to the diagnosis?

[12]MR. JORDAN: Objection to form.

[13]THE COURT: I am going to allow him to

[14]answer the question.

[15]A Yes.

[16]Q Now, Doctor, the first time you saw Jennifer

[17]Davey was July 12th, 1994; is that right?

[18]A Yes.

[19]Q And you generated a report from an examination;

[20]is that right?

[21]A Yes.

[22]Q Now, you saw Miss Davey in consultation; is that

[23]right?

[24]A Yes.

[25]Q And she was referred to you by her attorney? **[*60]**
[2]A Yes.

[3]Q Who was her attorney at that time?

[4]A I believe it was Alex Crane (ph).

[5]Q Alex Crane. And Mr. Krane has referred other

[6]patients to you before Miss Davey; correct?

[7]A Very few.

[8]Q The report that you generated was not addressed

[9]to anybody?

[10]A It's not. I have a report that is from my

[11]initial office visit that I transcribed into typing, my

[12]initial office record.

[13]Q Okay. Was this report prepared for the purposes

[14]of exchange with Miss Davey's attorney?

[15]A No, this report was prepared for the purpose of

[16]treatment.

[17]Q Well, at the time that Miss Davey Davey first

[18]consulted with you --

[19]A Yes.

[20]Q -- you knew she was a party to a lawsuit; didn't

[21]you?

[22]MR. JORDAN: Objection. I don't think the

[23]lawsuit had even started at that time.

[24]THE COURT: Rephrase your question.

[25]Q Were you aware at the time Miss Davey first saw

[2]you whether she was a party to a'lawsuit or not?

[3]A When I see a patient, the last thing **[*61]** on my mind

[4]is about lawsuits, about whether they are a party to a

[5]lawsuit.

[6]Q Did you inquire?

[7]A No.

[8]THE COURT: We are going to get something

[9]understood. We are not going to speak on top of

[10]one another. We are going to speak one at a

[11]time. Let him finish his answer.

[12]And let the attorney ask his question.

[13]It is a simple question. And then you

[14]respond to the question.

[15]MR. CAROLA: Judge, if I may. If the

[16]witness cannot respond yes or no, perhaps if he

[17]would let me know beforehand, and I will

[18]rephrase it.

[19]Q At the time you first met with Miss Davey, did

[20]you or did you not know whether she was party to a

[21]lawsuit?

[22]A I did not know. But I knew there might be a

[23]potential for a lawsuit.

[24]Q And did you know that there was a possibility

[25]that your report generated on July 12th, of 1994 may be

[2]used in this lawsuit?

[3]A There is always that possiblity.

[4]Q Now, you took an actual history from Miss Davey

[5]on the first day you saw her. How many times did she go

[6]to the hospital? **[*62]**
[7]A Twice.

[8]Q Do you know the dates that she went?

[9]A No.

[10]Q When Miss Davey went to the hospital the first

[11]time, do you know if she complained about back pain?

[12]A She did not.

[13]Q When she went to the hospital the second time,

[14]do you know if she complained about back pain?

[15]A I don't remember about the second time.

[16]Q Doctor, before you generated your report of July

[17]12th, of 1994, did you obtain a copy of Miss Davey's

[18]hospital records?

[19]A I did not.

[20]Q Do you know whether X-rays were taken in the

[21]hospital on either of the two occasions that you say that

[22]Miss Davey went there?

[23]A I don't remember. Offhand I am not sure.

[24]Q Do you have anything in your records which would

[25]refresh your recollection?

[2]A Yes, they were taken of the neck.

[3]Q Neck only?

[4]A That's what I have in my records.

[5]Q Now, the plaintiff went back -- she began

[6]treatment with an Ellen Bodner; is that correct?

[7]A Yes.

[8]Q That's **[*63]** a physical therapist?

[9]A Yes.

[10]Q Do you know what the plaintiff's complaints to

[11]Ellen Bodner were?

[12]A I do not know.

[7]
[13]Q Do you know what physical therapy Ellen Bodner

[14]provided to the plaintiff?

[15]A I believe she received treatment for her neck

[16]and her back -- lower back.

[17]Q How do you know that?

[18]A I asked the patient, when you went for therapy
.19 what did you get, the treatment.

[20]Q So your belief that Miss Davey received physical

[21]therapy for her back from Miss Bodner was based on what

[22]the plaintiff told you?

[23]A Yes.

[24]Q Did you ever obtain copies of Dr. Bodner's

[25]report before you generated your July 12th, 1994 report?

[2]A No.

[3]Q Before you took the stand today, did you ever

[4]review Miss Davey's hospital records?

[5]A Yes.

[6]Q Do you have those records with you?

[7]A I reviewed them Tuesday when Mr. Conrad showed

[8]them to me on Tuesday.

[9]MR. JORDAN: Jordan.

[10]THE WITNESS: I'm sorry.

[11]Q Do you have those records with **[*64]** you?

[12]A No, I do not.

[13]Q Did you review the records of Dr. Bodner before

[14]you testified today?

[15]A I reviewed so many record I am not sure. I may

[16]have.

[17]Q Well, do you specifically recall reviewing Dr.

[18]Bodner's records before testifying today?

[19]A Specifically, no.

[20]Q The plaintiff had an MRI of her cervical spine

[21]taken on December 17th, 1991; is that correct?

[22]A Yes.

[23]Q About two months after the car accident?

[24]A Approximately, yes; that's right.

[25]Q Maybe little bit longer?

[2]A That's correct.

[3]Q That MRI was negative, wasn't it?

[4]A Yes.

[5]Q After the plaintiff was discharged from the

[6]hospital she came under the care of an orthopedist; isn't

[7]that right?

[8]A Yes.

[9]Q Dr. Sultan?

[10]A Yes.

[11]Q Do you know what the complaints that the

[12]plaintiff made to Dr. Sultan were?

[13]A Yes.

[14]Q What were they?

[15]A Neck and back problems, as well as left shoulder

[16]problems.

[17]Q Did **[*65]** you ever review Dr. Sultan's records before

[18]you generated the report of July 12th, of 19947

[19]A Um, my report of July 12th, on her initial

[20]visit -- I did review Dr. Sultan's report the next day.

[21]Q Okay. Did you incorporate Dr. Sultan's

[22]findings in your report?

[23]A No.

