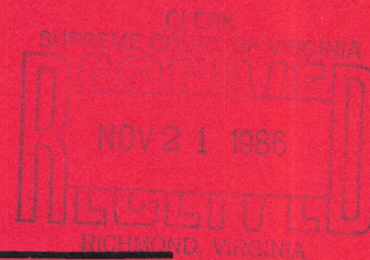


236Va 10



IN THE
Supreme Court of Virginia
AT RICHMOND

WILLIAMSON A. LEE
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RECORD NO. 860354

MAR 3 1989

ERIE INSURANCE EXCHANGE,

Appellant,

v.

JERALD JONES,

Appellee.

APPENDIX

Russell H. Roberts
ROBERTS & ASHBY
1014 Prince Edward Street
Post Office Box 7166
Fredericksburg, Virginia 22404
(703) 373-0113

Counsel for Appellant

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V I R G I N I A:

CIRCUIT COURT FOR THE COUNTY OF PRINCE WILLIAM

JERALD JONES,

Plaintiff,

v.

MARGARET MARY EVANS,

900 Palmer Drive
Lorton, Virginia 22079

Defendant.

ALSO SERVE:

NATIONWIDE MUTUAL INSURANCE
COMPANY

David R. Smythe,
Registered Agent
800 Graves Mill Road
Lynchburg, Virginia
24506

and

ERIE INSURANCE EXCHANGE

c/o Secretary of the
Commonwealth
9th Street Office
Building
Room 1114
Richmond, Virginia
23219

At Law No. 16278

RECEIVED
JUL 12 1983
PRINCE WILLIAM COUNTY
CLERK OF COURT
JUL 12 1983

JUL 12 1983
PM 2:00

4-886 77.60

MOTION FOR JUDGMENT

COMES NOW plaintiff, Jerald Jones, by counsel, and files this his Motion for Judgment against the defendant for the sum of THREE HUNDRED THOUSAND DOLLARS (\$300,000.00), plus costs, based upon the following:

1. On October 20, 1983, at approximately 3:45 p.m., plaintiff was operating his vehicle on Route 28 in Prince

William County and had brought his vehicle to a stop preparatory to making a lefthand turn.

2. At the same time and place the defendant negligently operated her 1978 four-door Lincoln sedan so as to cause a chain collision, resulting in a violent crash to the rear of plaintiff's vehicle.

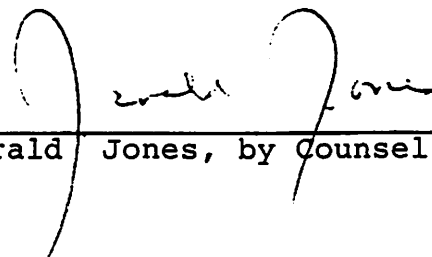
3. As a direct and proximate result of plaintiff's negligence in causing the collision as referred to in Paragraph Two above, plaintiff was caused to sustain serious and permanent injuries; has been prevented from transacting his normal business and occupation; has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability, deformity and potential loss of earning capacity; has sustained and will continue to sustain loss of earnings; has incurred and will incur in the future medical bills in an attempt to be cured of his injuries.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of THREE HUNDRED THOUSAND DOLLARS (\$300,000.00), plus cost of this proceeding.

J. Edward Flournoy, P.C.
9113 Church Street
Manassas, Virginia 22110

R. Craig Jennings, Esq.
SLENER, BRANDT, JENNINGS & JOHNSTON
3026 Javier Road
Fairfax, Virginia 22031

Counsel for Plaintiff


Jerald Jones, by Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

L-16278

JERALD JONES

Plaintiff

vs.

MARGARET MARY EVANS

Defendant

ANSWER OF ERIE INSURANCE EXCHANGE

The Erie Insurance Exchange for Answer to Motion for Judgment exhibited against it under the above style would respectfully answer and say:

1. That it denies that it is indebted to the Plaintiff in the amount sued for or any other amount of money.

2. That it denies that it provides uninsured motorist coverage to the Plaintiff under the facts and circumstances of this case.

3. That it denies the allegations contained in numbered paragraphs 1, 2, and 3 of the said Motion for Judgment.

4. That it would specifically allege that the Plaintiff himself was guilty of negligence contributing to cause the accident in question and accordingly, Erie Insurance Exchange will rely upon the defense of contributory negligence.

That no notice of the accident in question has ever been given to the Erie Insurance Exchange by Jerald Jones except service of the Motion for Judgment which was received nearly two years from the date of the accident. Accordingly, the Plaintiff, Jerald Jones, has not complied with the terms of his insurance policy with the Erie Insurance Exchange.

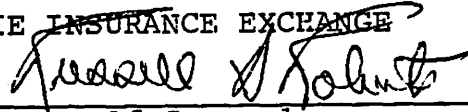
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CIRCUIT COURT OF PRINCE WILLIAM COUNTY
CLERK

WHEREFORE, the Erie Insurance Exchange respectfully prays that it be dismissed with its costs.

Respectfully,

ERIE INSURANCE EXCHANGE

By

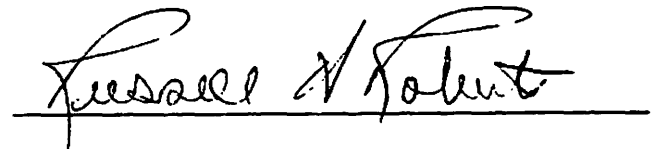


Of Counsel

Russell H. Roberts
ROBERTS & ASHBY
P. O. Box 7166
Fredericksburg, VA 22404

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed postage prepaid this 4th day of September, 1985, to J. Edward Flournoy, Attorney at Law, 9113 Church St., Manassas, VA 22110; R. Craig Jennings, Slenker, Brandt, Jennings & Johnston, 3026 Javier Rd., Fairfax, VA 22031; and to David R. Smyth, 800 Graves Mill Road, Lynchburg, VA 24506.



IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

JERALD JONES,

Plaintiff,

v.

MARGARET MARY EVANS,

Defendant.

At Law No. 16278

O R D E R

THIS MATTER came before the Court this day upon agreement of the parties to correct Paragraph 3 of plaintiff's Motion for Judgment filed herein by changing the last word appearing in the first line of that paragraph from "plaintiff's" to "defendant's"; and

IT APPEARING TO THE COURT that the Motion should be granted and that the correction should be considered made; it is therefore

SO ORDERED.

AND THIS MATTER IS CONTINUED.

ENTERED this 9th day of October, 1985.

SEEN AND AGREED:

H. L. Lundy - Lundy
J U D G E

MILLER, MILLER & KEARNEY.

By:

J. Miller
Lowry J. Miller, Counsel for Defendants ~~Evans~~ and Nationwide Mutual Insurance Company

SLENKER, BRANDT, JENNINGS & JOHNSTON

By:

R. Craig Jennings
R. Craig Jennings, Counsel for Plaintiff Jones

LAW OFFICES
SLENKER, BRANDT,
JENNINGS & JOHNSTON
3026 JAVIER ROAD
FAIRFAX, VIRGINIA 22031
(703) 849-8600

12/16/87

V I R G I N I A :

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

JERALD JONES :

Plaintiff,:

v. : AT LAW NO. 16278

MARGARET MARY EVANS, et al. :

Defendants:

REQUEST FOR ADMISSIONS

TO: Erie Insurance Company
c/o Russell H. Roberts
Roberts & Ashby
P.O. Box 7166
Fredericksburg, VA 22404

COMES NOW the Plaintiff, by counsel, and pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia calls upon the Defendant to answer separately and in writing, on or before twenty-one (21) days after service of the request, the below identified requests for admission. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. If any portion of an individual request for admission is denied, please identify what portion of the request is admitted, what portion of the request is denied and state the reasons for said denial.

In accordance with the foregoing and Rule 4:11, it is requested that you admit that:

1. Jerald Jones was involved in an automobile accident on 10/20/83 on Nokesville Road, south of Vint Hill Road wherein his vehicle was struck in the rear by Lela Lyon's vehicle who was struck in the rear by Deborah Tolson's vehicle who was struck in the rear by Margaret Evans.

2. The accident was proximately caused by the negligence of Margaret Evans.

3. Mr. Jones was lawfully stopped preparatory to making a left hand turn at the time that he was struck and that he was not contributorily negligent.

4. Margaret Evans was charged on the date of the accident with reckless driving, failure to keep her vehicle under control and bad brakes (See Attached Exhibit #1).

5. Margaret Evans pleaded guilty to reckless driving.

6. Margaret Evans pleaded guilty to improper driving.

7. Margaret Evans was convicted of improper driving.

8. Attached Exhibit #1 is authentic.

9. Attached Exhibit #1 is admissible.

10. As a proximate result of Margaret Evans' negligence in causing the accident on 10/20/83, Jerald Jones sustained a herniated lumbar disc.

11. Prior to 10/20/83 Jerald Jones had never experienced any back problems, diseases or injuries.

12. As a result of the herniated disc proximately caused by Margaret Evans' negligence, Jerald Jones was caused to undergo a decompression L4-S1 and arthrodesis L4-S2.

13. Mr. Jones underwent the procedure mentioned in #10 above at the National Orthopaedic & Rehabilitation Hospital from 11/13/84 to 11/30/84 in an attempt to be cured of the injuries proximately caused by the collision.

14. The total cost of the procedure from National Orthopaedic & Rehabilitation Hospital which was both reasonable and necessary was \$6,246.45.

15. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones was also treated at National Orthopaedic & Rehabilitation Hospital from 11/14/83 to 11/19/83.

16. The charge for the hospitalization referred to in #15 above, which was both reasonable and necessary, was \$1,308.69.

17. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones was admitted to National Orthopaedic & Rehabilitation Hospital from 11/28/83 to 12/10/83 with a diagnosis of herniation nucleus pulposus L5-S1.

18. The charge for the hospitalization referred to in #17 above, which was both reasonable and necessary, was \$4,121.83.

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19. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones received x-rays from the Northern Virginia Clinics on 11/13/84 and a myelogram on 11/14/84.

20. The cost for the radiologic procedures mentioned in #19 above, which was both reasonable and necessary, was \$98.00.

21. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones received x-rays from the Northern Virginia Clinics on 12/6/83 and a myelogram on 12/1/83.

22. The cost for the radiologic procedures mentioned in #21 above, which was both reasonable and necessary, was \$98.00.

23. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones received medical care and treatment from the Rehabilitation Medicine Center of Northern from 11/15/83 to 10/10/84.

24. The cost of the care and treatment mentioned in #23 which was both reasonable and necessary was \$580.00.

25. In an attempt to be cured of the injuries sustained as a proximate result of the collision and incident to the procedure mentioned in request #10, Mr. Jones received anesthesia from Anesthesia Group Service on 11/16/84.

26. The cost for the equipment and services from Anesthesia Group Service which was both reasonable and

necessary was \$616.00.

27. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones received orthotics and other medical care from National Orthopaedic & Rehabilitation Hospital on 11/10/83, 9/18/84, 10/18/84, 10/26/84 and 5/23/85.

28. That the charges for the treatment and orthotics referred to in #27, which were both reasonable and necessary, are as follows:

a)	11/10/83	\$214.00
b)	09/18/84	\$284.00
c)	10/18/84	\$ 62.00
	10/26/84	\$236.00
d)	05/23/84	\$ 36.00

29. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was treated by Dr. H.R. Noer.

30. The cost for treatment rendered by Dr. Noer, which was both reasonable and necessary, was \$4,047.00.

31. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was treated for pain in his lower back on 10/21/83 at the Prince William Hospital Emergency Room.

32. The cost of the medical treatment referred to in #31 above, which was both reasonable and necessary, was \$219.70.

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33. In an attempt to be cured of injuries sustained as a result of the collision, Mr. Jones was treated by Dr. Engh at the Anderson Clinic from 10/26/83 through 6/8/84.

34. The cost of the treatment referred to in #33 above, which was both reasonable and necessary, was \$434.00.

35. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was treated at Arlington Hospital on 11/30/84.

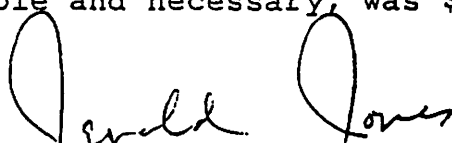
36. The cost of the treatment referred to in #35, which was both reasonable and necessary was \$295.00.

37. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones received x-rays on 11/30/83 from Virginia Radiological Associates.

38. The cost for the treatment in request #37, which was both reasonable and necessary, was \$103.00.

39. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was prescribed and did purchase medications.

40. The cost of the medications referred to in #39 above, which was both reasonable and necessary, was \$551.52.



JERALD JONES, By Counsel

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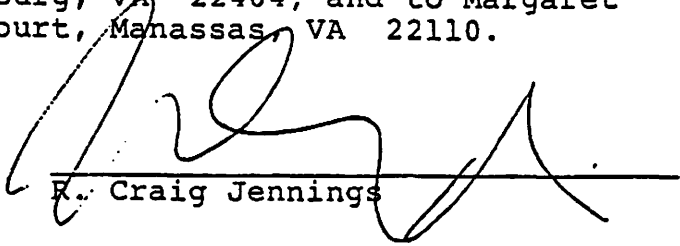
J. Edward Flournoy, P.C.
9113 Church Street
Manassas, VA 22110

R. Craig Jennings, Esquire
SLENKER, BRANDT, JENNINGS & JOHNSTON
3026 Javier Road
Fairfax, VA 22031

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, postage prepaid, this 16th day of December, 1985 to: Lowry J. Miller, Esquire, Esquire, 2701 N. Pershing Drive, Arlington, VA 22201; Russell H. Roberts, Esquire, P.O. Box 7166, Fredericksburg, VA 22404; and to Margaret Mary Evans, 7911 Meadow Court, Manassas, VA 22110.


R. Craig Jennings

LAW OFFICES
ENKER, BRANDT,
JENNINGS & JOHNSTON
2226 JAVIER ROAD
FAX, VIRGINIA 22031

(703) 849-8600

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

JERALD JONES

Plaintiff

vs.

