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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 770768

JAMES A. MAXWELL
Appellant

v.

ROGER McCAFFREY
Appellee

JOINT APPENDIX

Robert P. Holmes, Esq.
MELNICK & HOLMES
2425 Wilson Boulevard
Arlington, Virginia 22201

Counsel for Appellant

Charles F. Geschickter, Jr., Esq.
BRAULT, LEWIS, GESCHICKTER
AND PALMER
10533 Main Street
Fairfax, Virginia 22030

Counsel for Appellee

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*(Dr. Bortnick's testimony is included at the request of appellee although its inclusion was not requested by appellee at the time of the filing of the transcript by appellant and appellant considers it unnecessary to this appeal.)

MOTION FOR JUDGMENT

You are hereby notified that upon the expiration of twenty-one (21) days after service of this Motion for Judgment upon you, the undersigned will move the Circuit Court of the County of Fairfax, Virginia for judgment against you in the amount of $750,000.00 and costs by reason of the following:

1. Plaintiff, James A. Maxwell, is a resident of the City of Alexandria, State of Virginia.

2. Defendant, Dr. Roger McCaffrey, is a resident of the State of Virginia, practicing as a Chiropracter in the County of Fairfax, Virginia.

3. Defendant now is, and at all times herein mentioned was, a Chiropracter duly licensed to practice under the laws of the State of Virginia, with an office located at 3120 Sleepy Hollow Road, County of Fairfax, State of Virginia.

4. At all times herein mentioned, defendant held himself out to the public in general, and to Plaintiff in particular, as a Chiropracter, and maintained a large establishment for the treatment of various ailments.

5. On April 18, 1974, Plaintiff employed Defendant, Dr. Roger McCaffrey, to treat him for a shoulder muscle pain. On April 18, 1974 Defendant, Dr. Roger McCaffrey, gave to Plaintiff what

purported to be a Chiropractic treatment. Said treatment, however, did not consist of what is commonly called an adjustment of the spine. Said Defendant, Dr. Roger McCaffrey, pulled, pushed and manhandled Plaintiff's shoulder and lower back to such an extent that his back muscles were acutely strained, torn and greatly injured. Said manipulation of the Plaintiff's back was against his will and without his consent.

6. Defendant, Dr. Roger McCaffrey, in performing the acts above referred to, was negligent in that he failed to use the same degree of skill, diligence, and care as is possessed and used by prudent, skillful, and careful Chiropracters and Physicians practicing in the same vicinity.

7. As a direct and proximate result of Defendant's negligence, Plaintiff's back, neck, shoulder and arm were injured, his muscles were torn and strained and Plaintiff has had to endure great pain and suffering.

8. As a further direct and proximate result of said negligence of Defendant, Dr. Roger McCaffrey, Plaintiff has expended substantial sums for medical care, has lost time from work and lost wages and income thereby, and has suffered other damages.

9. That as a result of the Defendant's negligence the Plaintiff continues to suffer and will in the future suffer physical injuries of a permanent nature resulting in farther pain and suffering, loss of income and other damages.

WHEREFORE, Plaintiff moves the Court for judgment against you in the sum of $750,000.00 plus costs expended in his behalf.

Berryman, Melnick & Sanders
2400 Wilson Boulevard
Arlington, Virginia 22201
By _____

0002

James A. Maxwell, Plaintiff, by Counsel

ANSWER AND GROUNDS OF DEFENSE

Comes now the defendant ROGER McCAFFREY, by counsel, and for answer and grounds of defense to plaintiff's Motion for Judgment states:

1. He denies he committed any act or made any omission constituting negligence in this cause.

2. He states that plaintiff's injuries or damages, if any, were the result of his sole or contributory negligence.

3. He states that plaintiff assumed the risk of his injuries, if any.

4. He denies that the plaintiff was injured in the manner or to the extent alleged and demands strict proof of elements of injury and damage.

5. He denies all material allegations in plaintiff's Motion for Judgment not heretofore denied.

/s/ Roger McCaffrey

Roger McCaffrey
By Counsel

BRAULT, LEWIS, GESCHICKTER & PALMER

By/s/ Charles F. Geschickter, Jr.
Charles F. Geschickter, Jr.
Box 248, Fairfax, Virginia
Counsel for Defendant

I hereby certify that copies of this pleading were mailed to all counsel of record this 11 day of March, 1975.

///s Charles F. Geschickter, Jr/

BRAULT, LEWIS,
GESCHICKTER
& PALMER
ATTORNEYS AT LAW
P. O. BOX 248
FAIRFAX, VIRGINIA
22030

MEMORANDUM OF LAW

SUBJECT: TESTIMONY OF EXPERT WITNESSES IN MALPRACTICE ACTIONS

It is the unquestioned rule in Virginia that the prevailing standard in proving negligence in a malpractice case requires plaintiff to show that the actions of the defendant violated the standard ofcare in treating t he particular ailment as established by similar practitioners of the medical art. Ropp v. Stevens, 155 Va. 304,154 S.E. 553. The violation of this standard, or the negligence in question usually has to be shown through proper medical expert testimony. In the instant case negligence is being shown through the testimony of Dr. Stephen Levin, an orthopaedic surgeon much skilled in chiropractic manipulation. Aside from the personal and professional qualifications of Dr. Levin which will be delved into at trial, there are numerous legal justifications for acceptance of Dr. Levin's testimony. At the outset it should be noted that although Dr. Levin is not per se a chiropractor the legal question at hand does not involve the theory of chiropractic medicine, but does revolve around the art of manipulation, the techniques of which Dr. Levin is eminently qualified to discuss and in which he is much skilled.

The Court should take cognizance that the admissibility of expert testimony is within the discretion of the trial court, and its ruling allowing a witness to testify will not be reversed

unless it clearly appears that he was not qualified. Chesapeake & O. R. Co. v. Meyer, 150 Va. 656, 143 S. E. 478 (1928).