[24]Q Did you ever incorporate Dr. Sultan's findings

[25]this any subsequent report?

[2]A No.

[3]Q Doctor, when the plaintiff saw you for the first

[4]time she complained of pain radiating down into her leg;

[5]isn't that right?

[6]A Yes.

[7]Q When did you first note radiating type pain?

[8]A I don't know from my records. I don't have it

[9]listed.

[10]Q Was it a week after the accident?

[11]MR. JORDAN: Objection. He said he doesn't

[12]know.

[13]THE COURT: I appreciate it. Rephrase the

[14]question in a different form.

[15]Q Do you know if the plaintiff ever told Dr.

[16]Sultan about radiating pain?

[17]A I don't know.

[18]Q Do you know if she ever told Ellen Bodner about

[19]radiating pain?

[20]A I don't know.

[21]Q **[*66]** Did she ever tell anybody?

[22]A (No response.)

[23]Q On either of her two visits with you were you

[24]aware about radiating pain down her leg?

[25]A The first visit I know that I did not, but the

[2]second visit, I don't know.

[3]Q Who was the plaintiff's family doctor?

[4]A I believe it's Wegner.

[5]Q Dr. Weg?

[6]A Weg. I believe it's Dr. Weg, yes.

[7]Q Did you ever obtain copies of his report before

[8]January -- the July 12th, 1994 report?

[9]A Um, just an MRI report addressed to him.

[10]Q Dr. Weg was the plaintiff's family physician; is

[11]that correct?

[12]A I believe so, yes.

[13]Q She treated with Dr. Weg on a yearly basis for a

[14]yearly physical; is that correct?

[15]A I don't know. I have no idea. I don't know

[16]with what frequency she treated with Dr. Weg.

[17]Q Do you know if the plaintiff as a result of the

[18]first accident missed any time from school?

[19]A I don't know.

[20]Q Do you know if she missed any time from work?

[21]A I am not sure.

[22]Q **[*67]** Did she tell you that she worked out pretty much

[23]everybody day, whether it be jogging or aerobics?

[24]MR. JORDAN: Objection to form.

[25]THE COURT: When? Before the accident?

[2]MR. CAROLA: Before the accident.

[3]A Yes, I believe she told me that she did exercise

[4]on a regular basis, and even when she came to me

[5]afterwards, she exercised on a regular basis.

[6]Q That's from the first visit, July 12th, visit,

[7]that is when she came to you and she said --

[8]A When she came to me afterwards, during my

[9]treatment of her from July of 1994 until the last time I

[10]saw her for that injury, which was June 12, 1997, during

[11]that period she had mentioned to me that she was

[12]exercising on a regular basis.

[13]Q Who was Dr. Basson?

[14]A I believe Dr. Basson is a neurologist.

[3]
[15]Q I'm sorry. Let me back up, Doctor. Do you know

[16]if Dr. Sultan ever noted spasm in the plaintiff's lumbar

[17]spine during any examination of her?

[18]A I don't have a full report from Dr. Sultan. I

[19]have a report dated 10-17-91 where he makes no mention of

[20] **[*68]** vertebrael muscle spasm, but he did find no drop in

[21]rotation or abnormality.

[22]Q I was questioning you about the spasm.

[23]A And I answered.

[24]Q Did he also mention something about

[25]non-radiating back pain? I think it's towards the bottom

[2]of the report, first page, on forward flexion.

[3]A Yes, non-radiating.

[4]Q Did he say on forward flexion?

[5]A Yes.

[6]Q Okay. Doctor, is it fair to say that a

[7]herniated disk could be asymptomatic for more than a year?

[8]A If you have a traumatic disk herniation, it can

[9]be lower back pain with radiation and stiffness.

[10]There was shooting type pain. There was nerve

[11]root impingement. And with nerve root impingement, there

[12]is usually shooting pain.

[13]Q Now, the question is specific about herniated

[14]disks. Could a herniated disk be asymptomatic for two and
l5 a quarter years?

[16]A That depends. There are posterier and anterior.

[17]What type of disk are you referring to?

[18]Q Let's refer to the disk that is diagnosed in

[19]your records.

[20]A **[*69]** Central.

[21]Q Central?

[22]A The disk herniation?

[23]Q Yes.

[24]A The central disk herniation doesn't hit th-

[25]nerve root. If the nerve root becomes involved,

[2]usually become involved from the 'rotational force, from

[3]the chemical toxins released from the disk, unless that

[4]central disk herniation is so big that it extends further

[5]and hits the nerve root. -

[6]Q So do you know whether Miss Davey's disk

[7]herniation was asymptomatic up until the first time you

[8]saw her?

[9]A No, it was symptomatic right from the beginning.
1-0 Dr. Sultan has it in his report of 10-17-91. He diagnosed

[11]a cervical and lumbar strain. She did have, a lower --

[12]Q I'm sorry.

[13]A Cervical and lumbar strain.

[14]Q Strain?

[15]A Strain, S T. There was lower back complaint in

[16]the-beginning.

[17]Q Non-radiating?

[18]A Non-radiating, yes; that is correct.

[19]Q Now, on the first visit, and I am looking at the

[20]second paragraph of your July 12th, report, there is no

[21]mention of cervical spine radiating **[*70]** pain; is is correct?

[22]A That's correct.

[23]Q And, again, indicating that the patient

[24]complains of back pain raditation bilaterally. But you

[25]don't know when that started; correct?

[2]A That's correct.

[3]Q Patient specifically denied numbness or tingling

[4]in the lower extremities; isn't that right?

[5]A Yes.

[6]Q How many times did you see Jennifer Davey prior

[7]to January 18th, of 1995, which would be the date of the

[8]second accident?

[9]A Um, I believe it was 13 times total in my

[10]office.

[11]Q Do you have a copy of those records?

[12]A I do.

[13]MR. CAROLA: May I see them, Judge? I

[14]never saw them.

[15]THE COURT: Sure.

[16](Complied.)

[17]MR. CAROLA: Thank you.

[18]Q Are these in order, Doctor, as far as you know?

[19]A They may have been, but now I am not sure.

[20]Q Okay. Well, maybe it will save time if you can

[21]show me -- is this your whole record?

[22]A No. Those are the dates of service.

[23]Q Do you have records indicating what was

[24]performed on these dates?

[25]A **[*71]** Yes.