MARGARET MARY EVANS, et al

Defendants

AT LAW NO. 16278

RESPONSE TO REQUEST FOR ADMISSIONS

The Defendant, Erie Insurance Company, for Answer to Request for Admissions, would answer and say:

1. That it denies numbered paragraphs 2, 3, 5, and 9 through 40 of the said Request for Admissions.

2. That it admits numbered paragraphs 1, 4, 6, 7, and 8 of the said Request for Admissions.

ERIE INSURANCE COMPANY

By

Of Counsel

ROBERTS & ASHBY
P. O. Box 7166
Fredericksburg, VA 22404

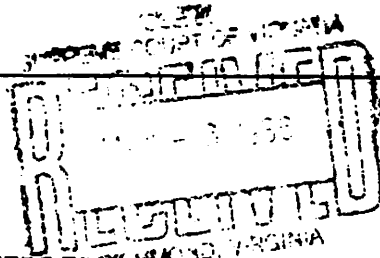
CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed postage prepaid this 19th day of December, 1985 to Lowry J. Miller, 2701 North Pershing Dr., Arlington, VA 22201; J. Edward Flournoy, 9113 Church St., Manassas, VA 22110; and R. Craig Jennings, 3026 Javier Rd., Fairfax, VA 22031.

860354

- ORIGINAL -

TVT/gf



1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

3 - - - - -X
4 JERALD JONES,

5 Plaintiff,

6 vs.

AT LAW NO. 16278

7 MARGARET MARY EVANS,

8 Defendant.
9 - - - - -X

10 Manassas, Virginia

11 Tuesday, January 21, 1986

12 The proceedings commenced at 10:00 o'clock a.m.

13 BEFORE:

14 THE HONORABLE H. SELWYN SMITH, *[Signature]* a jury.

15 APPEARANCES:

16 CRAIG R. JENNINGS, ESQ., and TARA MCCARTHY, ESQ.,
17 Slenker, Brandt, Jennings & Johnston, 3026
Javier Road, Fairfax, Virginia 22031, and
18 J. EDWARD FLOURNOY, ESQ., 9117 Church Street,
Manassas, Virginia 22110, counsel for the
19 Plaintiff;

20 RUSSELL H. ROBERTS, ESQ., Roberts & Ashby, 1014
Prince Edward Street, Fredericksburg, Virginia
22401, counsel for the Defendant.
21
22
23

I N D E X

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
Deborah Tolson	47	--	--
James Hermer	51	54	--
G. W. Bodmer	57	--	--
Elmer S. Jones, Jr.	62	69	71
J. Lee Buckley	72	77	--
Ruth Anderson	79	--	--
Colleen Jones	86	--	--
Victoria Lynn Emperton	97	--	--
Gerard Engh, M.D.	102	126	133
H. Rolf Noer, M.D.	137	156	---
Jerald Jones	165	189	---

EXHIBITS

<u>PLAINTIFF'S</u>	<u>FOR IDENT.</u>	<u>IN EVID.</u>
No. 1 (Copy of traffic summons)	61	61
No. 2 (Ledger of time off)	83	83
No. 3 (Ledger of overtime for Mr. Estes)	85	85
No. 4 (Curriculum Vitae of Dr. Engh)	124	124

I N D E X (cont.)EXHIBITS (cont.)

<u>PLAINTIFF'S</u> (cont.)	<u>FOR IDENT.</u>	<u>IN EVID.</u>
No. 5 (Dr. Engh's bill)	125	125
No. 6 (Curriculum Vitae of Dr. Noer)	138	138
No. 7 (Medical bills)	191	191

1 MR. JENNINGS: Why don't I play the doctor, and
2 Miss McCarthy can play me. He can play Lowry Miller.

3 MR. ROBERTS: I've done that before, too.

4 (Whereupon, the jury returned to the jury box.)

5 THE COURT: Mr. Jennings, if you will take the
6 witness stand then.

7 Ladies and gentlemen of the jury, this is a de
8 bene esse deposition. I made a comment about it earlier.
9 Mr. Jennings is going to take the part of Dr. Engh. Miss
10 McCarthy is going to take the part of Mr. Jennings, who was
11 asking the questions on that occasion.

12 The witness had been duly sworn and he would have
13 testified in answer to the questions that were propounded to
14 him as will be read back to you at this time.

15 Whereupon,

16 GERARD ENGH, M.D.,
17 was called as a witness by and on behalf of the Plaintiff,
18 by de bene esse deposition, and was examined and testified
19 as follows:

20 DIRECT EXAMINATION

21 BY MISS MCCARTHY:

22 Q Doctor, would you tell the ladies and gentlemen
23 of the jury your name, please, and your profession.

1 A My name is Gerard Anderson Engh. I'm an orthopedic
2 surgeon.

3 Q Dr. Engh, where do you practice?

4 A At 2465 Army Navy Drive, Arlington, Virginia.

5 Q Where did you attend medical school, sir?

6 A At the University of Virginia.

7 Q What year did you graduate?

8 A 1966.

9 Q Following graduation, could you briefly tell us
10 the extent of your further medical training?

11 A Yes. I spent five years in internship and residency
12 in orthopedic surgery at Yale New Haven Hospital, in New
13 Haven, Connecticut.

14 Q Did you say the residency training was in orthopedic
15 surgery?

16 A At Yale New Haven Medical Center, New Haven,
17 Connecticut.

18 Q Following your residency, Dr. Engh, where did you
19 go or what did you do after that?

20 A I spent two years as a Major in the Medical Corps
21 at Fort Belvoir, and I began my private practice of ortho-
22 pedics in 1973 at Anderson Clinic in Arlington, Virginia.

23 Q Have you been engaged in orthopedic surgery since

1 1973 in Arlington up to the present time?

2 A Yes, sir.

3 MISS McCARTHY: Does anyone have any questions on
4 Dr. Engh's qualifications?

5 MR. ROBERTS: No questions.

6 BY MISS McCARTHY:

7 Q Your secretary, I understand it, is bringing up
8 your C.V., so I will have you identify that when she comes.

9 A Yes, sir.

10 Q Dr. Engh, do you know Jerald Jones?

11 A Yes, I do.

12 Q Do you know him as a patient?

13 A Yes, sir. I've seen Mr. Jones on a number of
14 occasions as a patient.

15 Q Can you tell me when the first time that you saw
16 him as a patient would have been, Doctor?

17 A I saw him for the first time as a patient on
18 October 26, 1983.

19 Q Have you known Mr. Jones prior to October of '83 in
20 a category not as a patient?

21 A Yes, sir. I have a farm in Prince William County,
22 and Mr. Jones' brother is my farm manager. And I have known
23 Mr. Jerald Jones probably for fifteen years.

1 Q When you said you saw him on October 26th, 1983,
2 where would that have been?

3 A That was here at Anderson Clinic.

4 Q For what purpose did you see him? Why was he
5 here?

6 A Well, Mr. Jones was seen here because of problems
7 of pain in his back, hip, and leg. I had actually seen him
8 at my farm a few days before, when he came to me relating
9 that he was having problems of pain following an automobile
10 accident. And I asked him to make an appointment at my
11 office so I could evaluate him.

12 Q Did you take a history from him when you saw him
13 here at Anderson Clinic on October 26 of 1983?

14 A Yes, sir, I did.

15 Q What history did he give you, Dr. Engh?

16 A He related he was working a job for Northern
17 Virginia Electric Company and he was in a company truck and
18 was struck from behind. I believe he related that he was the
19 fourth vehicle in a collision at that time.

20 Q Did he tell you what date that had occurred on?

21 A The date of that injury he said was October 20,
22 1983.

23 Q Did he give you any further history about any

1 problems that had happened after that accident?

2 A Yes, sir. He related that one hour after that
3 accident he began experiencing pain in his back, hip, and
4 right leg. The following day he went to the Prince William
5 Emergency Room, where x-rays and medication was instituted.
6 And he was referred to an orthopedic surgeon at that time.

7 Q Did you ask him whether he had any physical
8 complaints at the time that you saw him?

9 A Yes, sir. On my initial visit in questioning him
10 about his complaints, he related that he had continued to have
11 pain off and on since the accident. He related that he had
12 particular problems sitting on his right side, with pain in
13 the buttocks area. He related that he found sitting to be
14 the most uncomfortable position for him. And the most
15 comfortable was a beach chair or reclining type of position.
16 He related difficulty sleeping at night, requiring him to get
17 up, and as he described it, lean against a bean bag type
18 of chair to relieve his pain. He stated the medication was
19 definitely benefitting him, but as soon as he would stop
20 taking any medication, that there would be increasingly
21 severe pain in the buttocks and the leg.

22 Q Did you inquire, Dr. Engh, concerning any prior
23 history of problems with respect to Mr. Jones?

1 A I'm sorry. Any prior history of problems?

2 Q I believe that's what I asked, sir, yes.

3 A Yes. I asked him if he had any previous problems
4 with his back. He related that he had not. And I have known
5 Mr. Jones for many, many years, and have been unaware of any
6 back problems with this individual.

7 Q Knowing him for many, many years, can you tell us
8 the state of his health as far as you could determine as a
9 doctor?

10 A Well, Mr. Jones was a very strong individual. I
11 think you -- what you might call a bull. And I think he
12 featured himself as such. He was always an individual that
13 was challenged by a heavy bag of feed or a heavy job at
14 work. He would help us off and on on occasion at our farm
15 with heavy type of work. A lot of heavy lifting, a lot of
16 work with livestock. In fact, he was physically very, very
17 strong in everything he undertook.

18 Q Did you conduct a physical examination of Mr. Jones
19 on that visit of October 26th here at the clinic?

20 A Yes, I did.

21 Q Would you tell the ladies and gentlemen of the
22 jury what that examination disclosed?

23 A Well, the most notable aspect of the exam was a

1 great deal of muscle spasm in this gentleman's back. He
2 stood with a rigid posture, could not bend symmetrically, had
3 tenderness in the lower lumbar area, and a strongly positive
4 straight leg raising test on the right side with the pain
5 radiating into the thigh and calf area. There was no reflex
6 deficit to his exam at that time. His strength was satis-
7 factory in the lower extremities, and his sensory examination
8 was unremarkable.

9 Q What, Doctor, if any significance, attaches to
10 those things that you did find, such as the spasm and the
11 tenderness and the leg raising and so forth?

12 A Well, I think they supported the fact that this
13 gentleman was, indeed, in considerable pain at that time.
14 They did not tell us for sure if there was pressure on the
15 sciatic nerve, but certainly the positive straight leg rais-
16 ing test and positive flip side with pain radiating into the
17 right leg was strongly suggestive that there was at least
18 irritation of the sciatic nerve, if not pressure on it at
19 that time.

20 Q Do you have an impression or a diagnosis based
21 upon reasonable medical certainty as to what his condition
22 was as of the day of that evaluation?

23 A It was my impression either that he had a disk

1 herniation from this accident, or possibly bruising of the
2 sciatic nerve in the buttocks area.

3 Q Dr. Engh, did you make any recommendation or did
4 you have any recommendations to be made concerning the care
5 and treatment of Mr. Jones following that visit?

6 A Yes. It was my recommendation that he remain in
7 strict bed rest at home, with medications, primarily anti-
8 inflammatory medication and be re-evaluated in ten days.

9 Q Did you prescribe medication for him, sir?

10 A Yes, sir.

11 Q Do you remember what it was?

12 A Yes. It was an anti-inflammatory medicine,
13 Clinoril, and a pain medication, a Tylenol Number 3.

14 Q When would you have next seen Mr. Jones, Dr. Engh?

15 A He was next seen in the office November 3, 1983.

16 Q What symptoms or complaints did he present with on
17 that occasion?

18 A The symptoms were essentially unchanged. Pain in
19 the buttocks area primarily, pain aggravated by sitting.

20 Q Did you examine Mr. Jones on that occasion?

21 A Yes, sir, I did.

22 Q What did that examination reveal?

23 A It was essentially unchanged. Continued positive

1 straight leg raising test and muscle spasm in the lumbar
2 area.

3 Q Did you prescribe any type of treatment for Mr.
4 Jones on that occasion?

5 A Yes, sir. I injected an area of focal tenderness
6 in the gluteal region with anti-inflammatory medication, a
7 steroid preparation, and advised him to continue to rest at
8 home.

9 Q When you say you injected the gluteal area, would
10 you tell the ladies and gentlemen of the jury what area of
11 the body that is?

12 A This is the buttocks area. The area of tenderness
13 that -- The patient had a focal area that was extremely
14 sensitive to any pressure. And what I was trying to accom-
15 plish here was reduce any focal inflammation in/and around
16 the sciatic nerve in that area.

17 Q Did you consider that injection as being necessary
18 for the proper care of that patient?

19 A Yes, sir.

20 Q Did you make any other recommendation concerning
21 the care and treatment of Mr. Jones at that point?

22 A Yes. I suggested that if his pain did not improve,
23 that I would like to get a second opinion by Dr. Mondall.

1 Q Did you arrange for any evaluation or examination
2 by Mr. Mondall at that time?

3 A Yes. We -- Through my office, we scheduled Mr.
4 Jones to see Dr. Mondall. And he did see him and electrical
5 testing was performed on November 10 of 1983.

6 Q When you say electrical testing was performed, can
7 you tell the ladies and gentlemen of the jury what that was?

8 A Yes. It was a test to evaluate the function of the
9 components of the sciatic nerve to the lower extremities and
10 the muscles of the lower extremities to determine if there
11 was irritability of the nerves going to the lower legs.

12 Q Were the results of that test furnished to you, Dr.
13 Engh?

14 A Yes.

15 Q Is that in writing?

16 A Yes, it is.

17 Q What did that test denote?

18 A They indicated minimal evidence of membrane irrita-
19 bility in the right lumbar perispinal muscles supplied by the
20 L-4 and L-5 nerve roots. And the interpretation of these
21 studies was suggestive of a mild irritation of the right L-4,
22 5 posterior primary ~~fami~~-innervated musculature.

23 Q Who conducted that electrical test that you just

1 mentioned?

2 A Dr. Mondall.

3 Q As a result of that testing done by Dr. Mondall,
4 did you make any further recommendations or take any action
5 with respect to the care and treatment of Mr. Jones?

6 A Not specifically at that time. In other words,
7 when the electrical testing was done, I did not see the
8 patient on that occasion. But I did have continued communi-
9 cation with the patient, not seeing him again in the office,
10 but by telephone.