In Virginia, when it is proved that a witness is a practicing physician, he is competent to express an opinion, as an expert, upon a medical question Livingston v. Com. 55 Va. 592 (1857) The mere expression of belief by a party that he is an expert, however, is not sufficient to constitute him such, he must further testify as to some information, skill or experience in a certain line, to bring him within that class. An expert must be specially skilled in his line. Com. v. Lackin 88 Va. 422, 13 S.E. 901 (1891). But generally, if a witness has some qualifications with relation to the matter about which he undertakes to testify he should be permitted to give his opinion . And a witness is not required to be qualified in the highest degree or in any particular degree to render his opinion of value or quantity admissible. Toppins v. Oshel, 141 W. Va. 152, 89 S.E. 2d 359(1955) Similarly knowledge to qualify one to speak as an expert may be derived from study or experience, Norfolk & W. Ry. v. Anderson, 207 Va. 567, 151 S.E. 2d. 628 (1966). An expert need not have all the knowledge possible for one in his class to entitle him to speak, but he may testify unless it clearly appears that he is not qualified at all. Richmond Locomotive Works v. Ford 94 Va. 627, 27 S.E. 509 (1897).

Virginia appears to be in line with the recognized exceptions to the supposition that a practitioner of one school of medicine is not competent to testify as an expert in a malpractice action against a practitioner of another school of medicine.

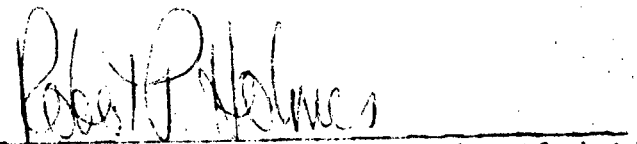
One of the exceptions as outlined in 85 A.L.R. 2d, p. 1026 is " "where the method of treatment of the school of the defendant is the same as that of the witness". In the case at hand we are dealing with manipulative techniques which in practice are the same, or should be the same between the expert and the defendant. Fully ten states have recognized this exception.

A second very relevant exception is "where the method of treatment in defendants school and the school of the witness should be the same". Three states recognise this exception, and the court's attention is directed to Foster v. Thornton 125 Fla. 699, 170 S.E. 459 in which two M.D.s testified to a chiropractor's negligence.

A third exception, one in point under the facts in question, is that testimony is admissible where the testimony of the witness is based on knowledge of defendant's own school.

A final exception exists "where the testimony of the witness is as to matters of common observation and experience". Virginia follows the rule, as stated in Clark v. United States 402 F 2d 950 (1968) that where the matter is regarded as within the common knowledge of laymen it has been held that the jury may infer negligence without the aid of any expert, also Frazier v. Grace Hospital, 117 W. Va. 330, 185 S.E. 415.

Based on the above, it is submitted that Dr. Levin is well qualified to testify as an expert in this matter.



 Robert P. Holmes, Counsel for Plaintiff

MAR 16 1977
JAMES E. ... E
Clerk of the Circuit Court
of Fairfax Co., Va

ORDER

This cause came on to be heard on February 23, 1977, on plaintiff's Motion for Judgment, the Answer and Grounds of Defense of the defendant, and the other proceedings in this cause;

WHEREUPON, after being examined on their voir dire, seven jurors were chosen from a panel of thirteen veniremen. The jurors heard the opening statements of counsel and the evidence presented by plaintiff, after which counsel for defendant moved to strike plaintiff's evidence; and it appearing to the Court that said motion should be granted, it is therefore

ADJUDGED, ORDERED and DECREED that the evidence presented by plaintiff is hereby stricken and summary judgment entered for defendant, Roger McCaffrey, to which plaintiff's counsel objects and notes his exception.

Entered this 17th
day of March, 1977.

James Keith, Judge

BERRYMAN, MELNICK AND SANDERS
Excepted to:
By: Robert P. Holmes
Robert P. Holmes
Counsel for Plaintiff

BRAULT, LEWIS, GESCHICKTER & PALMER

By:
Charles F. Geschickter, Jr.
Counsel for Defendant

BRAULT, LEWIS,
GESCHICKTER
& PALMER
ATTORNEYS AT LAW
P. O. BOX 248

FILED

MAR 22 1977

JAMES E. HOOFNAGLE
Clerk of the Circuit Court
of Fairfax Co., Va.

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

TO JAMES E. HOOFNAGLE
Clerk of the Circuit Court
Fairfax, Virginia

Notice is hereby given that James A. Maxwell appeals from a final judgment rendered by this Court on the 17th day of March, 1977, and announces his intention of applying for a writ of error and supercedeas to the Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

The Trial Court erred in its failure to allow Dr. Stephen Levin to testify:

1. As a medical expert and consulting physician;
2. By failing to accept Dr. Stephen Levin's qualifications as an expert in the practice of manipulation and specific adjustments of the spinal column;
3. After qualification, by failure to allow Dr. Stephen Levin to testify as to the proper standard of care of physicians in the community utilizing manipulation and specific adjustments of the spinal column.

A transcript or partial transcript of the relevant testimony will be hereafter filed.

James A. Maxwell
James A. Maxwell, by Counsel

Berryman, Melnick and Sanders
2400 Wilson Blvd.
Arlington, Va. 22201
By Robert P. Holmes
Robert P. Holmes
Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal and Assignment of Error was mailed postage prepaid to Charles F. Geschickter, Counsel for Defendant, this 22nd day of March, 1977, at 10533 Main St., Fairfax, Virginia 22030.