[2]Q What the complaints were?

[3]A Yes.

[4]Q Are they here now?

[5]A They're in your hand.

[6]Q Let me ask you this question: Do you have a

[7]patient procedure history by dates of service indicating

[8]the treatment 7-12-94 until 10-19-94 on a somewhat regular

[9]basis?

[10]A There is another entry of 6-12-94.

[11]Q Do you have any -- maybe it will save time if

[12]you can show me in here the records of these treatments?

[13]Specifically I am looking for patient complaints and what

[14]was done for her.

[15]A Everything here, except the physical therapy

[16]records, and those dates by the billing was about nine

[17]sessions of physical therapy. Everything else is written

[18]in my handwriting.

[19]Q Okay. May I see what you are referring to?

[20]THE COURT: He said everything else.

[21]MR. CAROLA: May we approach?

[22]A This is my handwriting. This is my office -- my

[9]
[23]note of 6-12-97. This is my report of 6-10-97. This is

[24]my office note of 7-26-94. And this is my note -- report

[25]of 7-12-94. **[*72]**
[2]Q Okay. Would it be fair to say there are some

[3]records missing from the dates that are here?

[4]A The only things that aren't listed here are the

[5]physical therapy, that's the only thing that is missing.

[6]Q When was Miss Davey discharged from active

[7]treatment prior to January 18th, of 1995?

[8]A Um, the last time she was seen was on 10-19-94.

[9]Q Then she had a subsequent accident on January

[10]18th, of 1995?

[11]A Yes.

[12]Q Do you know when the last time she received any

[13]treatment to her lower back was, before the first time she

[14]saw you?

[15]A I can't answer that question, I don't know.

[16]Q Do you have anything in your records which would

[17]indicate that?

[18]A No.

[19]Q Now, following Miss Davey's January 18th, 1995

[20]accident, when was the next time you had seen her?

[21]A After January 18th, 1995?

[22]Q Yes.

[23]A The first time I saw her was on 1-27-95.

[24]Q Okay. And you generated a report that is

[25]addressed to Dr. Mustafi; is that correct?

.14010* - **[*73]**
[2]A That's correct.

[3]Q How long had she been treated by Dr. Mustafi for

[4]prior to her seeing you for the first time?

[5]A I imagine after the accident, the exact time I

[6]don't know.

[7]Q Do you know if she had ever seen Dr. Mustafi in

[8]connection with the first accident?

[9]A To my knowledge, no.
-0 Q Did you ever refer her for treatment to Dr.

[11]Mustafi prior to January 27th, 1995?

[12]A It doesn't work that way, Counsel. The answer

[13]is no. Because as a chiropractor -- he was a consulting,

[14]not a treating Doctor, Dr. Mustafi. The treating

[15]doctor -- a treating Doctor does not send a consultant

[16]records.

[17]Q Because he was a chiropractor also?

[18]A No.

[19]Q He is a chiropractor. Isn't that going

[20]backwards?

[21]A No.

[22]Q You're not a stranger to testifying in court,

[23]are you?

[24]A If you're asking me have I testified before, I

[25]gave you an approximate -- I told you I have testified

[2]many times, yes.

[3]MR. CAROLA: May I have one moment?

[4]THE COURT: Okay. **[*74]**
[5](Pause in the proceedings.)

[6]Q Doctor, you recall testifying in the matter of

[7]Katherine Meisel versus Mortimer Frank?

[8]Was that an arbitration?

[9]Q No, it was a trial before the Honorable Kenneth

[10]Thomas, Supreme Court, Bronx County, on March 14th, 1997,

[11]this year.

[12]A 1997?

[13]Q This year.

[14]A Yes. Yes, I do, in the Bronx.

[15]MR. CAROLA: I am sorry, Judge. I would

[16]just ask for the patience of the jury.

[17]Q Doctor, do you remember being asked this

[18]question and giving this answer --

[19]MR. CAROLA: I am sorry, Judge, I don't

[20]have a court copy for the Court.

[21]Q "Doctor, in your experience did you ever see any

[22]ther patients with similar complaints of neck pain that

[23]you referred to a chiropractor?

[24]"Answer: I don't refer patients to

[25]chiropractors, they refer them to me as an M. D. I don't

[2]go backward, I go forward. There is nothing a

[3]chiropractor can do that I can't, except that they do

[4]manipulation and I do not do manipulation."

[5]Do you recall testifying to that, being asked

[6]that question **[*75]** and giving that answer?

[7]MR. JORDAN: I object to that.

[8]THE COURT: Yes, I understand your

[9]question, I understand your objection.

[10]Doctor, that is your statement; is that

[11]correct?

[12]THE WITNESS: The one he read from.

[13]THE COURT: Yes. Yes, it is.

[14]Q Doctor, I got your testimony here. You said

[5]that 70 percent of your diagnosis -- you just said 70

[1]percent of your diagnosis comes from a history from the

[17]patient.

[18]A Yes; that's correct.

[19]Q Well, do you recall being asked this question

[20]and giving this answer?

[21]MR. JORDAN: Your Honor, since I don't have

[22]a transcript of this, I would ask --

[23]THE COURT: Do you just mind showing it to

[24]Mr. Jordan.

[25]MR. JORDAN: Would you mind showing it to

[1]
[2]me?

[3]THE CAROLA: Sure. No problem.

[4]Q "Can you describe the significance of taking a

[5]history from a patient, Doctor?
"Answer: The majority of diagnoses comes from
ory, I would say approximately 75 to 80 percent from

[8]
[9]Do you recall --

[10]A 70 percent to me is the same.

[11]Q Okay. Very well. I'm sorry.

[12] **[*76]** Did you ever review Dr. Mustafi's report?

[13]A No.

[14]Q Now, being that some 70, possibly 80 percent of

[15]your history comes from the patient, did you think it

[16]would be important --

[17]MR. JORDAN: Objection to counsel's

[18]comment.

[19]THE COURT: Reprhase it if you can.

[20]MR. CAROLA: All right.

[21]Q Well, Doctor, you said --

[22]MR. JORDAN: I think he said 70 percent.

[23]Q I'm sorry. 70 to 80 percent of your diagnoses

[24]comes from the history of a patient; is that correct?

[25]A Yes.

[2]Q And if the patient told Dr. Mustafi certain

[3]things she didn't tell you, wouldn't that be important for

[4]you to have in your history?