11 Q Did there come a time when Mr. Jones entered the
12 hospital?

13 A Yes, sir. He was hospitalized four days after that
14 electrical study was performed under my care.

15 Q Who recommended that he go in the hospital?

16 A I did.

17 And again, that was after receiving the results of
18 Dr. Mondall's tests, and because of the patient's continued
19 complaints of pain at home at bed rest.

20 Q What hospital was he put in, Dr. Engh?

21 A We admitted him to the National Hospital for
22 Orthopedics.

23 Q Did you consider that admission necessary for the

1 proper care and treatment of Mr. Jones?

2 A Yes, sir.

3 Q What treatment did Mr. Jones receive while he was
4 in the hospital, sir?

5 A We placed him at bed rest. We tried some pelvic
6 traction on him. We again tried local steroid injections
7 in the tender point areas. He did improve during this
8 hospitalization to the point where we thought we could
9 continue him on outpatient care. And we again, after five
10 days, in the hospital, referred him back to him home to
11 continue bed rest to try and alleviate the inflammation.

12 Q Do you have an opinion during this period of time
13 as to whether he was able to work at his normal job?

14 A No, sir. He definitely was not able to.

15 Q Now, following his discharge from the hospital, I
16 think you said five days after entry, was he thereafter
17 cared for and followed by you?

18 A At the time of this discharge, and he was seen by
19 Dr. Mondall during the hospitalization, he was sent home.
20 And I instructed Mr. Jones that if he regressed or was not
21 improving, that he should go -- get back and see Dr. Mondall
22 again. Actually it was Dr. Mondall that had injected the
23 steroids during the hospitalization of November 14th.

1 When I sent Mr. Jones home on the 19th, I told him
2 if he was not doing better, to get back with Dr. Mondall for
3 our next step in his care.

4 Q When did you next see Mr. Jones?

5 A He was hospitalized a second time on November 28th.
6 He was hospitalized on Dr. Mondall's service at that time at
7 my request. I continued to see him during that hospitaliza-
8 tion, although I was not his primary treating physician for
9 the second hospitalization. Dr. Mondall was.

10 Q Were there any tests done while Mr. Jones was
11 hospitalized the second time?

12 A Yes, sir. He had repeat electrical studies. And
13 these demonstrated definite abnormal electrical findings.
14 Primarily nerve root S-1, with posterior primary rami irrita-
15 tion.

16 Q Let me stop you right there. Where is S-1 in the
17 anatomy? Could you orally describe it to the jury?

18 A That's the nerve root that comes out at the junction
19 between the lumbar spinal segments and the sacral spine. It
20 is the most common area of nerve root irritation by herniated
21 disk.

22 Q Where there any other tests done while he was in the
23 hospital during that period of time?

1 A Yes, sir. The patient had a CT scan. A CAT scan
2 of the lumbar spine. And this study, again, there was a
3 question of abnormality involving the right lateral nerve
4 root canal at the L-1 -- I think S-1 disk space level. The
5 same area that had appeared abnormal on his electrical
6 testing.

7 Q Any other testing done?

8 A Yes. On December 1st, he had a lumbar myelogram.
9 And this showed an essentially midline epidural defect
10 impinging upon the anterior aspect of the dye column at the
11 L-5, S-1 level. Again, a test that was compatible with our
12 other two tests indicating that there was, indeed, pressure
13 to the right S-1 nerve root.

14 Q Can you tell the ladies and gentlemen of the jury
15 your opinion, based upon a reasonable medical certainty, as
16 to what, if anything, was wrong with Mr. Jones at this time?

17 A Yes. I think the tests were all quite positive and
18 all in agreement that this gentleman did have a herniated
19 disk at this time.

20 Q What was your recommendation for treatment during
21 this period of second hospitalization?

22 A Well, Dr. Mondall and I conversed on modes of
23 treatment. It was my feeling, because of knowing Mr. Jones

1 and his strong physical nature, that I wanted to try and
2 avoid surgery if at all possible in this individual. We
3 therefore elected to go with a conservative treatment program
4 of epidural blocks, which is injecting Zylocaine and steroids
5 into the space around the nerve roots. He had two epidural
6 blocks during this hospitalization. And, again, it was my
7 fervent desire to try and keep this gentleman away from
8 cervical intervention if at all possible.

9 Q Did the injections seem to help Mr. Jones?

10 A He seemed to be much improved following the epidural
11 blocks. His pain was markedly relieved. We thought we could
12 therefore continue with the conservative treatment mode.

13 Q Dr. Engh, when was Mr. Jones released from the
14 hospital then during his second stay?

15 A On December 10, 1983.

16 Q And released to follow this conservative care
17 regimen you've spoken of?

18 A Yes, sir.

19 Q Was that second hospitalization in your opinion
20 necessary for the proper care and treatment of Mr. Jones?

21 A Definitely.

22 Q What transpired then in terms of any follow-up care
23 and treatment by you, Doctor?

1 A Well, Mr. Jones was sent home on a very restrictive
2 activity program, very light exercise for his back and his
3 muscles, and a continued program of rest at home.

4 Q When did you next see him after his discharge from
5 the hospital?

6 A On January 9 of 1984.

7 Q What was his condition at that time?

8 A He related he had continued to improve since his
9 hospitalization. He stated he had much more tolerance to
10 being up during the day, that he still had some, but only
11 minimal pain in the buttocks area. At the time, the muscle
12 spasms pretty much subsided in his back, and he had regained
13 satisfactory flexibility. His straight leg raising test was
14 negative at that time.

15 Q Did you make any recommendations?

16 A I thought that if a very light duty type of work
17 was available for him with Northern Virginia Electric
18 Company, that he could return to light duty at that time.

19 Q Were there any restrictions that you placed upon
20 his return to duty at that time?

21 A Yes. I advised him against lifting anymore than
22 forty pounds maximum and avoiding any excessive overtime work.
23 And basically, I wanted him to perform a more supervisory type

1 of job at that time.

2 Q When did you next see Mr. Jones?

3 A Approximately a month later on February 7, 1984.

4 Q How was he getting on?

5 A Again, he seemed to be doing fairly well. He
6 still had occasions of pain in the leg and occasions of
7 muscle spasms when he would overdo. But as long as he
8 maintained the restrictions I had imposed, he seemed to be
9 reasonably comfortable.

10 Q Did you make anymore recommendations concerning
11 whether these restrictions should be lifted or continued?

12 A We continued them. And actually reduced his
13 lifting requirement to thirty pounds on that visit. And,
14 again, for an additional period of six weeks, suggested or
15 recommended no overtime work.

16 Q When did you next see him in the office, Dr. Engh?

17 A Approximately two months later, on April 9, 1984.

18 Q How was Mr. Jones doing at that time?

19 A At that point he related that he was basically free
20 of pain except for occasion mild pain in the hip or buttocks
21 area. His examination at that point was also quite normal.

22 Q Did you make any recommendations to him at that
23 time about working at his job?

1 A Yes. I suggested that he go ahead and try his
2 regular work, but not do any overtime work.

3 Q Were you satisfied with his progress to date at
4 that point in time?

5 A Yes. I felt we were doing quite well with the
6 gentleman with the conservative treatment program.

7 Q When did you next see him in your office?

8 A Approximately two months later, on June 8, '84.

9 Q Your records reflect June 7, what you noted
10 reflects June 7. Is that an accurate date?

11 A No, it was actually June 8. It's a typographical
12 error in the records. My handwritten charts indicate him
13 as being here June 8.

14 Q During that spring of 1984, had you seen Mr. Jones
15 other than in the office here?

16 A I had only talked to him on the phone. I am
17 routinely in Prince William County on Tuesday afternoons,
18 and Mr. Jones lives about a mile from the farm I have in the
19 area. And he would, on Tuesday, communicate with me when he
20 could.

21 Q By telephone?

22 A Yes, telephone mostly.

23 Q Do you know how he was getting on after you had

1 seen him in April and he returned to regular duties?

2 A I don't remember. The gist of this conversation
3 is between April and June.

4 Q What was his condition when you saw him in June?

5 A In June he came back because he was having pain
6 again in the back. Again in the back and into the buttocks
7 area primarily. He was relating more back pain at that time
8 and was having leg pain at that point.

9 Q Did you make any recommendations concerning your
10 care and treatment?

11 A Yes, I did. He had a lot of tenderness at the
12 sacral lumbar area at that point, but he responded well
13 previously to some steroidal medication, and we again injected
14 the S-1 joint on this occasion with steroids.

15 Q Did you follow him at all during the summer months
16 of 1984?

17 A Off and on during the summer through personal
18 communications I did follow Mr. Jones. He continued to have
19 intermittent problems through the summer of pain primarily
20 in the buttocks area.

21 Q Did you make any recommendations in the summer
22 months as to what Mr. Jones should do about that?

23 A Well, again, I had continued to strongly stress

1 that we needed to give things as much time as we possibly
2 could to let the inflammation subside to avoid stress on the
3 disk, and I suggested that if he regressed, that he would
4 have to have Dr. Mondall see him to further evaluate him.

5 Q Did you make any recommendations concerning Dr.
6 Mondall seeing him again in the summer of '84?

7 A Again, through personal communication when again
8 he related to me he wasn't doing well, I did recommend that
9 he get back to see Dr. Mondall. There apparently was a
10 period of time when Dr. Mondall was gone and the patient had
11 difficulty obtaining appointments with Dr. Mondall. Gener-
12 ally because of Dr. Mondall's unavailability. He saw one of
13 his associates, Dr. Cherick, on September 18, 1984.

14 Q Would that have been at your request, Dr. Engh?

15 A Yes, sir.

16 Q Do you know what Dr. Cherick did?

17 A Dr. Cherick reviewed the electrical studies that
18 Mr. Jones previously had before by Dr. Mondall.

19 Q Was there any follow-up thereafter in the care and
20 treatment of Mr. Jones either by you or at your direction?

21 A Yes. Again, a report was sent to me from Dr.
22 Cherick that the patient continued to communicate he
23 continued to have pain, and I recommended that he see Dr.

1 Mondall on his return.

2 Q To your knowledge, did he see Dr. Mondall upon
3 Dr. Mondall's return?

4 A Yes, sir. That would have been October 10, 1984.

5 Q At that point in time, and following that visit by
6 the patient to Dr. Mondall, do you have an opinion, based
7 upon a reasonable medical certainty, as to what Mr. Jones'
8 problem was, physical problem that is?

9 A Yes. My impression was that everytime Mr. Jones
10 would try and increase activity at all, he would irritate
11 the nerve root and the herniated disk and recreate pain in
12 the buttocks area.

13 Q Do you have an opinion, Dr. Engh, based upon
14 reasonable medical certainty, as to what the cause or what
15 the origin of this herniated disk was?

16 A I have no reason to believe it was anything other
17 than the accident that Mr. Jones related to me originally.

18 Q Did you make any kind of recommendation in October
19 of '84 about further care and treatment of Mr. Jones?

20 A Yes. Dr. Mondall and I communicated at length
21 about this case. Dr. Mondall felt that we needed to consider
22 surgery, and I was in full concurrence with this. I
23 recommended to Dr. Mondall, since I had stopped or

1 discontinued back surgery in my own practice, that we have
2 Dr. Rolf Noer see him in consultation to consider the
3 possible intervention.

4 Q Did you then refer Mr. Jones to see Dr. Noer?

5 A Dr. Mondall and I did concurrently.

6 Q Have you seen Mr. Jones since that time?

7 A Yes. I saw him, Mr. Jones, approximately three
8 weeks ago.

9 Q How was he getting on? I mean, did you see him
10 professionally?

11 A I did not see him professionally. I saw him in
12 Prince William County and talked with him.

13 Q How was he doing?

14 A He seemed to be quite happy and seemed to be doing
15 very well.

16 Q Your secretary now has handed you the C.V. I'll
17 ask if you can identify it?

18 A Yes. That's a correct copy of my Curriculum Vitae.

19 MISS McCARTHY: It's marked for identification as
20 Plaintiff's Exhibit 1 in the deposition, Your Honor, but I'd
21 move that as Plaintiff's Exhibit Number 4.

22 THE COURT: All right.

23 MISS McCARTHY: There was no objection.

1 MR. ROBERTS: None.

2 MISS McCARTHY: We should make it 4 instead of 1,
3 I guess.

4 THE COURT: Four.

5 (Whereupon, a Curriculum
6 Vitae of Dr. Engh was marked
7 for identification as Plain-
8 tiff's Exhibit Number 4 and
9 received in evidence.)

10 BY MISS McCARTHY:

11 Q Did you charge Mr. Jones for services rendered by
12 you?

13 A Yes, I did.

14 Q Let me show you this document and ask you if you
15 can identify that document?

16 (Document handed to the witness.)

17 A Yes, this is a copy of the charges that I -- for
18 Mr. Jones of management by me of his back condition.

19 Q Dr. Engh, are those charges fair and reasonable for
20 the services rendered?

21 A Yes, they are.

22 Q Do you have an opinion, based upon reasonable
23 medical certainty, as to what necessitated those charges

1 being incurred?

2 A My opinion is that the necessity for these charges
3 was a herniated disk caused by an automobile accident
4 reported by Mr. Jones, an accident dated October 20, 1983.

5 Q The myelogram and the electrical study and at
6 least the two hospitalizations in the latter part of 1983,
7 do you have an opinion with reference to those as to whether
8 they were necessary for the proper care and treatment of Mr.
9 Jones?

10 A Definitely I think they all were. And I think the
11 whole scenario of his management was correct and appropriate
12 for this type of situation.

13 MISS McCARTHY: I would move the bill as Plaintiff's
14 Exhibit Number 5.

15 MR. ROBERTS: No objection, sir.

16 (Whereupon, Dr. Engh's bill
17 was marked for identification
18 as Plaintiff's Exhibit Number
19 5 and received in evidence.)

20 BY MISS McCARTHY:

21 Q Dr. Engh, do you have an opinion as to whether it
22 was reasonable and also necessary for Mr. Jones to stay out
23 of work from the time of the automobile accident in October

1 until you released him to return to work sometime in mid-
2 January of 1984?

3 A Yes. It was my recommendation, and this was in
4 full support of Dr. Mondall in consultation.

5 MISS MCCARTHY: Cross examination

6 THE COURT: Now, ladies and gentlemen of the jury,
7 Mr. Roberts is going to take the part of one Lowry Miller,
8 who is an attorney who was actually present at the time and
9 was the other examining -- I should say questioning lawyer.