Robert P. Holmes
Robert P. Holmes

1 P R O C E E D I N G S

2 *

3 Whereupon,

4 DR. RONALD BROTNICK,

5 was called as a witness by and on behalf of the plaintiff,

6 and, having been previously duly sworn, was examined and

7 testified as follows:

8 DIRECT EXAMINATION

9 BY MR. HOLMES:

10 Q Would you state your full name please?

11 A Dr. Ronald Bortnick.

12 Q What is your occupation sir?

13 A I am a neurological surgeon.

14 Q Where do you practice?

15 A My office is 8301 Arlington Boulevard, Fairfax,

16 Virginia.

17 Q How long have you been --

18 MR. GESCHICKTER: (Interposing) Your Honor, I will

19 stipulate Dr. Bortnick is a qualified neurosurgeon.

20 THE COURT: All right.

21 BY MR. HOLMES:

22 Q Dr. Bortnick, are you familiar with the plaintiff

23 in this case, James Maxwell?

1 A Yes, sir, I am.

2 Q When did you first meet him?

3 A I first saw him in Fairfax Hospital.

4 Q What day was that, sir?

5 A It was April 18th, 1974.

6 Q What were the circumstances surrounding your seeing
7 him on that date?

8 A I was called to see him after he had been admitted
9 into the emergency room at the hospital. He stated that he
10 had twisted himself in the shower on that morning, hurting
11 his back. He had had a back manipulation and had severe
12 back pain because of the manipulation and had come to the
13 emergency room of the hospital.

14 Q Did you treat him at the emergency room?

15 A I believe I did see him in the emergency room and
16 then sent him upstairs to be admitted.

17 Q What were your findings upon seeing him in the
18 emergency room?

19 A On examination his back was not tender. His motor
20 sensation was intact. His reflexes were zero to one plus
21 bilaterally. The straight legging test was negative
22 bilaterally. It was my opinion at that time he had an
23 acute lumbar spine strain.

1 Q Did you take x-rays of Mr. Maxwell at that time?
2 A Yes.
3 Q What did you find if anything?
4 A The lumbar spine x-rays showed slight interspace
5 loss at the L-4, 5 interspace. However the change was
6 minimal.
7 Q In terms of everyone here, what does that mean?
8 A I have a model of the spine here. It might be
9 easier to show on that. This is a plastic model of the
10 spine in the low back. The bones are in white and the disc
11 for demonstration are in blue. Now the disc are made of
12 cartilage and do not show on the x-rays. All you see are the
13 bones showing white on that x-ray. If this is the lowest
14 vertebra in the back, the fifth lumbar vertebra this
15 (indicating) would be the fourth lumbar vertebra. This
16 space (indicating) would be narrowed on the x-ray findings,
17 some narrowing of the space in the back. It is indicative
18 that the disc had softened somewhat and is narrowed. You
19 cannot see in which direction or if the disc is actually
20 herniated out of the space in which it normally exists.
21 You can infer though that there is some disease in the
22 disc by the narrowing.
23 Q At that time did you have Mr. Maxwell admitted to

1 the hospital?

2 A Yes.

3 Q What was the therapy?

4 A He was treated with bedrest, traction, muscle

5 relaxants, physical therapy, heat and massage to the low

6 back.

7 Q Dr. Bortnick, do you recall where the source of

8 his complaints were at that time?

9 A In the low back.

10 Q Could you point out physically where that would be?

11 A In the area of the belt line and just below that in

12 the back of the body.

13 Q How long was he in the hospital?

14 A He was discharged on April 22nd, 1974.

15 Q Do you recall what the reason was he was

16 recommended to be discharged?

17 A As far as I can recall he had showed improvement

18 and I felt he could be treated as an out-patient and followed

19 in the office.

20 Q What do you mean as treated as an out-patient?

21 A Treatment in the office. He didn't require any

22 further hospitalization at that time.

23 Q Did you recommend any course of action for him to

1 follow after he was discharged?

2 A Yes. Let me -- let me get my office notes. He was

3 told to use muscle relaxants -- Robaxon, and to come back into

4 the office in approximately a month, which he did.

5 Q Dr. Bortnick, in speaking to Mr. Maxwell did you

6 ascertain what his employment was?

7 A Yes. He installed and moved around heavy photo-

8 graphic equipment I believe that weighed several hundred

9 pounds.

10 Q Did you give him any advice as to the affect of

11 his injury upon his employment?

12 A At that time I told him he certainly shouldn't be

13 doing that till I could see how he was doing in the office --

14 but that he shouldn't be doing it at that time.

15 Q Why did you recommend that?

16 A I wanted his back to heal further and not aggravate

17 his back injury any further.

18 Q Did you see him after that?

19 A Yes, on May 14th, 1974, about three weeks after

20 that.

21 Q What were your findings at that time?

22 A He had some mild pain in the low back at that time.

23 He said he had been doing some work in spite of admonition.

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On examination his back was not tender. His motor sensation was intact. The reflexes were absent in his legs. Straight leg raising was negative bilaterally. I told him to return as needed, use the Robaxon and to lose some weight, that that might help relieve some pressure on his back.

Q What was your diagnosis of his injuries at that time?

A It was still a lumbar spine strain at that time. Then he returned on August 12th, 1974. He said he was still having pain -- getting worse back pain with coughing. That is a significant finding if a disc is beginning to herniate out coughing stress will push it out further. It will give you the feeling that something is pushing out in the back against the spine and against the nerves.

Q Doctor, could you explain that in terms of that model you have there?