[5]A I have to correct you. Because a history is

what the physician takes. He doesn't bring another
physician's history into it, and he doesn't make a
---.dagnosis from another doctor's history. I am talking

[9]1 about the history that a doctor obtains. I may take a

[10]1 history and it may be completely different from any other

[11]doctor's history, and visa versa.

[12]Q So you wouldn't want to know what **[*77]** she told a

[13]treating chiroptractor?

[14]A It always helps to have as much information as

[1]possible from a patient. If a patient told me what

[16]treatment she received, yes, it is important. But in

[17]terms of history, if I am going to be form my own
18: diagnosis, I have to rely on my history. That's why when

[19]we go to a hospital each doctor is required by law to take

[20]a different history. No doctor relies on a different

[21]doctor's history. I am not concerned about what other

[22]doctors learn.

[23]THE COURT: Move on.

[24]Q If a patient gave a history to Dr. Mustafi of

[25]not being involved in any prior automobile accident prior

[2]to the accident that is the subject of this lawsuit --

[3]A I can't answer that question. I don't know what

[4]history she gave Dr. Mustafi. You ask about history to

[5]Dr. Mustafi. I can't answer it, because I don't know the

[6]history she gave to Dr. Mustafi.

[7]Q Now, at the time -- well I am not saying that,

[8]Doctor.

[9]You don't know the history she gave to Dr.

[10]Sultan either; correct?

[11]A No, that's not correct. **[*78]** I saw her on July

[12]12th, 1994, her second set of MRI's, she had not had them

[13]yet.

[14]Q In reference to the first time you saw her

[15]following the second accident?

[16]A Do you want to let me clear it up? I saw her --

[17]Q You saw her on January 27th, 1995 following the

[18]second accident?

[19]A Yes.

[20]Q The lumbar MRI's were taken January 30th, of

[21]1995; is that correct?

[22]A I don't have any idea when they were taken.

[23]Q Okay. Did you refer her for an MRI to an MRI

[24]facility?

[25]A No, I did not.

[2]Q Do you know who did?

[3]A I believe it was Dr. Mustafi, he was the

[4]treating doctor.

[5]Q Now, the plaintiff also had a second set of the

[6]cervical MRI's taken; is that correct?

[7]A Yes.

[8]Q They were also negative?

[9]A Correct.

[10]Q Do you ever have an opportunity to review the

[11]second set of lumbar MRI's?

[12]A Yes.

[13]Q And these were taken by Doctor Profer; isn't

[14]that correct?

[15]A Yes, they were. They were read by Dr. Profer.

[16]Q **[*79]** Interpreted by Dr. Profer?

[17]A Yes.

[18]Q Dr. Profer is the same physician who interpreted

[19]the first set of MRI's?

[20]A That's correct.

[21]Q Doctor, did you know there were two different

[22]MRI facilities?

[23]A I came into the picture after that.

[24]Q I asked you --

[25]THE COURT: Excuse me. I appreciate the

[2]statement, Doctor, but'it's a question put could

[3]you and it legitimate.

[4]THE WITNESS: I'm sorry.

[5]A I have no knowledge of that.

[6]Q Now, your report of January 27th, 1995 indicated

[7]that the plaintiff gave a history of sustaining three

[8]bulges as a result of the first accident; isn't that

[9]correct?

[10]A Yes.

[11]Q Now, is that a history you obtained from the

[12]plaintiff?

[13]A Correct.

[14]Q But from an earlier report she sustained

[15]allegedly three herniations?

[16]A Bulges with central disk herniations.

[17]Q It doesn't mention herniations in that report,

[18]Doctor, does it? You doesn't mention herniations in this

[19]report?

[20]A I do not.

[21]Q Miss **[*80]** Davey was a former patient of yours; is

[22]that correct?

[23]A From the very onset, yes.

[24]Q Did you ever go back and review her medical

[25]records?

[1]
[2]A After the initial evaluation

[3]Q Did you ever incorporate those findings from

[4]this accident in any report generated following the

[5]second accident?

[6]A I don't believe so.

[7]Q Trying to keep them separate, were you?

[8]A I'm sorry.

[9]Q Were you trying to keep them separate, or did

[10]you just --

[11]MR. JORDAN: Objection to form.

[12]THE COURT: Yes.
Q D
ctor, was there a particular reason why you
there incorporated) the notes from the first accident?
Was ere a reason for that?

[16]A This goes back two years. I don't know what

[17]was on my mind two years ago.

[18]Q Did you ever personally review the first set

[19]of films before you generated the January 27th, 1995

[20]report.

[21]A I reviewed the MRI films, yes.

[22]Q And when you reviewed them, did you confirm

[23]the presence of herniations?

[24]A Did I, yes.

[25]Q But you didn't **[*81]** put that in your report?

[13]
I

[15]
[2]A If I can explain to you.

[3]Q Yes.

[4]A When I first saw her on January 18th, 1995 I

[5]didn't have access to my past record.

[6]Q Now, the complaints Miss Davey made to you on

[7]the date of the accident, is it safe to assume it was

[8]January 18th, because that's the date the report was

[9]made?

[10]A That's the day I saw her, yes.

[11]Q She complained about neck pain radiating to

[12]her you know extremities; isn't thta right?

[13]A Yes.

[14]Q But she didn't have that complaint the first

[15]time you saw her?

[16]A For the first case?

[17]Q The first time you saw her ---

[18]A Correct.

[19]Q -- she did not have this complaint?

[20]A She did not.

[21]Q Now, Doctor, in your report you go onto

[22]indicate that past medical history.

[23]A Yes.

[24]Q Who provided that information to you?

[25]A The patient.

[2]Q And again the patient told you that the MRI

[3]of her neck was negative, **[*82]** but the MRI from the lumbar

[4]spine revealed three buldges to the best of her

[5]recollection?

[6]A Yes.

[7]Q You did straight leg raises on this

[8]plaintiff, didn't you?

[9]A Yes.

[10]Q And it was 75 degrees?

[11]A Correct.

[12]Q And you examined her, and for the first

[13]report the straight leg raises was to 60 degrees?

[14]A Yes; that's correct.

[15]Q So she has improved fifteen degrees?

[16]A Based on comparing that to this, yes.