10 CROSS EXAMINATION

11 BY MR. ROBERTS:

12 Q Doctor, in regard to determining whether one has a
13 herniated disk or not, is it not a fact that orthopedic
14 surgeons use many tests, including the EMGs and the CAT scans
15 and the myelograms in trying to determine whether or not a
16 herniated disk exists?

17 A Yes, sir.

18 Q Is it not a fact that none of those tests that I
19 mentioned are absolutely positive as to whether or not there
20 is a herniated disk? They are just guides for you and to
21 help things for you; is that correct?

22 A That's correct.

23 Q Is it not normal in the everyday practice of

1 medicine that one could have an EMG which was -- Excuse me.
2 Is it not normal in the everyday practice of medicine that
3 one could have an EMG which would indicate a herniated disk,
4 but in fact later on it was found out that there was no
5 herniated disk? Isn't that something that could occur?

6 A That could occur.

7 Q In this particular case, is it not a fact that to
8 actually make a positive diagnosis as to whether or not Mr.
9 Jones had a herniated disk, you would actually have to open
10 him up and look at the disk to actually determine that; isn't
11 that correct?

12 A To be a hundred percent sure, yes, that's true.

13 Q Now, in your review of Mr. Jones, the testing that
14 was done, did you realize that these indicated what is called
15 Bertilites(phonetic) Syndrome was present in Mr. Jones?

16 A You're referring to the results of one of the
17 electrical tests; is that correct?

18 Q Any of the tests that were done, x-rays, CAT scans,
19 myelograms?

20 A Could you repeat the question, please?

21 Q All right. As a result of your review of the
22 testing that was done on Mr. Jones, during the time that you
23 were treating him, were you aware of the fact that Mr. Jones

1 had what is a called a Bertilites Syndrome?

2 A No, sir, I wasn't aware of his having a Bertilites
3 Syndrome.

4 Q Could you tell me what a Bertilites Syndrome is?

5 A No, sir, I couldn't.

6 Q Do you know Dr. Noer, who will be testifying in
7 this case, referred to the Bertilites Syndrome as an
8 asymmetric incomplete sacralication. Does that help you any?

9 A Sure does.

10 Q Were you aware of this fact in existence in this
11 particular patient during the time that you were treating
12 him?

13 A Yes, sir. I'm just not familiar with that being
14 referred to as Bertilites Syndrome.

15 Q Is it not a fact that the testing that was done on
16 Mr. Jones also indicated that he had spinal stenosis ~~exis-~~
17 ting during the time that you treated him?

18 A Am I aware that he had spinal stenosis?

19 Q Were you aware at the time that you were treating
20 him, as a result of the tests and your examination?

21 A I was aware that there was a suggestion of such.

22 Q What is spinal stenosis?

23 A Spinal stenosis is a condition where the space for

1 the nerve root is inadequate for the nerve root. In other
2 words, a decreased diameter of the spinal canal where the
3 nerve roots pass.

4 Q Is it not a fact that this type of condition is
5 caused either for congenital reasons or through an aging
6 process where, through the normal aging process, the canal
7 area gets smaller; is that correct?

8 A Those are both possible causes, but there are
9 innumerable causes of spinal stenosis.

10 Q In regard to the possible suggestion, you did not
11 count that as sufficient suggestion to believe that that was
12 causing his problem; is that what I gather from that?

13 A I did not feel his condition was caused by spinal
14 stenosis. The one test that suggested such was the lumbar
15 CT scan. There, however, was not evidence either from elec-
16 trical studies or from the lumbar myelogram of spinal stenosis.

17 Q In regard to the electrical diagnostic report of
18 November 10, 1983 done by Dr. Mondall, he indicates that his
19 testing indicates a mild irritation of the right L-4, L-5
20 posterior primary rami and innervated musculature. Could
21 that also be caused by what is referred to by Dr. Noer as a
22 Bertilites Syndrome, or the stenosis problem?

23 A I'm not an expert in electrical diagnostic testing.

1 To the best of my knowledge, it cannot be caused by
2 Bertilites Syndrome. And most ~~physiatrists~~ or neurologists that
3 would perform electrical therapy should be able to differ-
4 entiate changes of spinal stenosis from distinct nerve root
5 pressure.

6 Q It is not a fact that in reviewing x-rays, just
7 simple x-rays of Mr. Jones' back that were taken by the
8 various physicians, that there is nothing abnormal that you
9 did observe on the x-rays other than the normal aging process;
10 is that correct?

11 A This gentleman had original x-rays of the lumbar
12 spine before -- the date I have on my report is November 30,
13 1983, a report. I did not have those films with me.

14 On AT and lateral, the lumbar spine with no
15 destructive lesions or other abnormalities can be seen. I
16 did not obtain films, plain x-rays films, because the patient
17 related he had had x-rays at Prince William Hospital. And
18 generally, x-rays for herniated disks at the most might indi-
19 cate some muscle spasm, but that's about all they would tend
20 to indicate.

21 Q I would refer you to the lumbar myelogram of
22 December 1, 1983, and I'll give you a chance to find that.

23 A Okay.

1 Q It seems to indicate that the impressions, in the
2 middle of that report, the impressions that there is a
3 partially lumbarized first sacral vertebra associated with a
4 congenitally narrowed S-1, S-2 and intravertebral disk space,
5 is that the Bertilites situation?

6 A The first part of that is the partially lumbarized
7 first sacral vertebra is what Dr. Noer refers to as
8 Bertilites Syndrome.

9 Q And congenitally means that that has been long time
10 present; is that correct?

11 A Something that basically the individual was born
12 with, that's correct.

13 Q The S-1, S-2 area, that would be just above where
14 the lumbar area is; is that correct?

15 A No, it would be just below.

16 Q Just below I mean, excuse me.

17 A That's correct.

18 Q Now, in September of 1984, the electrical diagnos-
19 tic tests were done again by Dr. Cherick; is that correct?

20 A That's correct.

21 Q It's my understanding that Dr. Cherick compared
22 his electric diagnostic findings and studies with Dr.
23 Mondall's studies of December 5th, 1983; is that correct?

1 A That's correct.

2 Q And that he refers to what was found by Dr. Mondall
3 and states that at this time he cannot even find this degree
4 of abnormality; is that correct?

5 A That's correct.

6 Q So, basically, his testing was practically normal;
7 is that correct? That is Dr. Cherick's testing?

8 A By Dr. Cherick's interpretation.

9 Q Now, you stated, if I recall correctly, that it was
10 your feeling that as a result of this accident, you felt
11 that with a reasonable degree of medical certainty, that
12 there was a herniated disk created, and that that is what
13 eventually you referred him to Dr. Noer for further study and
14 possible surgery; is that correct?

15 A That's correct.

16 Q If it was determined that he did not have a
17 herniated disk, then what injury, if any, was caused by this
18 accident?

19 A Again, what injury, if any, was caused? I could
20 only speculate.

21 Q Well, don't speculate. If you could give us an
22 answer within a reasonable degree of medical certainty, if
23 you know. If you don't fine.

1 A If he did not have a ruptured disk from the acci-
2 dent, the patient could have had a lumbar back injury from
3 the accident. If he did not have a herniated disk, I could
4 not account for his lower extremity findings which were the
5 source of most of his pain.

6 Q It's my understanding that by January of 1984, he
7 had negative straight leg raising tests; is that correct?

8 A That's correct.

9 Q What does the straight leg raising test test?

10 A It basically tests irritability of the sciatic
11 nerve.

12 MR. ROBERTS: I have no further questions.

13 REDIRECT EXAMINATION

14 BY MISS MCCARTHY:

15 Q In your opinion, Dr. Engh, this Bertilites
16 Syndrome that Mr. Roberts talked about and the spinal
17 stenosis, do those in any way change your opinion as to what
18 the cause of Mr. Jones' lower back difficulties was?

19 A No, sir.

20 Q Would a disk problem show up on x-rays?

21 A Not on plain x-rays.

22 Q On the other three types of testing you did, the
23 EMG, the myelogram, and the CAT scan, did evidence of a disk

1 problem show up?

2 A Yes, sir, they did.

3 Q Is that why you recommended or ultimately concurred
4 in Dr. Mondall's recommendation of surgery?

5 A Yes, sir.

6 MISS MCCARTHY: That's all I have.

7 THE COURT All right. Thank you very much.

8 Your next witness will be?

9 MR. JENNINGS: Dr. Noer.

10 THE COURT: He's due here at 2:00?

11 MR. JENNINGS: Two.

12 THE COURT: Ladies and gentlemen, we're going to
13 recess until 2:00 o'clock. You'll be on your own, obviously,
14 for lunch. Return when you're through, back to the Jury
15 Room. Remain therein, do not discuss the case among yourselves
16 or let anyone discuss it with you. See you back here at
17 2:00. Thank you.

18 (Whereupon, the jury was temporarily excused.)

19 THE COURT: Do you gentlemen have suggested
20 instructions that I might be looking at over the lunch hour?

21 MR. JENNINGS: I don't have now, but we will have
22 shortly. I think three, maybe four.

23 THE COURT: You're free to go, Mr. Jones, and the

1 rest of you.

2 MR. ROBERTS: Your Honor, we all have three.

3 THE COURT: See you at 2:00 o'clock.

4 (Whereupon, at 12:51 o'clock p.m., the trial was
5 recessed, to reconvene at 2:00 o'clock p.m.)
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1 Whereupon,

2 H. ROLF NOER, M.D.,
3 was called as a witness by and on behalf of the Plaintiff,
4 and after having been first duly sworn, was examined and
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. JENNINGS:

8 Q Would you tell the ladies and gentlemen of the
9 jury your name and your profession, sir?

10 A H. Rolf Noer, M.D. I'm an orthopedic surgeon.

11 Q Do you have a voice problem?

12 A Yes, I have terrible laryngitis. I may last
13 fifteen minutes.

14 Q Dr. Noer, at my request, did you give me your
15 Curriculum Vitae outlining your qualifications as an
16 orthopedic surgeon?

17 A Yes, I did.

18 Q Is that this document here (indicating)?

19 A Yes, sir. Containing the corrections I made last
20 night.

21 MR. JENNINGS: Counsel, you've seen this?

22 MR. ROBERTS: I've seen it.

23 MR. JENNINGS: I'd just move this in as Dr. Noer's

1 qualifications as an orthopedic surgeon as Plaintiff's
2 Number 6.

3 THE COURT: Any objection?

4 MR. ROBERTS: No.

5 THE COURT: Thank you. That will be Plaintiff's
6 Number 6.

7 (Whereupon, a Curriculum
8 Vitae of Dr. Noer was marked
9 for identification as Plain-
10 tiff's Exhibit Number 6 and
11 received in evidence.)

12 MR. JENNINGS: I'd move his qualifications to
13 testify as an expert in the field of orthopedic surgery.

14 THE COURT: You have no objection to that, do you?

15 MR. ROBERTS: No, sir.

16 THE COURT: All right. He's qualified as an
17 expert in orthopedic surgery.

18 BY MR. JENNINGS:

19 Q Dr. Noer, in your practice as an orthopedic surgeon,
20 have you dealt with low back complaints of pain or problems
21 associated with the care and treatment of the low back?

22 A Yes, sir, frequently.

23 Q Have you done any research or writing in that area?

1 A A small amount.

2 Q Does that constitute a part of your everyday on-
3 going practice as an orthopedic surgeon?

4 A Yes, sir, it's about sixty percent of my practice.

5 Q Now, Dr. Noer, did you take over, if you will,
6 Mr. Jerald Jones as a patient?

7 A Yes, I was called in consultation; and, yes, I
8 agreed to care for him; and, yes, I operated on him.

9 Q Who called you in on consultation, Dr. Noer?

10 A Another orthopedic surgeon, Dr. Gerard Engh.

11 Q When was that?

12 A I don't know when the first date of the request
13 arrived in our office, but I first saw him on 10/18/84.

14 Q What was, as reported to you by the patient, what
15 was Mr. Jones' problem?

16 A Well, he was complaining of pain in the low back
17 situation, with numbness in his legs, moreso on the right
18 than the left, which he attributed to an automobile accident,
19 or, more properly, a truck accident, that occurred on 20
20 October in 1983, which was about a year before I had seen
21 him.

22 Q Did he give you or tell you what had happened in
23 that accident?

1 A Yes, sir, he did.

2 Q How did he relate to you the accident had occurred,
3 sir?

4 A Well, he was driving a three-quarter ton service
5 pickup truck in connection with his employment, I believe,
6 and he was stopped preparatory to making a turn. Another
7 vehicle was behind him, and then another one behind that,
8 and a fourth car came and hit the back car, which drove that
9 into the middle car, which drove that forward into his
10 truck with such force that it took the steel bumper off his
11 truck when the first car in the chain drove underneath the
12 truck.

13 Q Did he indicate that there was any damage to the
14 rear bumper?

15 A Yes, sir. He said it was bent.

16 Q Did he indicate to you whether he had any problems
17 physically right there at the accident scene after it occurred?

18 A No, not at the accident scene. He began to get
19 stiff and sore that night and worse the following morning.

20 Q Let me ask you in terms of your experience and
21 your practice, is a delay in symptoms from an accident to
22 sometime later on, is that unusual in any way?

23 A No. As a matter of fact, it's par for the course.

1 Q So in Jerald Jones' case, that was par for the
2 course?

3 A Yes, sir.

4 Q Did he indicate to you or were you aware of what
5 his medical care and treatment had been under Dr. Engh up
6 until October of '84 when you saw him?

7 A Well, yes, sir, in two ways. Dr. Engh had very
8 kindly made available to us his entire file on the patient,
9 containing all of his records. And as is my practice, when
10 that occurs, we had Xeroxed those matters and added them to
11 our file. Then, of course, the patient and I talked about
12 it.