A Well, here (indicating) is the front of the stomach and here (indicating) is the back. The nerves to the legs come down the center core here and go out the side to go to the limbs. If the disc is herniated out the back and pushing against the nerves it effective traps it against the bones in the back and the disc pushing backwards causing pressure on it and then the pain is radiating down into the

1 buttocks and legs. If this is pushing out the room that the
2 nerve would normally have to swing back and forth is
3 diminished. Its breathing space so to speak is cut down so
4 with a cough it would push a little harder and cause pain
5 so this is something we can ask or usually always ask in
6 examining a patient; does it hurt down your legs or your
7 back when you cough and he said it did, that the pain was
8 now more to the low right back. It was localizing now to
9 one side. He had been unable to do any heavy activity at
10 all. On examination his back was tilted to the left. Motor
11 sensation was still intact -- reflexes were negative.
12 Straight leg raising was negative bilaterally. The tilting
13 of the back would reflect spasms of the muscles, one of the
14 earlier signs of a disc beginning to herniate further and
15 further out. I recommended Robaxon and bedrest at home. He
16 was to call me at the end of the week. I said that he
17 might need a myelogram to determine if this disc were
18 herniating out.
19 Q Dr. Bortnick, at this time did you have any opinion
20 as to the causation of his condition?
21 MR. GESCHICKTER: Your Honor, if it please the
22 Court, I would ask that be rephrased.
23 THE COURT: He has to be able to answer that question

with reasonable medical certainty.

BY MR. HOLMES:

Q Dr. Bortnick, within reasonable medical certainty given the history and the symptoms you found with Mr. Maxwell do you have an opinion as to how this disc was herniated or how these symptoms came about?

A It was my opinion that the precipitating cause of all this marching along symptoms so to speak was precipitated by the back manipulation that he had had.

Q Has this manipulation been described to you?

A Yes, it was.

Q Do you recall what type of manipulation occurred?

A There were two kinds of manipulation apparently but the manipulation that I felt would mechanically be the type of manipulation that I felt would herniate a disc would be the type of manipulation where the patient is forcibly flexed like this (indicating) very hard and I can show you on the model what would happen if your forcibly flex someone forward like this (indicating) these disc spaces open up in the back and this (indicating) can pop out backwards this way -- it loosens up the space -- if it isn't clear, I can draw it for you. That is the manipulation I feel, very forcibly done which precipitated in his instance the disc

1 herniation.

2 Q Did Mr. Maxwell see you further after that?

3 A Let me see, he called back four days later. He was

4 not getting total bedrest. He was having pain when he

5 coughed. He felt he was standing straighter and wanted to

6 try more bedrest at home. Apparently that didn't work out

7 because the next office notice is after surgery -- we will

8 have to skip back to what happened after his second hospital

9 admission.

10 Q Would you discuss for us, Doctor, his admission

11 back to Fairfax Hospital on September 4th?

12 A He obviously did not show any further improvement,

13 I hospitalized him and did a lumbar myelogram.

14 Q Would you describe to the jury what that test is?

15 A As I mentioned before these discs are made of

16 cartilage that do not show on x-rays so in order to outline

17 these discs a lumbar puncture is done. A spinal needle is

18 placed into the spinal canal -- this is not only nerve roots

19 but spinal fluid enclosed in a fiborous tubing. Dye that

20 shows on x-rays is then put into the spinal canal and spinal

21 fluid, this is done in the x-ray department. The x-ray table

22 is tilted up and down. The dye is in an oil base and is heavier

23 than the spinal fluid and will crawl up and down in one long

1 stream and the dye will then flow over top the disc and you
2 will see a column of dye on the x-ray. If the disc is out
3 of position you will see an indentation like a thumb print
4 pushing into the column of dye. That is what we found on
5 Mr. Maxwell.
6 Q Do you have with you what one of these needles
7 looks like?
8 A Yes, I do.
9 MR. GESCHICKTER: Your Honor, I object. I don't
10 see what the needle has to do --
11 THE COURT: (Interposing) Objection overruled.
12 A (Continuing) This is a number 18 spinal needle
13 (showing needle to the jury) that is placed in his back.
14 BY MR. HOLMES:
15 Q Is the patient conscious when you do this test?
16 A Yes, he is fully awake. I put a small amount of
17 novacaine into his skin with a smaller needle and this is
18 passed through that area into the spine and on down to the
19 dural sacrum area.
20 Q Did Mr. Maxwell have any physical reaction to your
21 performing this test?
22 A It is a bit uncomfortable.
23 Q What do you mean by uncomfortable?

1 A Well, you are lying on your stomach with a needle
2 like that in your back for about half an hour. After the
3 myelogram I don't recall if he had headaches or not. About
4 25 percent of the patients can have some rather severe
5 headaches, nausea and vomiting after this -- it is not a
6 pleasant test to have.
7 Q How long was he in Fairfax Hospital?
8 A He was discharged on September 6, 1974 to be
9 readmitted for surgery sometime. It is a bit difficult to
10 operate immediately so we had to readmit him later to perform
11 surgery.
12 Q Was his surgery later performed?
13 A Yes, on September 10th, 1974.
14 Q What was done?
15 A A right hemilaminectomy at the L-4, 5 interspace
16 for the removal of herniated disc. In that type of an opera-
17 tion -- this is the back again, the muscles are -- at least
18 that far back from the spine, even though if you feel your
19 back it feels like you are right up against the bone but you
20 are not -- allthe muscles are stripped away. A portion of the
21 bone about like this (indicating) is removed and then the
22 nerves and all the spinal nerve roots are retracted to the
23 middle and the surgeon goes under with a special instrument

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1 cleans out this half of the disc.

2 Q How long does this operation take?

3 A Anywhere from one to two hours depending on the

4 individual's back and the indivudal case.

5 Q How long was Mr. Maxwell hospitalized as the result

6 of this operation?

7 A He was admitted on 9-9-74, surgery was the following

8 day. I am trying to find the exact date. I am having

9 difficulty --

10 THE COURT: (Interposing) What are looking for?

11 A (Continuing) The date of discharge from the hospital

12 on the second --

13 BY MR. HOLMES:

14 Q (Interposing) Do you have any idea how long he was

15 in the hospital?

16 A It should be a week to ten days. I really don't

17 have the exact date.

18 Q When was the next time you saw him after the

19 surgery?