[17]Q Doctor, did you ever learn that there was a

[18]pretrial conference in this case on June 9th, 1997?

[19]A No.

[20]Q And yet you generated a report dated June

[21]10th, 1997; is that correct?

[22]A Right: I generated a report on June 10th,

[23]1997 without having any knowledge of any pretrial or

[24]post trial conference, or any other trial.

[25]Q Well, this report is not addressed to anyone;

[2]is that right?

[3]A That's correct.

[4]Q But it does contain an opinion; is that

[5]correct?

[6]A That's correct.

[7]Q Any time your report contains **[*83]** an opinion, it

[8]is addressed to an attorney; isn't it?

[9]A It goes to an attorney, yes.

[10]Q So you knew that this report could somehow

[11]work its way to Miss Davey's attorney; right?

[12]A Yes, it was requested by Miss Davey's

[13]attorney.

[14]Q What date was it requested?

[15]A What date? I don't know exactly what date,

[16]but that was the day it was done.

[17]Q Now, you indicated in this report of June

[18]10th, 1997 a treatment course; is that right?

[19]A Yes.

[20]Q And you indicated that you reviewed the form

[21]from Dr. Eisenberg dated 5-12-91. That would be

[22]actually Dr. Basson, wouldn't it?

[23]A Same practice.

[24]Q Did you review Dr. Basson's report from

[25]December 17th, 1991?
… . ?.l.

[2]A The only report I reviewed of Dr. Basson was

[3]the report of December 5th, 1991.

[4]Q Do you know if she did nerve conduction

[5]studies?

[6]MR. JORDAN: Objection. If he didn't

[7]review it, he is not going to know the answer

[8]to the question.

[9]THE COURT: Ask a general question. Lay

[10]some sort **[*84]** of foundation.

[11]MR. CAROLA: That's what I intend to do,

[12]your Honor.

[13]THE COURT: Thank you.

[14]Q In the course of your treatment of Miss

[15]Davey, did you ever come to learn whether Dr. Basson

[16]had ever performed nerve conduction studies on her?

[17]A Based on the report of 5-91 she was planning

[18]to do it. Whether she did it or not, I have no

[19]knowledge.

[20]Q Would that be for the upper or lower

[21]extremities?

[22]A The upper extremities.

[23]Q That would be the cervical spine? She

[24]suspected an jury to the cervical spine; right?

[25]A That's correct.

[2]Q No mention of the lumbar spine?

[3]A That's correct.

[4]Q Now, Doctor, you make referrence in your June

[5]10th, 1997 report, to the negative MRI of the cervical

[6]spine performed December 17th, 1991; is that right?

[7]A Yes.

[8]Q You make mention of the MRI of the lumbar

[9]spine done January 22, 1993 addressed to Dr. Weg; is

[10]that right?

[11]A Yes.

[12]Q Doctor, you don't indicate the other two

[13]MRI's that were done on **[*85]** the plaintiff, do you?

[14]A Which other two MRI's?

[15]Q The lumbar and cervical MRI taken following

[16]the second accident?

[2]
[17]A This only deals with the accident of 1991,

[18]and says right on top of it, date of accident 10-6-91.

[19]The information in this report refers only to the

[20]accident of 10-6-91.

[21]Q Doctor, in your opinion did the plaintiff

[22]aggravate an alleged preexisting condition as a result

[23]that second accident?

[24]A Absolutely, yes.

[25]Q But you didn't incorporate any opinion as to

[2]whether any treatment or diagnostic tests on June 10th,

[3]of 1997 were given to plaintiff's attorney?

[4]A The answer is the same as the one I gave you

[5]earlier.

[6]Q Correct; for the reason you indicated, that

[7]the plaintiff -- that the MRI's of the lumbar spine of

[8]1-22-94, the first set of MRI's --

[9]A Right.

[10]Q -- indicated mild femural stenosis.

[11]A Yes.

[12]Q Did you review these films yourself?

[13]A I did.

[14]Q The doctor who read the MRI said there was a

[15]femural **[*86]** stenosis; is that correct?

[16]A Let's go back and read his report. He found

[17]femural stenosis.

[18]At each level there is a mild degree of

[19]indentation of the vertebrael convex disk resulting in

[20]mild canal stenosis and bringing about femural

[21]stenosis.

[22]Q Would you tell us what femural stenosis is,

[23]Doc ?
A Mild femural stenosis is a mild inflammation

[25]at t e L3, L4 level.

[2]Q Okay. Thank you.

[3]Now, again, in your June 10th, 1997 report,

[4]Doctor, you gave an opinion based upon the history

[5]obtained and clinical examination findings, the results

[6]of the MRI, and the EMG report; is that correct?

[7]A Correct.

[8]Q And you say, it is my professional opinion

[9]that this patient has sustained a permanent partial

[10]disability causally related to the episode of 10-6-91;

[11]is that correct?

[12]A Yes.

[13]Q No mention of the subsequent accident though?

[14]A Again, as I mentioned, this report is only

[15]for the accident of 10-6-91.

[16]Q When you discharged the plaintiff from your

[17]active care following the **[*87]** first accident, had your

[18]therapy acheived the desired results?

[19]MR. JORDAN: Objection to the form.

[20]THE COURT: Do you understand that

[21]question?

[22]THE WITNESS: Vaguely.

[23]THE COURT: Respond to it.

[24]A Obtained? To the degree she could improve,

[25]she had responded to my therapy.

[2]Q Doctor, was is meant by secondary gain?

[3]A Secondary gain --

[4]Q You're not familiar with the term secondary

[5]gain?

[6]THE COURT: One at a time type.

[7]MR. JORDAN: I would just ask that this

[8]takes the form of a question rather than

[9]argument, Judge.

[10]THE COURT: There is no dispute.

[11]Ask a question, Counsel.

[12]Q Now, Doctor, I want to know whether you

[13]personally are familiar with the term secondary gain?

[14]A Yes, I am familiar with the term secondary

[15]gain.

[16]Q And can you tell us what that term means?

[17]A When a patient has no injury and they are

[18]trying on obtain some sort of a remuneration for

[19]injuries that aren't there.

[20]Q And, now, in the the course of your treatment

[21]of patients have you **[*88]** ever encountered any patient that

[22]came to see you for secondary gain?

[23]MR. JORDAN: Objection as to the form,

[24]as to other patients.

[25]A I imagine.