13 Q Did you examine him when you saw him October 18,
14 1984?

15 A Yes, sir.

16 Q What did that examination reveal?

17 A Well, we examined him standing, bending, front,
18 back, both sides, twisting, walking, both flat on his feet
19 in the usual fashion and tippy toe, on his heels, and
20 we examined him lying on his back and lying on his stomach.
21 We carried out a screening examination of both hips and both
22 knees. Checked his circulation, both arterial and venous in
23 both lower extremities. We carried out a neurological

1 evaluation of both lower extremities and a lumbar spine
2 examination. All of this was within normal limits, except
3 for the patient was seen to have the potbelly, like me, that
4 he had pain on bending backwards more than bending forward,
5 with a little limitation in bending backwards. He had
6 decreased sensation involving the right lower extremity.
7 And he had tenderness in the lumbosacral area, meaning the
8 small of the back, just under the belt, a few inches over
9 from the midline, each side. And he was tender there, moreso
10 on the right. And the decreased sensation on the right.

11 Q When you say decreased sensation, what do you
12 mean, decreased sensation where?

13 A In the entire right leg.

14 Q The leg?

15 A Yes, sir.

16 Q Did you have available to you at that time also any
17 results of any tests that had been performed on him prior to
18 October 18, 1984?

19 A Yes, sir. I told you we had Dr. Engh's file. And
20 we had the CAT scan that had been done at Arlington Hospital
21 at Dr. Engh's request on 12/1/83. We had electromyograms
22 that were done on 11/10/83, and again on 9/18/84. We had a
23 myelogram that was done on 12/1/83, but we didn't have plain

1 films of the back. So I got some x-rays of his back the day
2 that I saw him.

3 Q Did you have any recommendation or did you reach
4 any opinion at that point as to what should be done for Mr.
5 Jones in his medical care and treatment?

6 A Yes, sir.

7 Q Would you tell the ladies and gentlemen of the jury
8 what your conclusion was?

9 A Well, what I wrote in my reply to Dr. Engh's request
10 was, "We discussed this situation in some detail with the
11 patient. There are three things of which to do to help this
12 patient. Treat him conservatively. That's failed."

13 I add here, this is not a quote, over the course of
14 a year, in the hands of a Board Certified orthopedic and a
15 Board Certified physiatrist.

16 Going back to the writing. "We can monitor him,
17 treat him with therapy, consider surgical repair."

18 "Patient hurts too much to monitor. Conservative
19 therapy hasn't worked. Therefore, I agreed with both Dr.
20 Mondall and Dr. Engh at the time to help him in the operating
21 room."

22 Q Did you recommend that surgery be done then?

23 A Yes, sir.

1 Q Did you do the surgery on Mr. Jones?

2 A Yes, sir.

3 Q Preoperatively, what was your opinion as to what
4 was wrong or what Mr. Jones' condition was?

5 A He had asymmetrical sacralization at the bottom
6 most level, meaning the bottom vertebrae between the pelvis
7 and the spine. Couldn't make up its mind whether it wanted
8 to be part of the sacral or wanted to be part of the mobile
9 spine.

10 And he also, I thought, probably had disk disease.
11 In this I was misled. But I thought he did. I agreed with
12 the other two doctors. And I thought he was too fat.

13 Q Are you aware of what the CAT scan had revealed at
14 Arlington Hospital?

15 A Yes, sir. They had recorded it as a bulging disk,
16 and I agreed.

17 Q Now, when you operated upon him, would you tell the
18 ladies and gentlemen of the jury what the operation consisted
19 of?

20 A Yes. That was carried out on 11/16/84. The 16th
21 of November in '84. And let's see if I can avoid a lot of
22 problems, because we're getting into numbers and anatomy.

23 Okay. Normally you've got seven vertebrae in the

1 neck, you've got twelve in the thorax, meaning the part of
2 the spine that ribs are hung off of. You've got five in the
3 lumbar area. That's between the pelvis and the rib cage
4 portion. And you've got five that are fused together to
5 make the sacral. That's normally.

6 You can have only eleven rib-bearing vertebrae.
7 You can have six lumbar vertebrae. You can have only four
8 that are going to make up the sacrum. That also gives you the
9 six. This guy's got a vertebra that can't figure out which
10 way to go. So let's avoid numbers, because nobody is sure
11 about the numbers.

12 There's another terminology equally acceptable.
13 Lumbosacral. Means the joint between the lumbarized portion
14 of the spine. That is, it's not going to have the ribs on it,
15 it's not going to have the pelvis on it. It's just free and
16 in the middle. And sacrum is the portion of the spine that
17 enters into the pelvis.

18 So lumbosacral is a specific plate. We can identify
19 that in this guy. So I'm going to use that as a landmark
20 instead of numbers.

21 So we explore him. We explore the transition of
22 vertebrae and two levels above it and a level below it.

23 We did not find a disk hernia. We did find spinal

1 stenosis, which means the canal through which the dura
2 passes was too darn small for the dura, so it was pressing
3 on it. The dura is the container, if you will, rubber tire,
4 that contains the spinal fluid that bathes the spinal cord
5 and the nerve root. It was too tight.

6 So we solved that problem by taking off the arch
7 and converting what had been a tube into a trough. So
8 there's what we called a decompression. It's also called a
9 laminectomy. Here I'm using the term laminectomy as
10 properly and precisely as according to the dictionary.
11 Unfortunately, in common parlance, laminectomy is used as a
12 synonym meaning disk removal. No, we didn't take out his
13 disk. We did take off the lamina. Ectomy, in medical Latin,
14 means take out. So we decompressed him by doing a laminecto-
15 my.

16 Q When you say decompressed him by doing a lamin-
17 ectomy, what do you mean by that?

18 A I already specified, counsellor. Took off the
19 lamina. So the hole through which the dura goes was too
20 tight, was controverted into a groove. No top. So the dura
21 can come out.

22 Q Prior to the surgery, Dr. Noer, did you have an
23 opinion as to whether or not Mr. Jones had any nerve root

1 irritation in the lumbosacral area of the spine?

2 A There's no doubt that he had. It was on again,
3 off again. Sometimes the electromyograms that were done, I
4 think three times, showed positive findings, sometimes they
5 didn't. Sometimes the neurologic examination was positive,
6 sometimes it wasn't. On again, off again, but they were
7 there.

8 Q Do you have an opinion for these ladies and
9 gentlemen as to what was -- the physical nature of what was
10 causing physically this nerve root irritation in this man's
11 lumbosacral spine?

12 A Yes, sir. I was describing the operative findings.
13 They included a stenosis that I talked about, means too
14 tight. We also found some facette joint arthritis at the
15 level just above this where it couldn't make up its mind,
16 transitional vertebrae. And that was leaning. And the disk
17 was bulging per the CAT scan. I guess that was right. We
18 didn't find a hernia, but I can't say the bulge was there.
19 All of this made too little space. That was what was
20 irritating the nerve. Because it was nerve irritation rather
21 than permanent nerve damage. The findings were coming and
22 going. Sometimes he demonstrated it and sometimes he
23 wouldn't. It depended on how much irritation there was that

1 particular day.

2 Q Tell these folks what, if anything, the difference
3 is between disk hernia, you used that phrase, and the
4 bulging disk?

5 A Well, the hernia in medical parlance, is a normal
6 anatomic substance in an abnormal anatomic location. You're
7 supposed to have an omentum, but it ain't supposed to be
8 hanging outside your belly button in your pocket. That's an
9 abnormal hernia. You're supposed to have a stomach, but it
10 isn't supposed to be up inside your chest tickling your
11 lungs, as it is with a hiatal hernia. You're supposed to
12 have loops of bowel, that they aren't supposed to be down
13 pushing on your testicle but they are in an inguinal hernia.

14 In this particular case, you're supposed to have a
15 nucleus pulposus, which is the center part of the disk.
16 The pulpy center, which in ancient Latin is pulposus. It
17 isn't supposed to be leaked outside and wrapped around the
18 nerve root. It wasn't. But it was bulging. Bulging like
19 the side of a tire that's underinflated. Pooching out.

20 Q Was the surgery designed to help correct this
21 situation?

22 A Yes, sir. That's what we did the laminectomy. You
23 know, you can't push on something unless it's free to push

1 back. If you try to squeeze something, you've got to have
2 two sides to it. Otherwise, it just moves away. We took
3 off the back side so there was no squeezing. That's the
4 laminectomy.

5 Q Did that seem to work?

6 A Yes, sir. We got him back at fulltime work now.
7 Proof of the pudding is in the eating.

8 Q Did you do any testing before the surgery to see
9 what you could find out about this man's low back?

10 A Yes, sir. But certainly you ought to mention the
11 spinal fusion. Never got around to saying that.

12 Q All right. Tell us about the spinal fusion then?

13 A We made the bones go together by putting bone graft
14 across. And we fused the bottom -- We attempted to fuse
15 the bottom two normal vertebrae and the transitional vertebra,
16 the one ~~that~~ couldn't make up its mind one way or the other,
17 to the bowels of the sacrum. Isn't going to make much
18 difference what the numbers are now that I've explained it
19 that way.

20 We were -- That's three levels. Transitional
21 vertebra sacrum, last normal to the transitional vertebra,
22 the level above that. Involves four bones, involves three
23 spaces.

1 We were successful in getting a solid fusion at
2 two of these levels. He isn't solidly fused at the top
3 level, but that doesn't seem to bother him that much. I'm
4 sure we'll talk about that later.

5 So we made these bones grow together by bone
6 grafts across. His body perceived the situation as a
7 fracture and proceeded to knit it over the course of the next
8 three to six months. Like a fracture in two out of three
9 cases.

10 Q Do you have an opinion for the members of the jury,
11 based upon your experience and training as an orthopedic
12 surgeon, and based upon reasonable medical certainty, as to
13 what role, if any, the automobile accident played in the
14 treatment that you rendered to Mr. Jones, including the
15 surgery?

16 A Yes, sir. I have no doubt that the auto accident
17 is what brought it on, and if it hadn't been for the auto
18 accident, I wouldn't be operating on him.

19 Q Did you keep Mr. Jones off work from October of '84
20 up until June of '85?

21 A Well, he was off work when I first saw him, and I
22 didn't put him back on until I wrote a letter on 23 May return-
23 ing him to light duty as of Monday, 17 June.

1 Q Have you continued to follow him after the surgery
2 as a patient?

3 A Yes, sir. It's our practice normally to see these
4 patients six weeks in the office -- six weeks after the
5 operation, three months after the operation, three and a
6 half months after the operation, four months after the
7 operation, six months after the operation, and a year after
8 the operation. He made all, touched all those bases and had
9 an extra visit or two.

10 And what we're calling the one-year visit, in
11 fact, occurred on 11 November, when we had -- that was the
12 last time I saw him. When you consider the surgery was the
13 16th of November. That's good enough for government work for
14 one year.

15 Q How was he doing as of the last time you saw him,
16 Dr. Noer?

17 A Well, he told me that he returned to full work
18 along about the middle of June, shortly after he had seen me.
19 Been at full work ever since. He now had no leg pain whatso-
20 ever. He had a little soreness in the thigh, but no particu-
21 lar pain in the back. Hip soreness, or buttock soreness, if
22 you will, on the right side only occurred only when he did
23 lift something heavy, such as cutting wood or doing a lot of

1 bending.

2 At the present time, his work -- at that time was
3 11 November -- his work consisted of climbing poles, riding
4 in a poorly-sprung vehicle, such as a truck, walking, but not
5 too much stooping and lifting. And he didn't have any pain
6 in the back anymore when he would sneeze or cough. But he
7 did have some pain in cold or damp weather.

8 Q Did you assess at that time the results of the
9 spinal fusion that you had done a year earlier?

10 A Yes, sir. Repeated the bending x-rays, and, as I
11 already commented to the jury, that he was solid at the
12 bottom two levels where we tried to fuse. But he was moving
13 at the top level. In that regard we'd have to claim it as
14 unsuccessful. However, that didn't seem to be hurting him.

15 My experience, along with everybody else that's
16 writing on the subject, is that about half of the patients
17 with pseudoarthrosis; which is a fancy word. Pseudo meaning
18 fake, as in pseudoscientific. And arthrosis in Greek is a
19 joint. The word literally means a false joint. What it
20 actually means is that the bone that you intended to grow
21 together didn't heal. Well, it's been our experience that
22 about half of the patients with pseudoarthrosis don't hurt
23 and about half do. We don't operate on them unless they hurt.

1 And he's telling me this story I just quoted to you, he
2 doesn't come back and tell me it hurts a lot worse than that,
3 I'm not going to go in and fix that. On the other hand, if
4 he does find himself limited and it does hurt, then on that
5 basis we'll go back in and patch it up.

6 Q When you say go back in and patch it up, what do
7 you mean?

8 A About like going in a cracked brick wall. I'll go
9 back in, find the crack, freshen it up, put in some bone
10 grafts and infuse it just like I tried to do the first time.

11 Q Do you have an opinion, again based on reasonable
12 medical certainty, as to what the future holds for Jerald
13 Jones, age forty-seven, forty-eight, whatever Jerald is, as
14 he goes on in life?

15 A Yeah. He's going to have some trouble.. Make no
16 mistake about it. My name is not Jesus Christ. I don't make
17 normal backs.. I do improve on situations, like I did in
18 this case, got him back to work to the point he doesn't like
19 to see the doctor, but he still hurts. And the sensitivity
20 portion of this hurting, worse in the cold weather, that
21 probably will fade slowly with time. I don't think he's got
22 any nerve problems anymore. But whether or not we're going
23 to have to repair that pseudoarthritis, I couldn't comment at

1 this point. And I think the jury will be out on that for
2 about another four or five years.

3 Q Be four or five years before one can tell whether
4 he's going to have to have it?

5 A Yeah.

6 Q One other question, Dr. Noer. Do you have an
7 opinion as to whether or not the automobile accident had
8 any affect on or any impact on this incomplete sacralization
9 that you referred to?

10 A Yes, sir. I cannot dot the i's and cross the t's,
11 but it's been my observation in some thirty odd years of
12 practice that once you make one of these Bertilites Syndromes,
13 sort of asymmetric sacralization, one of these vertebra that
14 can't decide whether it's part of the sacrum or of the mobile
15 spine, but once you get one of these Bertilites Syndromes
16 start hurting, it's apt to continue to hurt. Conservative
17 treatment on them is less successful than anything else that
18 I know of, including ruptured disks. That's what I think
19 this guy had.