20 A On 10-15-74.

21 Q What did you find then?

22 A My notes say five weeks post-op, right L-4, 5 disc

23 surgery, felt good, no further back or leg pain. Low back

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1 tilted to left with some muscle tightness. Motor sensations
2 were intact. Reflexes were absent in the legs. Straight
3 leg raising was negative bilaterally. He was to return in
4 one month. He could start doing a little light work and
5 exercise with care.
6 Q What kind of light work did you think he could do?
7 A Light things, shuffling papers, something like
8 that. Nothing physical at all.
9 Q Did you advise him to return to the same type work
10 he had been doing before?
11 MR. GESCHICKTER: I object to the leading question.
12 THE COURT: Don't lead the witness.
13 BY MR. HOLMES:
14 Q Did you give him any advice as to his work?
15 A Yes. He should refrain from doing any heavy work
16 that would require lifting more than 20 or 25 pounds, that
17 he should not do work that would require long hours of
18 standing or walking for long periods of time.
19 Q When was the next time you saw Mr. Maxwell?
20 A Let's see, unless I have missed a visit here, I have --
21 it was 1-9-75.
22 Q At that time did you make a prognosis as to a
23 permanent injury?

A I felt that he would be permanently impaired from doing very heavy type of work as he had been doing in the past. He could do something much lighter but heavy work was out permanently.

Q What about what is called a whole body disability; did you give him one of those?

A I would think in total body it would be up to 15 percent, 10 to 15 percent would be reasonable range of total activities that he could not do -- that is total body but of low back activities it is 100 percent of doing heavy activity to the low back.

MR. GESCHICKTER: Your Honor, may we approach the bench?

THE COURT: You may.

(Whereupon, the following bench conference was held out of the hearing of the jury.)

MR. GESCHICKTER: Nowhere in Dr. Bortnick's records have I seen that he has 100 percent disability -- I would object to that testimony and ask that it be striken.

(Whereupon, the Court referred to documents in the file.)

THE COURT: Objection overruled.

(Whereupon, the bench conference was concluded,

1 and the proceedings continued within the hearing
2 of the jury.)
3 BY MR. HOLMES:
4 Q Dr. Bortnick, have you seen Mr. Maxwell since
5 January 9th, 1975 date?
6 A No, sir.
7 MR. HOLMES: Your Honor, if I could have from the
8 Clerk the medical records.
9 THE COURT: All right.
10 BY MR. HOLMES:
11 Q Dr. Bortnick, I am going to give you a group of
12 medical bills that are -- first you have a bill for your
13 medical services that you gave to Mr. Maxwell?
14 A Yes.
15 THE COURT: That is No. 3.
16 (The document previously
17 referred to was marked Plaintiff's
18 Exhibit No. 3 for identification.)
19 BY MR. HOLMES:
20 Q Is that the amount you charged Mr. Maxwell for
21 your treatment of him?
22 A Yes, sir.
23 Q Is that what you would consider to be a reasonable

1 and proper necessary charge for that work?

2 A Yes, sir.

3 THE COURT: Plaintiff's No. 3.

4 BY MR. HOLMES:

5 Q Dr. Bortnick, I am going to hand you three bills

6 from Fairfax Hospital. Are these reasonable and necessary

7 charges for the hospitalization that took place for Mr.

8 Maxwell?

9 A The first one is 9-18-74 -- 4-18-74, excuse me --

10 4-22-74, that is the first hospitalization when he had the

11 initial treatment -- I think that is a proper bill. The

12 second one is September 4, '74 to September 6, '74. That

13 would be the time for the myelogram. I feel it is a proper

14 and necessary bill also and the last one covers the time of

15 surgery which is 9-9-74 to 9-17-74, that is eight days --

16 yes, I would feel that is proper also.

17 THE COURT: All right, four, five and six.

18 (The documents previously

19 referred to were marked

20 Plaintiff's Exhibits 4, 5 and 6

21 for identification.)

22 BY MR. HOLMES:

23 Q Now I submit these bills for x-rays and physical

1 examinations from Dr. Levin. Would you comment on their
2 reasonableness and necessariness?
3 MR. GESCHICKTER: I don't know if it is fair to
4 ask Dr. Bortnick to comment on those bills.
5 MR. HOLMES: At least to the x-rays as stated in
6 that bill, could you comment on that?
7 THE WITNESS: Yes, that is a reasonable charge for
8 the x-rays.
9 THE COURT: That is No. 2, -- the x-rays?
10 MR. HOLMES: The bottom of No. 2, Your Honor --
11 this next one, Your Honor, is a bill that was --
12 THE COURT: (Interposing) I will call that one
13 three and take that one back.
14 BY MR. HOLMES:
15 Q Dr. Bortnick, I wonder if you would inspect these
16 records from Fairfax Hospital. Is this your signature on
17 these and can you tell us whether those are the medical
18 records from the hospital?
19 A This one -- the front sheet of the chart, the
20 patient information, his final diagnosis -- diagnosis at
21 discharge -- this is my signature. The second one is a
22 copy -- it is not a copy, it's the emergency room chart, a
23 record which I did not sign but I saw and I have a copy of

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1 it in my record and this is a copy of the admitting note
2 and the progress of the first hospitalization and of the
3 x-rays, the discharge summary -- yes, the first hospitaliza-
4 tion I signed and so forth.
5 Q Dr. Bortnick, did you prescribe -- Mr. Geschickter,
6 do you want to see these?
7 MR. GESCHICKTER: I think I agreed to their
8 admission.
9 THE COURT: All right, these are number seven.
10 (The documents previously
11 referred to were marked as
12 Plaintiff's Exhibit No. 7
13 for identification.)
14 BY MR. HOLMES:
15 Q Dr. Bortnick, did you prescribe any medications?
16 A I did not put in my records if I did or did not.
17 It is quite likely and I probably prescribed muscle relaxants,
18 some type of pain medications. I have no record that I did.
19 Later on in my records though I state to continue the
20 Robaxon which is a muscle relaxant.
21 THE COURT: I have admitted those three prescrip-
22 tions without objection -- No. 8.
23