[2]Q Doctor, let me ask you this question: Have

[3]you ever found secondary gain patients and discharged

[4]those patients --

[5]MR. JORDAN: Objection, Judge.

[6]MR. CAROLA: Subject to connection, your

[7]Honor?

[8]THE COURT: No, I am not going to take

[9]it subject to connection. Sustained.

.10 Q Doctor, are you aware of the fact that Miss

[11]Davey came under the care of a psychologist following

[12]the second accident?

[13]A I don't have that information in my records.

[14]Q Did Miss Davey ever tell you she was going to

[15]see a psychologist?

[16]A I don't have that in my records. I can't

[17]tell you one way or the other.

[18]Q Did you refer her to a psychologist?

[19]I don't believe I did.

[0]Q Doctor, isn't it true about 99.9 percent of
2- the time that you testify it is for plaintiffs in

[22]lawsuits?

[23]A The plaintiff is the patient. I testify for

[24]my patients.

[25]Q Who are **[*89]** the plaintiffs in lawsuits, if you
j

[2]are testifying in a lawsuit.

[3]MR. JORDAN: Objection to the form.

[4]THE COURT: I appreciate that. I

[5]appreciate your interpretation. I appreciate

[6]the question.

[7]Please answer the question.

[8]A The answer is yes, 99.9 percent, whatever you

[9]say. I mean, the majority of my patients.

[10]Q Doctor, it's not what I say, it's what you

[11]say.

[12]THE COURT: We're not going to take that

[13]as a question.

[14]Thank you.

[15]MR. CAROLA: All right.

[16]Q Now, you indicated that you have an

[17]outstanding balance, an outstanding bill as a result of

[18]treatment for the accident?

[19]A Right.

[20]Q Do you ask your patients to sign a guaranty?

[3]
[21]A A lien, yes.

[22]MR. JORDAN: Judge, may I get a GEICO

[23]form?

[24]I think we better approach on that.

[25]THE COURT: Yes.

[2](Sidebar conference out of the hearing

[3]of the jury and the court reporter.)

[4](In open court.)

[5]Q And do your patients sign a guaranty?

[6]A You mean a lien, yes.

[7]MR. **[*90]** CAROLA: Could I mark them

[8]Defendant's C and D for identification.

[9]THE COURT: Mark them Defendant's C and

[10]D.

[11](Defendant's Exhibits C and D marked for

[12]identification only.)

[13]THE COURT: Counsel, you have seen this;

[14]is that correct?

[15]MR. JORDAN: Yes; that's correct.

[16]Q Dr. Guy, in the report that you generated

[17]that the you knew were going to an attorney, you knew

[18]the plaintiff had a prior history of a motor vehicle

[19]accident that is the subject of this litigation; is

[20]that right?

[21]A I'm sorry?

[22]Q In the report that you rendered -- that you

[23]generated following the second motor vehicle

[24]accident --

[25]A Yes.

[2]Q -- you --

[3]A Yes.

[4]Q Let me finish my question.

[5]A I remember what you said.

[6]THE COURT: Sometimes it's difficult for

[7]the reporter, so if we just wait for each

[8]other it will make the reporter's job a lot

[9]easier.

[10]Q So in those records or those reports that you

[11]knew were going to be used for the litigation, you did

[12]indicate there was a prior history; **[*91]** is that

[13]correct?

[14]A Okay. See, the second part of your comment

[15]you put there, I did indicate what is pertinent past

[16]medical history, and there is a prior history

[17]indicated. Whether it is for litigation or not for

[18]litigation, I include it irregardless.

[19]Q How about for getting paid, to make sure you

[20]get compensated for your services?

[21]A What does that have to do with this?

[22]Q To make sure --

[23]THE COURT: Sustained.

[24]MR. JORDAN: Objection.

[25]THE COURT: Yes, sustained.

[2]
[2]Q Let me ask it this way --

[3]MR. CAROLA: May I see the two exhibits,

[4]please?

[5](Complied.)

[6]Q I would like you to take a look at what has

[7]been marked as Defendant's Exhibit C for identification

[8]purposes.

[9]A Yes.

[10]Q Okay. Now, is that a bill for services

[11]rendered, Doctor?

[12]A Yes.

[13]Q Does it contain a copy of your signature?

[14]A No.

[15]Q Your signature does not appear on this

[16]document?

[17]A That is not my signature. That's one of my

[18]staff that has authorization **[*92]** to sign my name. It's not

[19]my signature.

[20]Q That's not your signature on the document

[21]dated 2/25/95?

[22]A That's not my signature on the document dated

[23]2/25/95.

[24]Q That is someone on your staff that has the

[25]authority to sign your name?

[2]A Yes, a bill.

[3]MR. CAROLA: Judge, I would ask that

[4]this be marked in evidence as Defendant's

[5]Exhibit C.

[6]MR. JORDAN: Objection as to relevance.

[7]Q Well, Dr. Guy, there is an indication for the

[8]person's name and address.

[9]A Patient's name and address?
.10 Q Yes, on the form. It's a form, isn't it,

[11]Doctor?

[12]A We do you see the patient's name and address?

[13].That's my name and address.

[14]Q No. The patient's name and address, and --

[15]question number one, patient's name and address; isn't

[16]that correct?

[17]A Yes. But there is no address there.

[18]Q But it has a name?

[19]A Yes.

[20]Q Question number two indicates age?

[21]A Yes.

[22]Q Question number three indication a sex?

[23]A Yes.

[24]Q Occupation, **[*93]** question number four?

[25]A Yes.

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[2]Q Question number five'indicates a history of

[3]occurrences as described by patient; is that correct?

[4]THE COURT: Counsel, I appreciate your

[5]doing that, but if you do that, he will be

[6]testifying from something that is not in

[7]evidence. Ask a general foundation question.

[8]Q Well, Dr. Guy, does this form indicate

[9]whether the plaintiff ever had a prior similar

[10]condition?

[11]MR. JORDAN: Objection. That form is

[12]not in evidence.

[13]THE COURT: Rephrase the question.

[14]Q Dr. Guy, somebody on your staff indicated for

[15]billing purposes that Miss Davey had never been

[16]involved in a prior similar accident or had a similar

[17]condition.

[18]MR. JORDAN: Objection to what somebody

[19]else did.