20 That sacrum is formed -- In other words, the time
21 that that defect occurred and development somewhere around
22 the sixth year of life. Normally the sacrum between the
23 second and eighth year of life in the top levels and goes

1 from about bottom side up. So the sixth, seventh year of
2 life. Six, seven years old. And I saw him at forty-six.
3 His accident -- Forty-seven. His accident occurred when he
4 was forty-six. So he worked with this thing for forty-odd
5 years. Hadn't bothered him much. Not enough to complain.
6 Not enough to interfere with work. But, in any event, the
7 back of his truck is caved in, it started hurting and won't
8 stop hurting. It's par for the course with Bertilites
9 Syndrome.

10 I can't tell you why we haven't been able to figure
11 out how to treat these people. Lord knows we'd like to know,
12 but we don't.

13 Q In your opinion, what started the incomplete
14 sacralization to start hurting in this man?

15 A His automobile accident or truck accident.

16 Q Did you get any history from any source whatsoever,
17 either Mr. Jones or any medical record that you've seen in
18 this case, that he ever had a prior problem with his low back
19 area?

20 A No, sir.

21 MR. JENNINGS: Do we have a stipulation on the
22 bill?

23 MR. ROBERTS: Certainly.

1 MR. JENNINGS: We do?

2 MR. ROBERTS: Yes.

3 MR. JENNINGS: I have no other questions. Thank
4 you.

5 THE COURT: Cross examination?

6 CROSS EXAMINATION

7 BY MR. ROBERTS:

8 Q Dr. Noer, with this particular patient, with Mr.
9 Jones, you had the luxury of exploring the spine, the low
10 spine instead of relying totally on tests that were done
11 prior to the surgery. So you were able to see what was
12 wrong with the man's back, weren't you?

13 A I hope so.

14 Q And you found a number of problems there?

15 A Yes, sir.

16 Q One of which you found stenosis or a tightening or
17 a smalling or lessening of the size of the channel through
18 which a nerve passes; is that correct?

19 A All of the nerves pass, yes, sir.

20 Q Now that, in and of itself, that lessening in size
21 of that particular channel, was not caused by this accident,
22 was it?

23 A I don't know.

1 Q You don't know?

2 A Certainly the complaints were caused by the accident.

3 Now whether the accident by stressing the bone caused bony
4 hypertrophy and the bone enlarged, when the ring enlarged
5 that makes bone a little smaller, that's one perhaps theory.
6 Another perhaps theory is that because of the accident and
7 cutting on the dura, it became injured and therefore
8 inflamed, and therefore swelled, and the swelling level went
9 down and there wasn't room inside to hold the donut for the
10 swelling or for etcetera. You can have all of these theories
11 that you like, but in point of fact, he never had any com-
12 plaints before the accident. And he had the accident and
13 then he couldn't -- And two Board Certified specialists in
14 the course of a year weren't able to get an honest man well
15 without a knife. So I think there's causal relationship.

16 Q The stenosis, however, can be caused by aging, is
17 that correct? It's a simple matter that happens during age.

18 A Usually it's not aging. As a matter of fact, the
19 most common cause of stenosis is inappropriate spinal surgery.

20 Q Which he had not had prior to your --

21 A (Interposing) That's correct.

22 Q But there are a number of occasions that you run
23 across in your practice and in your studies where there has

1 been a narrowing of that channel that results in no symptoms
2 until there's been some trauma and then the trauma just brings
3 on the symptoms; is that correct?

4 A Roughly.

5 Q You mentioned the term that he was too fat. Am I
6 correct that overweightness or too much -- not enough
7 stomach strength can cause a strain on the back and just
8 cause back problems in and of itself?

9 A Yes, sir.

10 Q Was that one of his problems?

11 A That's one of my diagnoses. It was keeping him
12 from getting better. Obviously wasn't what caused him to
13 start hurting in the first place.

14 Q Right, sir.

15 And then he had this third problem of an incomplete
16 spacing?

17 A Well, one vertebra of the sacrum was -- couldn't
18 make up its mind to go one way or the other. I would have to
19 say the sacrum itself was incomplete.

20 Q Now, that problem is something that I believe you
21 said he had since age six or seven, somewhere in that
22 neighborhood?

23 A Yes, sir.

1 Q Now, is that a problem that without some trauma
2 could cause pain?

3 A I suppose theoretically that it could, but I
4 should hasten to add that I don't recall -- I graduated in
5 1948. This is 1986. So that's thirty-eight years. And I
6 can't recall of a patient that I have attended that came for
7 surgery for Bertilites Syndrome that had not had some
8 significant injury, not twisting to pick up a piece of
9 paper, but I'm talking about a car wreck or fall down the
10 stairs or something. There's something in the injury that
11 makes these people start hurting. I don't
12 recall personally attending one in thirty-eight years where
13 it just began spontaneously.

14 Q Could come -- The symptoms could become apparent
15 after heavy lifting; is that correct?

16 A I haven't seen one.

17 Q Over exertion?

18 A I haven't seen one.

19 Q No vigorous activity at all to cause these symptoms
20 to become apparent; is that what you're telling us?

21 A All I'm telling you is that I haven't seen one of
22 these people who became symptomatic and came to surgery that
23 hadn't had a significant injury. Nothing like over exertion

1 or being fat or stooping over or bending over, or not just
2 general wearing out and starting spontaneously. I don't
3 recall one of these people in thirty-eight years that hadn't
4 had a significant injury. I therefore conclude that the
5 history of injury is significant. All the patients can't be
6 nuts and all the patients can't be lying.

7 Q How much of your opinion is based upon your
8 conclusion that there was significant damage to Mr. Jones'
9 truck?

10 MR. JENNINGS: I object. That's not what he said.

11 THE COURT: He did say significant.

12 MR. JENNINGS: Significant injury. That had
13 nothing to do with the truck, Your Honor.

14 THE COURT: You can give the question. Restate
15 the question. The question was appropriate as stated.

16 BY MR. ROBERTS:

17 Q Dr. Noer, how much of your conclusion is based
18 upon what I believe you said earlier concerning the damage
19 to the truck? How much of your conclusion is based upon
20 your assumption that there was significant damage to the
21 truck that he was riding in?

22 A None of my diagnosis. I put that in the record
23 for an entirely different reason.

1 Q For an entirely different reason?

2 A Yes, sir.

3 Q Just as part of his history?

4 A If you like, I'd be glad to tell you.

5 I was appointed as a consultant to the Department
6 of Transportation in the area of Highway Safety, and
7 specifically with regard to seatbelts some years ago. And
8 as part of my work on this commission, I've been trying to
9 develop for myself some concept on how bad you've got to
10 crumble a car or a truck before it hurts somebody. And I
11 think that it would be great if we had black boxes in
12 vehicles, as we do in airplanes, so that people like me
13 could start to reconstruct this. Obviously, this is part of
14 my professional interest and you'll find this appointment in
15 my Curriculum Vitae, which you've already accepted.

16 So when I see auto accident cases, I try and
17 calibrate the force the only way I know how, and that's to
18 describe the amount of bent metal that was there. But that's
19 why I put it down, not because it related to his particular
20 care.

21 Q And you put it down --

22 A (Interposing) I'm trying to collect information
23 for my own purposes in relation to this appointment as a

1 consultant in highway safety for the Department of Transpor-
2 tation.

3 Q But based on the history you took in this particu-
4 lar case, you concluded that there was significant physical
5 damage to the truck; is that right?

6 A I don't think that's what I said. I think what I
7 said was "With such force, it lifted the back of his truck
8 off the ground as the car unfortunately went underneath.
9 Apparently the only damage to the service truck driven by
10 the patient was a bent rear bumper." And that's what I said.
11 Now, I don't find the words significant or insignificant in
12 there, counsellor. All I put down is how much bent metal
13 there was and I told you why I was interested.

14 Q You saw Mr. Jones, you say, on the 11th of
15 November of '85; is that correct?

16 A I think you're incorrect. I saw him on October 18,
17 '84.

18 MR. JENNINGS: The last visit.

19 BY MR. ROBERTS:

20 Q The last visit.

21 A 11/11/85, you're correct.

22 Q And you evaluated him at that time?

23 A Yes, sir.

1 Q Did you write a written report at that time of
2 your evaluation?

3 A No.

4 Q Or somewhat shortly thereafter?

5 A No, but I made, as I did with all of his visits, a
6 record which is a little bit different than a report. I
7 think counsel would agree there's a little significance.

8 Q I'm not going to argue about the difference.

9 Did you make a written record?

10 A Yes, sir, I did. I've already read to the jury
11 from it.

12 Q Did you read the entire record?

13 A No. If you'd like me to, I'd be glad to.

14 Q Would you, please, sir.

15 A "This is the first time I have seen Mr. Jones since
16 7/9/85. He's been seen for his one year check on his
17 decompression and arthrodesis of 11/16/84, a year ago.

18 "The patient states that he returned to full work
19 along about the middle of June, shortly after last seeing me.
20 Been to full work ever since. He now has no pain whatsoever.
21 He has a little soreness in the buttocks and no particular
22 pain in the back. The hip soreness is on the right side only.
23 Occurs only when he has been doing something heavy, such as

1 cutting wood or doing a lot of bending. At present his work
2 consists of climbing poles, riding in poorly strung
3 vehicles --" There's a misspelling there. --"poorly sprung
4 vehicles such as trucks, walking but not too much stooping
5 or lifting. He doesn't have any diffucilty in tussle events,
6 as exhibited when he sneezes or coughs, but he's a little
7 weather sensitive. Repeat bending films today reveal
8 silent arthrodesis, except the L-4, L-5 level, where I think
9 there is a jog of motion." I already told you about pseudo-
10 arthrosis. "In view of the negative history provided by the
11 patient, however, I think this is one of the asymptomatic
12 ones of which we'll have to do nothing. The patient is
13 therefore advised to gradually return to normal activi-
14 ties, return to see us if he does not gradually get rid of
15 the residual discomfort documented above."

16 MR. ROBERTS: Thank you, sir. That's all we have.

17 THE COURT: Redirect?

18 MR. JENNINGS: I have nothing.

19 THE COURT: Thank you, Doctor. Your voice lasted
20 longer than we thought it would.

21 THE WITNESS: We're both surprised.

22 THE COURT: Thank you. You're free to go.

23 (Whereupon, the witness was
excused.)

Q Even after the accident, the tailgate operated properly without any repairs?

A The tailgate wasn't touched, it was the bumper. The bumper is what was damaged.

Q So everything was up under -- Below, the bumper and below?

A That's right. Below the tailgate.

Q And the car behind you had damage to the grill; is that correct?

A I don't know what all damage it had. It was damaged to the front.

MR. ROBERTS: That's really all I have, Mr. Jones. Thank you very much.

THE COURT: Redirect?

MR. JENNINGS: No, sir.

THE COURT: Thank you, Mr. Jones. You may come back to counsel table.

(Whereupon, the witness was excused.)

THE COURT: Your next witness?

MR. JENNINGS: Plaintiff rests.

THE COURT: Plaintiff rests.

MR. JENNINGS: Except for the bills. I take that

1 back. You've stipulated to those and --

2 THE COURT: (Interposing) They'll come in. There
3 is a stipulation, Mr. Roberts?

4 MR. ROBERTS: Yes, sir, it is, Your Honor. These
5 are the bills that were incurred and we admit their
6 genuineness and their reasonableness.

7 THE COURT: All right. They'll be Plaintiff's
8 Number --

9 MR. JENNINGS: (Interposing) Do you want them
10 seriatim or do you want them --

11 THE COURT: (Interposing) Altogether. It's
12 Number 7.

13 MR. JENNINGS: Number 7, all right.

14 (Whereupon, a group of medical
15 bills were marked, collectively,
16 for identification as Plain-
17 tiff's Exhibit Number 7 and
18 received in evidence.)

19 THE COURT: Plaintiff rests. Defendant rest?

20 MR. ROBERTS: We rest, Your Honor.

21 THE COURT: All right. Ladies and gentlemen of
22 the jury, at this time the evidentiary stage of the proceed-
23 ing is over with. I'm going to send you back to the Jury

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

JERALD JONES,

Plaintiff,

v.

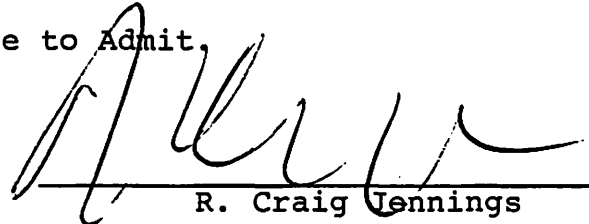
MARGARET MARY EVANS,

Defendant.

At Law No. 16278

N O T I C E

PLEASE TAKE NOTICE that the undersigned will bring before this Court for argument on Friday, February 14, 1986, at 10:00 a.m., or as soon thereafter as counsel may be heard, the following Motion for Expenses on Failure to Admit.


R. Craig Jennings

MOTION FOR EXPENSES ON FAILURE TO ADMIT

COMES NOW plaintiff, by counsel, and files this his Motion to have the reasonable expenses incurred in making certain proofs at trial, including reasonable attorneys' fees, assessed against the Erie Insurance Company, pursuant to the terms of Rule 4:12(c), stating as follows:

1. Plaintiff filed certain Requests for Admissions, copies attached hereto, to, inter alia, the Erie Insurance Company, c/o its attorney, Russell A. Roberts, Esq., with certificate of same being November 16, 1985.

2. The Erie Insurance Company filed its response, certified December 19, 1985, denying Requests 2, 3, 5, and

9 through 40. The response is attached hereto.

3. Subsequently, the plaintiff was caused to expend the sum of \$1,617.00 to doctors, plus a deposition charge of \$136.40, copies of those bills being attached hereto, in order to make his proofs concerning his injuries, his medical expenses, and his loss of income.

4. The Request for Admissions was never held objectionable; the Admission was of substantial importance; Erie Insurance Company as evidenced by its lack of proof at trial and by its lack of objection to plaintiff's proffered evidence, had no reasonable ground to believe that plaintiff was not correct and would not prevail in connection with his proof; and there was no other good reason for the Erie Insurance Company to fail to admit.

WHEREFORE, these premises considered, plaintiff requests that, pursuant to Rule 4:12, Rules of the Virginia Supreme Court, this Court enter an Order requiring Erie Insurance Company to pay to plaintiff the reasonable expenses incurred in making the proofs, including reasonable attorney's fees.