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1 (The documents previously
2 referred to were marked for
3 identification as Plaintiff's
4 Exhibit No. 8 and received in
5 evidence.)
6 BY MR. HOLMES:
7 Q Dr. Bortnick, I wonder if you would describe the
8 area from which the disc was removed?
9 A It's the right side between the fourth and fifth
10 lumbar vertebrae, that would be -- not the lowest disc space
11 in the low back but the one just above it. It is just below
12 the belt line on the right side to the right of the center.
13 Q Is this the area in which you found his original
14 complaints?
15 A Yes, in the low back area and later on it moved
16 over to the right side.
17 Q Doctor, in your experience as a physician is it
18 medically possible to tell whether a person is allergic to
19 milk by looking at x-rays?
20 A Never in my experience have I ever heard of anything
21 like that.
22 Q Have you ever heard of the expression, compression
23 and wedging?

1 A Of what?

2 Q Of the lower back?

3 A The back itself?

4 Q Yes.

5 A You can have a compression fracture and wedging of
6 the bone. You can have a compression of the disc itself but
7 not a term of compression and wedging of the lower back.
8 There could be a medical term kyphosis or soliosis of a
9 twisting or turning of the back but not a wedging and
10 compression of the whole back, no sir.

11 Q Dr. Bortnick, are you familiar with the life
12 expectancy tables of individuals in the State of Virginia?

13 MR. GESCHICKTER: I don't think he has to go into
14 that.

15 THE COURT: You don't have to go into that. It is
16 in the Code they will be admitted.

17 MR. HOLMES: All right.

18 THE COURT: Number 11.

19 (The document previously
20 referred to was marked for
21 identification as Plaintiff's
22 Exhibit No. 11 and received
23 in evidence.)

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1 CROSS EXAMINATION

2 BY MR. GESCHICKTER:

3 Q I will put these in some sort of chronological

4 order so we can go through these -- it looks like these are

5 duplicates of copies?

6 A Yes.

7 Q By the way, did you just happen to have that

8 needle in your pocket today, Doctor?

9 A No, I was asked to bring it.

10 Q Who asked you to bring it?

11 A Mr. Holmes.

12 Q Doctor, drawing your attention to the original

13 note of the emergency room as far as history is concerned,

14 what history was obtained from the patient in the emergency

15 room?

16 A Well, the emergency room clerk or the doctor or --

17 are you talking about this record?

18 Q Yes, sir.

19 A This is not my record.

20 Q I understand that.

21 A (Continuing) Coughed this morning while in shower.

22 Q He said he coughed while showering?

23 A Yes.

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1 Q And what did Mr. Maxwell tell you with regard to
2 history?
3 A I have down there, 32 year old, white male,
4 twisted in shower, hurt low back -- had back manipulation --
5 pain much worse. That is what I was told.
6 Q Did Mr. Maxwell tell you how he twisted in the
7 shower?
8 A No, he was in considerable pain and I really wasn't
9 trying to go into it too far at that time.
10 Q Did you ever discuss with him how he twisted in the
11 shower that morning?
12 A I have no record of going into that twist.
13 Q Other than your notes and your file, do you have
14 any independent recollection of the conversation with Mr.
15 Maxwell?
16 A We just talked about the manipulation and so
17 forth.
18 Q You indicated that you felt a manipulation which
19 his knee was bent up to his chest could be a precipitating
20 factor in a disc problem?
21 A Yes, sir.
22 Q Exactly what manipulation was described to you by
23 Mr. Maxwell?

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1 A He was bent up either on his back -- I think more
2 on his side and pressed up in this sort of pretzel type
3 position. There was another where he was lying, I think he
4 was in a prone position and pushed that way, that is not the
5 one that I would think would be the vital problem. I think
6 it is the other one -- a refraction injury.
7 Q Could you please describe for me in detail how
8 Mr. Maxwell said that pretzel procedure was performed on
9 him?
10 A It has been some time since we had that in detail.
11 This bending, this severe flexion is really the outstanding
12 significant portion of it that I recall.
13 Q Do you have that anywhere in your notes?
14 A No, I do not.
15 Q So other than your recalling that Mr. Maxwell
16 told you he was put in that position, his knee against his
17 chest, do you have any other knowledge of what procedure was
18 performed on him?
19 A That is correct.
20 Q You indicated that Mr. Maxwell described another
21 procedure that was performed on him?
22 A Yes.
23 Q What was that?

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1 A He was laying -- I don't recall which way and a
2 portion of the middle of the table was moved and he was
3 pressed down upon.
4 Q I don't know about the ladies and gentlemen of the
5 jury, I don't know the difference in how he could be laying?
6 A On his stomach or on his back.
7 Q All right, either way would not have any significant
8 bearing on --
9 A (Interposing) It would add insult to injury but I
10 don't think that would be in my opinion the one that really
11 opens up the space and pulls this thing widely open so a disc
12 can pop out.
13 Q What kind of force has to be applied to you when
14 you are in this pretzel shape in order to really cause a
15 disc to herniate?
16 A I cannot give you pounds per square inch but how
17 he described it as a significant, heavy force -- it is some-
18 thing that is not a tap. It is a hard push. It will vary
19 from individual to individual but a very significant hard
20 push as he described.
21 Q What I am trying to get at sir, is what he described
22 to you as the force that was applied?
23 A He said it was a severe force, a very hard force.