[20]THE COURT: Well, I appreciate it. He

[21]said his staff. He explained that.

[22]THE WITNESS: Your Honor, on another

[23]form they put down that the patient does have

[24]a prior history.

[25]MR. CAROLA: I am looking at what has
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[2]been --

[3]THE COURT: Doctor, **[*94]** I would appreciate

[4]it very much you wanting to volunteer

[5]information. However, plaintiff's counsel

[6]will get up on redirect and get the

[7]information that he thinks is appropriate.

[8]Please, respond only to the questions.

[9]MR. CAROLA: Judge, at this time, I

[10]would ask that this document be admitted into

[11]evidence. It is a document prepared by

[12]somebody on Dr. Guy's staff with his

[13]permission. It contains a signature and it's

[14]dated.

[15]THE COURT: Anything else?

[16]MR. JORDAN: He is clearly trying to

[17]give half a story to the jury.

[18]If he wants to put it in evidence, I

[19]object. But if he does, I will ask for the

[20]same privilege to show that she had a prior

[21]accident.

[22]THE COURT: Wonderful.

[23]Subject to redaction it will be marked

[24]into evidence.

[25](Defendant's Exhibit C received and

[2]marked into evidence.)

[3]MR. JORDAN: Your Honor, at this time I

[4]would ask that the form that Dr. Guy was

[5]referring to be marked into evidence.

[6]THE COURT: Is that a copy of the same

[7]form that we are talking about?

[8]MR. JORDAN: Yes.

[9]THE COURT: Mark it as **[*95]** Plaintiff's --

[10]MR. JORDAN: We can do it as a

[11]defendant's exhibit.

[12]THE COURT: Continue. Next question.

[13]Q Doctor, referring to what has been admitted

[14]into evidence as C. That's dated February 25, 1995; is

[15]that correct?

[16]A Yes.

[17]Q That's seven days after -- I'm sorry. That's

[18]roughly one month after plaintiff first saw you?

[19]A Yes.

[20]Q And there is a box there, has patient ever

[21]had a same or similar condition; is that correct?

[22]A Yes.

[23]Q And there are two X's in that box; is that

[24]correct?

[25]A ' That's correct.
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[2]Q And the next question down below, question

[3]ten. The condition that you are treating plaintiff for

[4]is solely as a result of this accident. And that's got

[5]two X's in that box; is that correct?

[6]A That is correct.

[7]Q Doctor, I would like to refer you now to what

[8]has been marked as Defendant's Exhibit D in evidence --

[9]for identification. I'm sorry. Dr. Guy, does your

[10]signature appear on this report?

[11]A No. This is not my signature. **[*96]** '

[12]Q This is one of your staff's signature?

[13]A Yes.

[14]Q Did they have the authority to sign for you?

[15]A Yes.

[16]Q And is that signed on or about May 5th,

[17]1995?

[18]A Yes.

[19]MR. CAROLA: Judge, at this time I would

[20]as that Defendant's D be marked into

[21]evidence.

[22]THE COURT: With the same objection,

[23]admit it.

[24](Defendant's Exhibit D marked into

[25]evidence.)

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[2]MR. JORDAN: Can I see what is going on?

[3]THE COURT: Sure.

[4](Complied.)

[5]Q Doctor, on that form there is a question as

[6]to whether the patient has ever had a similar

[7]condition.

[8]A Yes.

[9]Q Someone typed in no; is that correct?

[10]A That's correct.

[11]Q And the question below that, is condition

[12]solely a result of this accident; is that right?

[13]A Yes.

[14]Q Somebody typed in yes; is that correct?

[15]A That is correct.

[16]Q Now, Doctor, you referred to a form that you

[17]had in your folder. May I see that?

[18]A I referred to something else a moment ago in

[19]response **[*97]** to the question.

[20]THE COURT: Show it to him.

[21]MR. CAROLA: Judge, may we have it

[22]marked as Defendant's Exhibit E for

[23]identification?

[24]THE COURT: You want it in evidence?

[25]MR. JORDAN: Subject to redaction, sure.

[2]THE COURT: Just mark it in evidence on

[3]consent.

[4](Defendant's Exhibit E in evidence.)

[5]Q Doctor, is this the same type of form that we

[6]just referred to as Defendant's Exhibit C and

[7]Defendant's Exhibit D?

[8]A Yes.

[9]Q What is the date?

[10]A 4/4/95.

[11]Q Is there a date up in the top of that,

[12]Doctor?

[13]A Yes.

[14]Q 2/7/95?

[15]A Yes.

[16]Q The form was filled out 2/7/95, but it was

[17]executed 2/4/95?

[18]A I believe by the insurance company.

[19]Q When was it executed by somebody from your

[20]office?

[21]A 4/4/95.

[22]Q All right. Now, there is a history there of

[23]the plaintiff being involved in a prior motor vehicle

[24]accident; isn't that correct?

[25]A Right.

[2]Q Do you know who **[*98]** put in this physician's name,

[3]Dr. Bonsally? Who is Dr. Bonsally?

[4]A A doctor in my office.

[5]Q Is Dr. Bonsally still associated with you?

[6]A No.

[7]MR. CAROLA: I have no further

[8]questions, your Honor.

[9]THE COURT: Okay. Redirect.

[10]MR. JORDAN: Just a very few.

[11]REDIRECT EXAMINATION

[12]BY MR. JORDAN:

[13]Q Doctor, do you have in your records a typed

[14]version of the notes you took when you saw Jennifer

[15]Davey?

[16]A I do. You mean the June 12, '97?

[17]Q Yes.

[18]A Yes.

[19]MR. JORDAN: Can I have this marked as

[20]the next plaintiff's exhibit for

[21]identification.

[22](Plaintiff's Exhibit 17 marked for

[23]identification.)

[24]Q And, Doctor, is that a typed version of the

[25]notes that you took regarding your regular course of

[2]treating Jennifer Davey?

[3]A Yes.

[4]MR. JORDAN: I would like that marked in

[5]evidence, your Honor.

[6]MR. CAROLA: Objection. It's clearly

[7]bolstering, and to benefit the doctor's own

[8]testimony.

[9]MR. JORDAN: Those records are allowed

[10]to go into evidence.

[11]THE **[*99]** COURT: Not when he is-testifying to

[12]that same circumstance, Counsel. I haven't

[13]read the letter. I am assuming it's about

[14]the same testimony that he has already given

[15]as to his findings. Sustained.