LAW OFFICES
SLENKER, BRANDT,
JENNINGS & JOHNSTON
3026 JAVIER ROAD
FAIRFAX, VIRGINIA 22031

(703) 849-8800

SLENKER, BRANDT, JENNINGS & JOHNSTON

By:

R. Craig Jennings, Counsel for
Plaintiff

Jerald Jones, by Counsel

NOTICE FOR FEBRUARY 14, 1986, AND
MOTION FOR EXPENSES ON FAILURE TO
ADMIT FILED BY PLAINTIFF

At Law No. 16278
Page 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was mailed, postage prepaid, this 7th day of February, 1986, to:

Russell H. Roberts, Esq.
ROBERTS & ASHBY
(Counsel for Defendant)
Post Office Box 7166
Fredericksburg, Virginia 22404

Lowry J. Miller, Esq.
MILLER, MILLER & KEARNEY
(Counsel for Nationwide Insurance Company)
2701 North Pershing Drive
Arlington, Virginia 22201-1499

J. Edward Flournoy, Esq.
ATTORNEY AT LAW
(Co-Counsel for Plaintiff)
9117 Church Street
Manassas, Virginia 22110


R. Craig Jennings

LAW OFFICES
SLENKER, BRANDT,
JENNINGS & JOHNSTON
3026 JAVIER ROAD
FAIRFAX, VIRGINIA 22031

(703) 849-8600

V I R G I N I A :

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

JERALD JONES

:

Plaintiff,:

v.

:

AT LAW NO. 16278

MARGARET MARY EVANS, et al. :

Defendants:

REQUEST FOR ADMISSIONS

TO: Erie Insurance Company
c/o Russell H. Roberts
Roberts & Ashby
P.O. Box 7166
Fredericksburg, VA 22404

COMES NOW the Plaintiff, by counsel, and pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia calls upon the Defendant to answer separately and in writing, on or before twenty-one (21) days after service of the request, the below identified requests for admission. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. If any portion of an individual request for admission is denied, please identify what portion of the request is admitted, what portion of the request is denied and state the reasons for said denial.

In accordance with the foregoing and Rule 4:11, it is requested that you admit that:

1. Jerald Jones was involved in an automobile accident on 10/20/83 on Nokesville Road, south of Vint Hill Road wherein his vehicle was struck in the rear by Lela Lyon's vehicle who was struck in the rear by Deborah Tolson's vehicle who was struck in the rear by Margaret Evans.

2. The accident was proximately caused by the negligence of Margaret Evans.

3. Mr. Jones was lawfully stopped preparatory to making a left hand turn at the time that he was struck and that he was not contributorily negligent.

4. Margaret Evans was charged on the date of the accident with reckless driving, failure to keep her vehicle under control and bad brakes (See Attached Exhibit #1).

5. Margaret Evans pleaded guilty to reckless driving.

6. Margaret Evans pleaded guilty to improper driving.

7. Margaret Evans was convicted of improper driving.

8. Attached Exhibit #1 is authentic.

9. Attached Exhibit #1 is admissible.

10. As a proximate result of Margaret Evans' negligence in causing the accident on 10/20/83, Jerald Jones sustained a herniated lumbar disc.

11. Prior to 10/20/83 Jerald Jones had never experienced any back problems, diseases or injuries.

12. As a result of the herniated disc proximately caused by Margaret Evans' negligence, Jerald Jones was caused to undergo a decompression L4-S1 and arthrodesis L4-S2.

13. Mr. Jones underwent the procedure mentioned in #10 above at the National Orthopaedic & Rehabilitation Hospital from 11/13/84 to 11/30/84 in an attempt to be cured of the injuries proximately caused by the collision.

14. The total cost of the procedure from National Orthopaedic & Rehabilitation Hospital which was both reasonable and necessary was \$6,246.45.

15. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones was also treated at National Orthopaedic & Rehabilitation Hospital from 11/14/83 to 11/19/83.

16. The charge for the hospitalization referred to in #15 above, which was both reasonable and necessary, was \$1,308.69.

17. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones was admitted to National Orthopaedic & Rehabilitation Hospital from 11/28/83 to 12/10/83 with a diagnosis of herniation nucleus pulposus L5-S1.

18. The charge for the hospitalization referred to in #17 above, which was both reasonable and necessary, was \$4,121.83.

LAW OFFICES
SLENKER, BRANDT,
JENNINGS & JOHNSTON
3026 JAVIER ROAD
FAIRFAX, VIRGINIA 22031

(703) 849-8600

19. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones received x-rays from the Northern Virginia Clinics on 11/13/84 and a myelogram on 11/14/84.

20. The cost for the radiologic procedures mentioned in #19 above, which was both reasonable and necessary, was \$98.00.

21. In an attempt to be cured of the injuries sustained as a proximate result of the collision, Mr. Jones received x-rays from the Northern Virginia Clinics on 12/6/83 and a myelogram on 12/1/83.

22. The cost for the radiologic procedures mentioned in #21 above, which was both reasonable and necessary, was \$98.00.

23. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones received medical care and treatment from the Rehabilitation Medicine Center of Northern from 11/15/83 to 10/10/84.

24. The cost of the care and treatment mentioned in #23 which was both reasonable and necessary was \$580.00.

25. In an attempt to be cured of the injuries sustained as a proximate result of the collision and incident to the procedure mentioned in request #10, Mr. Jones received anesthesia from Anesthesia Group Service on 11/16/84.

26. The cost for the equipment and services from Anesthesia Group Service which was both reasonable and

necessary was \$616.00.

27. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones received orthotics and other medical care from National Orthopaedic & Rehabilitation Hospital on 11/10/83, 9/18/84, 10/18/84, 10/26/84 and 5/23/85.

28. That the charges for the treatment and orthotics referred to in #27, which were both reasonable and necessary, are as follows:

a)	11/10/83	\$214.00
b)	09/18/84	\$284.00
c)	10/18/84	\$ 62.00
	10/26/84	\$236.00
d)	05/23/84	\$ 36.00

29. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was treated by Dr. H.R. Noer.

30. The cost for treatment rendered by Dr. Noer, which was both reasonable and necessary, was \$4,047.00.

31. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was treated for pain in his lower back on 10/21/83 at the Prince William Hospital Emergency Room.

32. The cost of the medical treatment referred to in #31 above, which was both reasonable and necessary, was \$219.70.

33. In an attempt to be cured of injuries sustained as a result of the collision, Mr. Jones was treated by Dr. Engh at the Anderson Clinic from 10/26/83 through 6/8/84.

34. The cost of the treatment referred to in #33 above, which was both reasonable and necessary, was \$434.00.

35. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was treated at Arlington Hospital on 11/30/84.

36. The cost of the treatment referred to in #35, which was both reasonable and necessary was \$295.00.

37. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones received x-rays on 11/30/83 from Virginia Radiological Associates.

38. The cost for the treatment in request #37, which was both reasonable and necessary, was \$103.00.

39. In an attempt to be cured of injuries sustained as a proximate result of the collision, Mr. Jones was prescribed and did purchase medications.

40. The cost of the medications referred to in #39 above, which was both reasonable and necessary, was \$551.52.


JERALD JONES, By Counsel

LAW OFFICES
SLENKER, BRANDT,
JENNINGS & JOHNSTON
3026 JAVIER ROAD
FAIRFAX, VIRGINIA 22031

J. Edward Flournoy, P.C.
9113 Church Street
Manassas, VA 22110

R. Craig Jennings, Esquire
SLENKER, BRANDT, JENNINGS & JOHNSTON
3026 Javier Road
Fairfax, VA 22031

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, postage prepaid, this 10th day of December, 1985 to: Lowry J. Miller, Esquire, Esquire, 2701 N. Pershing Drive, Arlington, VA 22201; Russell H. Roberts, Esquire, P.O. Box 7166, Fredericksburg, VA 22404; and to Margaret Mary Evans, 7911 Meadow Court, Manassas, VA 22110.


R. Craig Jennings

LAW OFFICES
SLENKER, BRANDT,
JENNINGS & JOHNSTON
3028 JAVIER ROAD
FAIRFAX, VIRGINIA 22031

(703) 849-8600

SUMMONS
FILE NO. 11-15-83
INITIAL DATE
CONT. DATES
Evans, Margaret Mary
9000 Palmer Drive
Lorton, VA 22079
CITY/TOWN STATE ZIP

YOU ARE SUMMONED TO APPEAR IN THE
Prince William COUNTY/CITY
DISTRICT COURT AT 9250 Lee Avenue
9302 Lee Avenue, Manassas VIRGINIA

ON THE 15 DAY OF Nov 1983 AT 4:30 P.M.
ANSWER THE FOLLOWING VIOLATION OF
STATE COUNTY CITY TOWN LAW TO WIT.
SECTION 16.1-190.9, reckless driving,
Not under control/bad brakes

SIGNATURE Margaret Evans DATE 10-20-83
SIGNING BY SUMMONS IS NOT AN ADMISSION OF GUILT.
OFFICER: E W Badmer CODE BADGE NO. 0308

YOU MUST APPEAR FOR TRIAL AT THE TIME AND PLACE SHOWN. FAILURE TO APPEAR CONSTITUTES A SEPARATE OFFENSE.
TRIAL MAY BE WAIVED ONLY IF THIS BOX IS CHECKED.
CALL (BELOW) FOR DETAILS.
(703) 368-9171 EXT. 216 or 218 (ADULT)
(703) 369-9362 (JUVENILE)

COURT COPY

STATE FINE	
LOCAL FINE	
TRIAL FEE	
MAG. BAIL FEE	
FILING FEE	
SUMMONS FEE	
DMV FEE	
BLOOD TEST FEE	
ASAP	
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CT. APPT. ATTY. STATE	
CT. APPT. ATTY. LOCAL	
WEIGHING FEE	
LIO. DAMAGES	
TOTAL RECEIVED	

\$ 48.1-423.3
YES
NO
RECEIPT NO.
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902
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POLICE DEPT.
RACE W SEX F WGT 109 HT 5 IN 2 EYES H2 HAIR BK MO 4 DAY 17
O.L./C.L. NO 226-84-2490 STATE VA
VEH. YEAR 1978 MAKE LINC TYPE 4DR VEH. LIC. NO. AT5-472 YEAR 8-1 STATE VA
OWNERS NAME S/A OWNERS ADDRESS S/A
OFFENSE LOCATION Nokesville Rd/Vint-11/11 OFFENSE JURISDICTION 076
OFFENSE DATE 10-20-83 DAY, WK. THU TIME 3 AM. WEA. PN ROUTE NO./STREET Rt. 28 Nokesville Rd
DIRECTION N NO LANS 24 ACCIDENT YES DATE ARREST 3/1 ARREST LOCATION S/A
NAME OF COURT 31st G.D. COUNTY-CITY-TOWN PRINCE WILLIAM TRIAL DATE 11-15-83
OFFICER E W Badmer CODE-BADGE NO 0308

PLER G NG NC TA ATTORNEY
CONVICTED OF 11/10/84 driving

SENTENCE FINE 25.⁰⁰
O.L./C.L. SUSP. DAYS/MOS. SURRENDERED YES NO
JAIL DAYS/MOS. SUSP. ON CONDITION

DISMISSED NOLLE PROSEQUI C.W.L. DATE 11-15-82
JUDGE

I HEREBY NOTE AN APPEAL TO THE CIRCUIT COURT OF THIS
COUNTY/CITY, TO BE CALL ON 19
A COPY - TESTE:
C. E. GNADT, CLERK
DEFENDANT'S SIGNATURE Mary D Grayford Deputy Clerk

APPEAL WITHDRAWN
DEFENDANT'S SIGNATURE
DATE 11-15-83
F081942

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

JERALD JONES

Plaintiff

vs.

MARGARET MARY EVANS, et al

Defendants

AT LAW NO. 16278

RESPONSE TO REQUEST FOR ADMISSIONS

The Defendant, Erie Insurance Company, for Answer to Request for Admissions, would answer and say:

1. That it denies numbered paragraphs 2, 3, 5, and 9 through 40 of the said Request for Admissions.
2. That it admits numbered paragraphs 1, 4, 6, 7, and 8 of the said Request for Admissions.

ERIE INSURANCE COMPANY

By

Russell A. Robert
Of Counsel

ROBERTS & ASHBY
P. O. Box 7166
Fredericksburg, VA 22404

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed postage prepaid this 19th day of December, 1985 to Lowry J. Miller, 2701 North Pershing Dr., Arlington, VA 22201; J. Edward Flournoy, 9113 Church St., Manassas, VA 22110; and R. Craig Jennings, 3026 Javier Rd., Fairfax, VA 22031.

Russell A. Robert



PATT & DAWSON
REGISTERED PROFESSIONAL REPORTERS
SUITE M, FAIRFAX TOWNE OFFICE PARK
10195 MAIN STREET
FAIRFAX, VIRGINIA 22030
(703) 591-0007
TAX I.D. NO. 54-1111968

TO: R. Craig Jennings, Esq.
Slenker, Brandt, Jennings & Johnston
3026 Javier Road
Fairfax, Virginia 22031

Date: January 15, 1986

January 13, 1986

Jerald Jones vs. Margaret Mary Evans

Deposition of: Gerard Anderson Engh, M.D.

Original & 1 Copy \$136.40*

*Please put our Invoice No. 86-46-P on your check.

*Pd
check #17295*

Anderson Clinic, Inc.

2465 Army-Navy Drive, Arlington, Virginia 22206
Telephone: (703) 892-6500

Orthopaedics

Charles A. Engh, M.D.
Gerard A. Engh, M.D.
John L. Albrigo, M.D.
M. David Tremaine, M.D.
O. Anderson Engh, M.D. (Retired)

General Surgery

S. Joseph Cosimano, Jr., M.D.

December 31, 1985

R. Craig Jennings
Slenker, Brandt, Jennings & Johnston
Trial Attorneys & Counsellors at Law
3026 Javier Road
Fairfax, VA 22031

Dear Mr. Jennings:

In regard to the upcoming pre-deposition and the deposition in the case of Mr. Jerald Jones scheduled to take place in the office of Gerard A. Engh, M.D. on January 13, 1986 at 11:00 AM and 11:30 AM respectively, this is a reminder of the fees set for such a deposition.

The fee for the pre-deposition time - (11:00 - 11:30 AM is \$150.00).
The fee for the deposition that is scheduled for (11:30 AM - 12:30 PM) is \$350.00 for that hour and the cost is doubled for the time over the hour that has been reserved.