1 Q Did he say if it was enough to cause him pain
2 when it was done?
3 A I don't know whether he used that exact word or
4 not.
5 Q You know what I mean?
6 A Yes, it was a startling type thing. It was a
7 startling, heavy, forceful -- I don't know whether to say
8 the word painful or not -- it was a good hard force.
9 Q Would you expect any pain to be associated with
10 it?
11 A I would.
12 Q Expressly would you expect any pain in the area
13 involved?
14 A Yes, I would, it is possible that he said that.
15 Q Honestly, I am not arguing with you about that --
16 what I am trying to get at -- I am not trying to test your
17 memory as to what Mr. Maxwell said in any way, shape or
18 form -- what I am asking you really is if when the disc
19 herniated you would expect pain in that area?
20 A Yes, I would expect pain in the area.
21 Q At the time of the manipulation?
22 A Yes.
23 Q On the 18th, you indicated there were x-rays taken?

1 A Yes, sir.

2 Q Are you certain of that, I don't have that, you

3 have an x-ray report here?

4 A It is in the records that were given to me on the

5 first admission -- I have it in the report there.

6 Q What was the date of the x-ray?

7 A 4-18-74.

8 Q Is that the date that is put on there, the date

9 it is taken?

10 A Usually.

11 Q The x-ray report indicates there was some

12 narrowing at the L-4, 5 space?

13 A Yes.

14 Q That some other test would have to be done?

15 A It would require more definitive evaluation --

16 they are suggesting a myelogram but not in so many words.

17 Q You treated Mr. Maxwell for that four days in the

18 hospital, how?

19 A Bedrest, traction and muscle relaxants.

20 Q On the fourth day, what was his condition, as

21 compared to the time he was admitted?

22 A He was improved.

23 Q Do you have anyway of describing to us what that

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1 means?

2 A The pain and so forth diminished but he was never

3 really totally, fully free of pain.

4 Q At the time he left the hospital on the 18th, did

5 you order bedrest at home, did you order that, what did you

6 order?

7 A This would be from memory, but basically to take

8 it easy, don't lift anything heavy and to use the muscle

9 relaxants which I assume I prescribed because the next visit

10 I said to continue them, just continual, the treatment in the

11 usual fashion.

12 Q When you say not to lift or do anything heavy,

13 what activities could he engage in at home, or after he

14 left the hospital?

15 A It is easier to say what he couldn't do than what

16 he could do. He couldn't do any heavy lifting or long

17 walking like a lot of stairs, heavy activities such as

18 going out to play golf, dig ditches and so on.

19 Q Could he drive a car?

20 A Yes, he could.

21 Q Could he sit at a desk?

22 A Yes.

23 Q Could he move around in the apartment and in the

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1 neighborhood for instance?

2 A Yes, I would think so.

3 Q Then the next time you saw Mr. Maxwell was on the

4 14th of May, is that correct?

5 A Yes.

6 Q At that time he indicated to you he had been doing

7 some of the heavy work?

8 A I don't have here (indicating) that he had been

9 doing heavy work. He said he had been working, however --

10 in other words, I told him not to and however he had been

11 working anyway and he had had some pain in his back.

12 Q What kind of work was he doing?

13 A I didn't put down what kind of work he was doing.

14 Q But you felt it was all right for him to do light

15 work?

16 MR. HOLMES: I object to that question, Your Honor.

17 He is putting words in his mouth.

18 THE COURT: It's proper cross examination.

19 A (Continuing) I think he could do light things.

20 BY MR. GESCHICKTER:

21 Q So your notes would indicate that he had been

22 doing something more than you had suggested?

23 A I may have suggested not to go back to work at all,

1 that is what I may well have suggested. However if he had
2 gone back to work, he may have gone back to work against my
3 advice at all.
4 Q Do you know what work he was doing other than
5 moving the equipment around?
6 A No.
7 Q So you don't know what work he was doing or what
8 work he was not supposed to do?
9 A No, I didn't document what work he was doing.
10 Q Is there anything in your records that indicate
11 you told him not to work at all?
12 A The implication is there, but not to work but
13 whenever I see this, however he had been working, that implies
14 to me that I probably told him not to do any work. I can't
15 say that I told him that because I have not documented it
16 unfortunately.
17 Q On your examination on the 14th of May, 1974, you
18 say the straight leg test is negative. What is a negative
19 straight leg raising test indicative of?
20 A Let me explain as the nerves come out of the back
21 they come around this way. If a disc is pushing into them
22 markedly, a great deal of pressure, that is as you lift the
23 leg you stretch the nerve around the disc and it causes pain.

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1 In this instance the straight leg raising test was negative
2 so that would indicate one of two things, the disc was not
3 at that time severe or that the disc was herniating centrally
4 in the middle of the spine and not catching the nerves as
5 they came out the side.
6 Q You eventually when you operated found the
7 herniation on the right side?
8 A Yes.
9 Q So you would have expected that to elicit some
10 response on your straight leg raising test --
11 A (Interposing) If the disc had been well out pressing
12 on the right side, I would have.
13 Q So your straight leg raising test on the 14th would
14 indicate that it was not pressing on the right side -- the
15 side which you eventually found the herniation on?
16 A I would say not significantly pressing on that
17 side.
18 Q You state there that you did give a prescription
19 of Robaxon on the 14th?
20 A Yes.
21 Q You say you told him to lose weight, what was the
22 significance of that?
23 A To try and take any excess pressure off of his back.

1 Q Do you recall anything about his weight at the
2 time?
3 A No, sir.
4 Q You indicated at that time, on the 14th of May,
5 that you saw no evidence of any permanent neurological
6 damage from this back injury, what do you mean by that?
7 A I didn't find any loss of strength or sensation
8 at that time. There were no neurological changes. The
9 reflexes in the leg being absent could be a natural thing
10 provided they were symmetrical and they were in him so it
11 may have been just the way he was built.
12 Q So your tests didn't indicate anything significant
13 as far as a herniated disc at that time?
14 A At that time it did not show any significant
15 herniated disc.
16 Q By the way, if I recall correctly and you can
17 correct me if I am wrong, your notes after the operation,
18 the two examinations indicate that the reflex is still
19 absent in his legs?
20 A Yes.
21 Q Would you normally expect that after disc surgery
22 or does that mean that he probably never had it?
23 A If a reflex is absent prior to disc surgery, because

1 of the disc, it most commonly does not return.