[16]Q And, Doctor, I would like you to take a look

[17]at what has been marked as Plaintif's 16 for

[18]identification.

[19]Doctor, can you look through that and just

[20]tell me whether this is a copy of your office records,

[21]regarding Jennifer Davey?

[22]A Yes.

[23]Q And they were sent in by your office to this

[24]court house in response to a subpoena in this case?

[25]A Yes.

[2]Q Okay. Thank you. Now, Doctor, you were

[3]asked questions about patients complaining of radiating

[4]pain and low back pain.

[5]I want to ask you, the pain associated with a

[6]herniated disk in the lumbar spine, is that only

[7]radiating pain?

[8]A No.

[9]Q And can you explain your answer more fully?

[10]A You can have just localized pain, stiffness

[11]with increased range of motion. If the nerve roots are

[12]involved, you can have pain in your legs. You can **[*100]** have

[13]radiating lower back pain, and pain in the legs. You

[14]can have numbness. It depends on what structures are

[15]involved in the lumbar spine.

[16]Q And let me just ask you this: On the MRI

[17]report, do you recall that there was a notation -- I am

[18]talking about the MRI report of January, 1994 --

[19]indentation of the thecal sac? Do you recall that?

[20]A Yes. Yes.

[21]Q Could you explain the clinical significance

[22]of that, what it means to the patient, this identation

[23]on the thecal sac?

[24]A The thecal sac is the sleeve that covers all

[25]the nerve root structures. You have nerve roots inside

[2]the thecal sac, so it would cause pain or irritation

[3]inside the nerve root in the thecal sac.

[4]Q Now, in the physical therapy notes -- do you

[5]have a notation in your records of when this physical

[6]therapy was done? Do you have the actual physical

[7]therapy records, or do you know what physical therapy

[8]was prescribed?

[9]A Yes.

[10]Q Could you tell us what type was prescribed?

[11]A I am not sure about the physical therapy **[*101]**
[12]performed.

[13]MR. CAROLA: Objection.

[14]MR. JORDAN: You questioned him about

[15]physical therapy notes being missing.

[16]Q Physical therapy was done in your office;

[17]correct?

[18]A Yes.

[19]Q Explain to the jury what type of physical

[20]therapy was done.

[21]A In my report of 6/10/97, hot packs,

[22]electrical stimulation, manual massage and therapeutic

[23]exercises.

[24]Q And that would have been the same physical

[25]therapy performed in 1994?
x:

[2]A Yes.

[3]Q Did you yourself review and sign those forms?

[4]A No.

[5]Q Doctor, keeping in mind that you wrote a

[6]report in which you refer to the fact that Jennifer

[7]Davey was formerly your patient in the past, but

[8]because of a prior accident and in view of the form

[9]that went into the record where you office does not

[10]note the motor vehicle accident in 1991 and injuries to

[11]her back, can you tell this jury, have you ever

[12]attempted to hide the fact that Jennifer Davey had a

[13]1991 accident?

[14]MR. CAROLA: Objection to the form,

[15]Judge. That is **[*102]** a question for the jury to

[16]consider, not his state of mind.

[17]THE COURT: I appreciate that, but I

[18]will let him answer.

[19]A No. It's right here in the report. This is

[20]the report.

[21]THE COURT: Doctor, you have answered

[22]the question. Thank you.

[23]You're welcome.

[24]Q Finally, Doctor, is it at all unusual for

[25]different doctors to refer patients to different MRI
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[2]facilities?

[3]A No.

[4]Q Did the same doctors refer Jennifer Davey to

[5]both --- did the same doctor who referred her for the

[6]January 1994 MRI also refer her for the 1995?

[7]A No.

[8]Q Different doctors?

[9]A Yes.

[10]Q, Is the fact that the second doctor chose a

[11]different MRI facility to send her to than the first

[12]doctor, does that impact on your findings or your

[13]conclusions at all?

[14]A No.

[15]MR. JORDAN: I have no more questions.

[16]MR. CAROLA: I have nothing further.

[17]THE COURT: Thank you, Doctor, for

[18]coming.

[19](Witness excused.)

[20]THE COURT: We will take a brief recess,

[21]and we will be back as soon as **[*103]** we can.

[22]Don't discuss the case. Don't form any

[23]opinions or conclusion until I give you the

[24]case for that purpose.

[25](Recess taken. After the recess.)

[2]THE CLERK: Case on trial.

[3]COURT OFFICER: Jury entering.

[4](Jury entered.)

[5]THE CLERK: Counsel stipulate to the

[6]presence and proper seating of the jury in

[7]the box?

[8]MR. JORDAN: So stipulated.

[9]MR. CAROLA: So stipulated.

[10]MR. JORDAN: Your Honor, may we

[11]approach?

[12]THE CLERK: Be seated.

[13]THE COURT: You want to approach?

[14]Come up.

[15](Sidebar out of the hearing of the jury

[16]and the court reporter.)

[17](In open court, out of the presence of

[18]the jury.)

[19]THE COURT: There is an indication of an

[20]issue concerning the testimony of the next

[21]witness, Dr. Payne.

[22]MR. JORDAN: First of all, just about an

[23]hour ago I received a report from defense

[24]counsel regarding Dr. Pfeffer and her review

[25]of the second MRI. which I think we would

[2]have stipulated is coming into evidence by

[3]Dr. Pfeffer.

[4]Without waiving any of my rights, I have **[*104]**
[5]to challenge this very lengthy report.

[6]Sometimes I don't understand her review of

[7]the MRI.

[8]I will at this point indicate as we

[9]discussed yesterday my oral -- or I will

[10]discuss orally my interpretation of what Dr.

[11]Payne is going to testify regarding the

[12]second MRI. He is going to testify that the

[13]second MRI is an inferior study. And he is

[14]also going to say that despite that fact,

[15]that it is an inferior study, he felt that

[16]the findings which were present on the first

[17]MRI were present on the second.

[18]MR. CAROLA: Fair enough. As long as

[19]there are no new injuries to the disks shown

[20]on the second MRI.

[21]THE COURT: What do you mean by new

[22]injuries? You mean the distinction between

[23]the first and the second MRI, that the second

[24]MRI doesn't show any injuries to any new

[25]disks, or anything like that?

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