This payment for the deposition is expected to be paid at the time of the deposition.

Thank you.

Sincerely,



Debbie Ammeen
Secretary to Gerard A. Engh, M.D.

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

JERALD JONES,

Plaintiff,

v.

MARGARET MARY EVANS,

Defendant.

At Law No. 16278

JUDGMENT ORDER

THIS MATTER came before the Court for trial by jury, and at the conclusion of all the evidence, the plaintiff made a motion to strike defendant's evidence and for Summary Judgment in plaintiff's favor on the question of liability, said motion being granted by the Court to which action of the Court, the defendant, by counsel, duly noted her objection and exception.

WHEREUPON, the matter was submitted to the jury for resolution, upon proper instructions. Thereafter, upon due deliberation, the jury returned its verdict in favor of the plaintiff in the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00).

WHEREUPON, the defendant, by counsel, made a motion to set aside the verdict on the grounds of excessiveness, and the Court being of the opinion that the verdict is not excessive as a matter of law, the Court did thereafter deny the defendant's motion to set aside the jury verdict; and

IT APPEARING TO THE COURT that judgment should be entered on the verdict of the jury in plaintiff's favor against the defendant in the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00), plus costs of this proceeding; it is therefore

JUDGMENT ORDER

At Law No. 16278
Page 2

ORDERED that judgment be, and the same hereby is, entered in plaintiff's favor in accordance with the verdict of the jury against the defendant in the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00), plus the cost of this proceeding.

AND THIS ORDER IS FINAL.

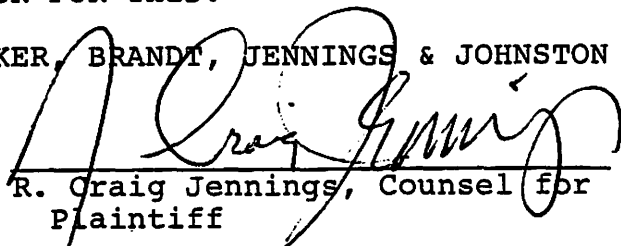
ENTERED this 5th day of February 1986.


JUDGE

WE ASK FOR THIS:

SLENKER, BRANDT, JENNINGS & JOHNSTON

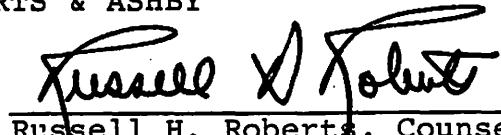
By:


R. Craig Jennings, Counsel for
Plaintiff

SEEN, OBJECTED TO AND EXCEPTION TAKEN:

ROBERTS & ASHBY

By:


Russell H. Roberts, Counsel for
Erie Insurance Exchange on
behalf of the defense

860354

2/5
due 5/5
paid 5/19

CLERK
SUPERIOR COURT OF VIRGINIA
RECEIVED
MAY - 6 1986
RICHMOND, VIRGINIA

V I R G I N I A

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

-----X
:
JERALD JONES :
:
Plaintiff, :
:
-vs- :
:
MARGARET MARY EVANS, et. al. :
:
Defendants. :
:
-----X

AT LAW NO. 16278

Manassas, Virginia

The proceedings commenced before:

THE HONORABLE H. SELWYN SMITH

Judge for the Circuit Court of Prince William County,
Virginia, February 12, 1986, in the Courthouse, Manassas,
Virginia, when were present:

For the Plaintiff:

R. CRAIG JENNINGS, ESQUIRE
1012 North Utah Street
Arlington, Virginia 22201

For the Defendants:

RUSSELL H. ROBERTS, ESQUIRE
1041 Prince Edward Street
Fredericksburg, Virginia 22401

lir

MANASSAS COURT REPORTING
9029 Center Street
Manassas, Virginia
361-7575

C O N T E N T S

The following pages 3-11 contain the motions by counsel.

MANASSAS COURT REPORTING
9029 Center Street
Manassas, Virginia
361-7575

P R O C E E D I N G S

(Thereupon, the court reporter was duly sworn by the Clerk.)

THE COURT: All right, gentlemen.

MR. JENNINGS: It's my motion for --

THE COURT: Yes, sir.

MR. JENNINGS: -- 4:12(c) sanctions in the Jones/ Evans case. I think the motion, more or less sets forth --

THE COURT: I got a chance to read it. Go with the motion. Go with the Rules, and I think, Mr. Roberts, it's up to you, sir.

MR. ROBERTS: All right, sir. Your Honor, I don't know what documents Mr. Jennings has submitted to you. Do you have my letter of December 19th, 1985, addressed to him, as well?

THE COURT: Well, let me find out. December 19th?

MR. ROBERTS: Yes, sir.

THE COURT: Would it be accompanying some of this?

MR. ROBERTS: It would have been accompanying my response to request for admissions. Maybe I can just hand the Court my packet. There will be some duplication there.

Your Honor, the request for admissions was submitted to us in mid December of 1985. Prior to the request

MANASSAS COURT REPORTING
9029 Center Street
Manassas, Virginia
361-7575

being submitted to us, we had deposed the Plaintiff, Mr. Jones. As a result of those depositions, it was apparent to us at that time from all the information that was reasonably available to us, that the property damage was quite light and that the seriousness of the back injury that Mr. Jones was claiming was considerably in doubt at that time. The request for admissions was submitted to us and it was also submitted to Nationwide, who was the other uninsured motorist carrier at the same time. And I've included in that packet Nationwide's responses to the same request for admissions. The request, of course, listed a number of things, many of which we admitted. But it also went on to say that Mr. Jones had to undergo a decompression surgery because of a herniated disk.

Now, at that time -- again, we question seriously whether there was a herniated disk. Interestingly enough, when Dr. Nora testified in this case, he concluded that there was not a herniated disk. So request No. 4 says, "As a result of the herniated disk proximately caused by Margaret Evan's negligence, Jerald Jones had to go through a number of medical procedures." And then, basically, the remaining requests for admission dealt directly back with this herniated disk diagnosis that no physician had made at that time, but Mr. Jennings had made in his request for admissions.

So we submit that in light of the, first of all,

MANASSAS COURT REPORTING
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Manassas, Virginia
361-7575

not severe property damage, not severe impact, is the evidence that was available to us, and as a result of considerable doubt from the medical evidence that was available to us at that time, that it was appropriate to deny these because it just did not appear that Mr. Jones' complaints were consistent with the information that we had.

Now, I wrote a letter to Mr. Jennings saying that the way the requests were phrased to us, we had to deny them because he was asking in every request basically to tie everything back to this accident. It would have been entirely appropriate if he wanted to say, you know, that these charges were reasonable, put us to the test of admitting the reasonableness of the charges. And in my letter to him, I told him that we would not only admit the reasonableness of the charges, but that we would -- we would not admit necessity or causation, but we would admit everything else that he has requested. The request for admissions were couched in such language that we had to deny them, because they were all tied back to the accident. I might also add that the type injury that he had, I doubt very seriously that Mr. Jennings would have tried this case without the medical testimony that he had, because in addition to proving causation, he certainly had to prove the permanency. And he would have needed these medical witnesses to prove his permanency anyway. So the expense that he is claiming that

MANASSAS COURT REPORTING
9029 Center Street
Manassas, Virginia
361-7575

he incurred I submit would have been incurred anyway. But I submit to Your Honor that our denial of the request for admissions was entirely appropriate, especially at the time that the requests were tendered to us.

THE COURT: All right. Mr. Jennings, anything you would have to say about that?

MR. JENNINGS: Yes, sir. I'd like to just give you a letter that came up -- I think it was sent to Mr. Roberts the next day after his.

THE COURT: 20th. That's correct.

MR. JENNINGS: All right.

THE COMMISSIONER: Or it's dated the 20th.

MR. JENNINGS: Just so we have the correspondence correct as to whether there was a question of --

THE COURT: Can I infer that these two letters were crossed in the mail, because one is dated the 19th, and the other is dated the 20th. Although you start your's out by saying, "Received your response for request for admissions."

MR. JENNINGS: They did not cross the mail.

THE COURT: All right. Even though they're dated that way.

MR. JENNINGS: His letter of the 19th I received on the 20th with his response.

THE COURT: All right.

MR. JENNINGS: On the 20th that letter went back

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out to Mr. Roberts.

THE COURT: That's mail service that we don't get in this town.

MR. JENNINGS: Well, it's very unusual that we get that in Fairfax, too, tell you the truth. But it did happen.

If the Court please, my position is, and I suggest to the Court, this is the only second aspect of a rule or a statute where I see that costs "shall," in a very nondiscretionary basis, "shall be awarded." I think if the Court would look at -- and the Court is probably familiar with the objection to venue statute that costs shall be awarded there. Under 4:12 you'll notice the discretionary portion of the rule is that the party who made the proofs, namely Mr. Jones, "may" -- we may apply to the Court for an order requiring that the expenses be paid. And then it says, "The Court shall make the order unless it finds," and then there are four listings. Our Rule 4:12 is word for word from Federal Rule 37. And again, it has been held that 37(c), which is our 4:12(c) is mandatory that the order for expenses be made, unless one of those criteria is met.

If the Court please, if you'll look at some -- just two or three of the requests that were denied that necessitated in January, Dr. Ing's deposition and then on January 21, Dr. Nora's personal testimony, if you'll look at 29, I believe, Request 29 says that in an attempt to be cured of

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the injuries, Mr. Jones was treated by Dr. Nora. That was denied. Thirty talked about his cost of treatment. That was denied. In 33, we said that in an attempt to be cured of his injuries, Mr. Jones was treated by Dr. Ing. That was denied. And then the cost of Dr. Ing's treatment was \$434. That was denied.

Thus, just on those four requests alone, justified the taking of Dr. Ing's deposition, on the one hand, and bringing Dr. Nora in person -- I guess we could have taken his deposition, too -- but bringing him in person. I think it begs the question to say that we would have used the witnesses anyway, because the question is now, did we have to incur these expenses to make those proofs to show that Jerald Jones in an effort to be cured of his injuries was treated both by Dr. Ing and by Dr. Nora?

The Court will recall, I hope, that in this case the defense produced no witnesses. There was no contradictory medical evidence at all. There was no contradictory documentary evidence. In fact, there was no evidence at all. As soon as Plaintiff rested, the defense rested. So at that point in the game, if you will, all of the evidence presented by the Plaintiff in this case was uncontradicted. We did have those expenses incurred, and I see no reason for those to have been refused. I come before you for Mr. Jones really, not for Craig Jennings, because Craig Jennings is not

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going to have to pay these folks. Jerald Jones is going to have to pay Dr. Ing and Dr. Nora.

THE COURT: Does that authorize me to drop the attorney's fee portion of it?

MR. JENNINGS: Well, I don't know how much attorney's fee I'm really looking for. To make the proofs was a -- I guess the deposition and the pretrial conference was a couple hours -- two and a half hours all totaled. But I think in this situation that Rule does have teeth in it. I gave you my December 20th letter just to let you know that this wasn't a surprise.

THE COURT: All right.

MR. JENNINGS: They found out later on. They could have amended, you know, after the depositions and after they got into the medical and they never did that either, sir.

That's the Plaintiff's position.

THE COURT: All right, sir, I think under the circumstances, and after we have heard the deposition -- or after the completed deposition, it was incumbent upon you, Mr. Roberts, to amend. Certainly that was ample time to amend before the trial of the case. I had not had the benefit of the letter of December the 20th. I have read, or was aware of the contents of the letter of December the 19th. But under the circumstances, I think that the Rule is there and the Rule is there for a purpose, and I see no

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reason why the -- the evidence was not there, and I cannot find any excuse for not going with the Rules. In other words, the Rule says, "The Court shall make the order unless it finds" one, two, three, and four, and there's not anything that I can find in those four items that would justify not making the award.

MR. ROBERTS: May I address the matter very briefly?

THE COURT: All right, sir.

MR. ROBERTS: One of the grounds is that there is no reasonable ground to believe that the Plaintiff was correct and here the evidence that we had at that time --

THE COURT: I understand that. But that's the reason I prefaced my whole remark with that you had ample time after you learned that that was the case within which to amend and had you have done that, we wouldn't have had the expense that he's complaining of in this particular case.

MR. ROBERTS: Well, Your Honor, when Dr. Ing testified, he testified there was a herniated disk, and then Dr. Nora said there was not a herniated disk.

THE COURT: Mr. Roberts, your exception is duly noted.

MR. ROBERTS: Yes, sir.

THE COURT: Mr. Jennings, if you'll prepare the appropriate order.

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MR. JENNINGS: I have an order. I do have order, but there are blanks in terms of the expenses. I don't know if I've added them up. But I'd like -- and there is an attorney's fee blank, which may be either filled in or deleted.

THE COURT: You give more the order and I'll pick it up from the motion. I'll do the arithmetic from the motion.

MR. JENNINGS: All right, sir.

(Thereupon, the hearing was concluded.)

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V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

JERALD JONES,

Plaintiff,

v.

MARGARET MARY EVANS,

Defendant.

At Law No. 16278

O R D E R

THIS MATTER came before the Court on February 12, 1986, upon plaintiff's motion for expenses to be assessed against the Erie Insurance Company pursuant to Rule 4:12(c), Rules of the Supreme Court of Virginia, and the matter was argued by counsel for the parties; and

IT APPEARING TO THE COURT that plaintiff's motion should be granted and that expenses in the amount \$ 1752⁴⁰, plus attorneys' fees in the amount of \$ 250⁰⁰, should be assessed against the Erie Insurance Company for requiring the plaintiff to make certain proofs at trial of this cause on January 21, 1986, to which action of the Court the Erie Insurance Company, by its attorneys, notes its objection and exception; it is therefore

SO ORDERED.

ENTERED this 12th day of February, 1986.

H. S. S. Smith
J U D G E

WE ASK FOR THIS:

SLENKER, BRANDT, JENNINGS
& JOHNSTON

SEEN, OBJECTED TO AND EXCEPTION TAKEN:

ROBERTS & ASHBY

By:

[Signature]
R. Craig Jennings,
Counsel for Plaintiff

By:

[Signature]
Russell H. Roberts, Counsel for
Erie Insurance Company

QUESTIONS PRESENTED

1. Did Erie have reasonable ground to believe that it might prevail on the matters which were requested to be admitted?