2 Q You saw Mr. Maxwell again on the 16th day of August,

3 1974?

4 A August 12, I have my records --

5 Q (Interposing) I'm sorry, he called on August 16th.

6 A Yes, he had -- I had seen him the 12th. At that

7 time he did have a lot of changes. He was getting tilted

8 over and I told him to call to see how he was doing with

9 complete bedrest at home.

10 Q All right. On August 12th when you saw him and

11 he was tilted over, what is the significance of that?

12 A The significance is that the disc is now starting

13 to push out a little bit further hitting those nerve roots

14 coming out of the spine causing more pain, more spasms of

15 the muscles which will cause tilting. It is interesting

16 frequently the patient will tilt away from the side the

17 disc is herniated. In other words, he is tilting to the left

18 and the disc is coming out the, to the back, to try to open

19 the space up to give that nerve a little bit more room --

20 trying to get away from the pressure of the disc pushing on

21 the nerve.

22 Q Is this noticeable to a lay observer, the tilt?

23 A If you looked at him from the back with his clothes

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1 off, you could certainly see it.

2 Q I am asking you about Mr. Maxwell?

3 A I don't remember, I examined him with his clothes
4 off obviously. He did have a tilt which he didn't have
5 before.

6 Q Then he called on the 16th and said he was still
7 not getting total bedrest?

8 A Yeh and he had not done it as well as he thought
9 he should have and he wanted to try some more. He called
10 back at my request. He was not getting total bedrest which
11 I wanted. I don't recall exactly how much he was or wasn't
12 but he wasn't doing as much as I wanted. He told me he was
13 standing straighter and that he wanted to try more bedrest
14 at home.

15 Q By the way, going back to the 12th, on the 12th
16 in the first paragraph you say he has been unable to do
17 any heavy activities?

18 A Right.

19 Q So that would indicate that on the 12th was the
20 first time as opposed to the note we have before we were
21 trying to decide if he was doing heavy work --

22 A (Interposing) It would indicate that he had tried
23 at least once.

1 Q To do heavy work?

2 A Heavy activity.

3 Q What do you mean by heavy activity?

4 A Anything from trying to mow the lawn to picking
5 up a case of milk. Probably I questioned him about many of
6 his activities.

7 Q You just don't remember?

8 A Just heavy activity, anything more than light
9 work.

10 Q Anything more than 25 or 30 pounds?

11 A I would think so, yes.

12 Q Now, finally you did do the myelogram and operation?

13 A Yes, sir.

14 Q You indicated that after the operation he was
15 discharged as improved. I assume that you expect -- that
16 was on September 17th. I assume that he would still have
17 some pain from the operation itself?

18 A Yes.

19 Q You mean improved from the symptoms of a herniated
20 disc?

21 A Correct. The particular pain in the leg, the
22 pain he came in for -- the patient goes out with a different
23 kind of pain. He doesn't have the pain for which he is

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1 operated, that is taken care of. He has a surgical pain
2 and soreness in the back.
3 Q Did Mr. Maxwell ever complain of radicular
4 pain in the leg?
5 A It was going away to the right side of the back.
6 I don't recall it going all the way down his leg. I
7 testified that it moved into the right area of the back
8 radiating away from the spine -- this type pain was gone
9 but in the center where the incision was, that certainly
10 was sore.
11 Q Is it true that you didn't see Mr. Maxwell again
12 until January 9th of 1975?
13 A No, I saw him five weeks after surgery, 10-15-74,
14 five weeks post-op, right L-4, 5 disc surgery. Feels good,
15 no further back or leg pain.
16 Q Mr. Maxwell told you on October 15th, 1974 that
17 he felt good?
18 A Yes.
19 Q That he had no back pain at all?
20 A That is what he said.
21 Q Did you do an examination of him at that time?
22 A Yes, his low back was still tilted a little bit
23 to the left with some muscle tightness that had not fully

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1 resolved. Motor sensations were intact. Reflexes were
2 still absent in his legs. The straight leg raising test
3 was negative bilaterally. I said he could return in one
4 month and maybe could start doing some light work and like
5 I said before unless I missed an office visit or something,
6 he came back in, oh, about six weeks or something like that --
7 he came back January 9th of '75.
8 Q In the January note -- would you read it?
9 A No pain in back or leg. Legs tire after working.
10 Low back no longer tilted. Motor sensation intact. Reflexes
11 absent in legs. Straight leg raising test negative. So his
12 only complaint was that he was tiring after walking, that
13 his back and legs were tiring.
14 Q Did he tell you how much walking it took to tire
15 him?
16 A He may have. I didn't put it down on here.
17 Q Again in January of 1975, Mr. Maxwell said he
18 had no pain?
19 A That is correct.
20 Q Do you think you would put that -- your notes
21 are accurate?
22 A Yes.
23 Q Doctor, one last thing in your notes, again I think

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1 this is after the January -- yes, I'm sorry, this is after
2 the January visit in a typed note signed by you?
3 A Yes.
4 Q Would you state your prognosis?
5 A The patient in my opinion will have a 15 percent
6 partial permanent impairment in the low back.
7 Q Of his low back?
8 A Yes.
9 Q So you felt he would have a 15 percent partial
10 permanent impairment in the function of his low back?
11 A That is right.
12 Q What does that mean, Doctor?
13 A That means that the 15 percent of the low back, if
14 you want to try and get it down to figures, 15 percent --
15 that portion of his law back activity -- impaired means
16 activity that he cannot do. The activity of heavy work.
17 That 15 percent of the low back activity -- the activity
18 that he can't do, that is what that basically means.
19 Q Maybe I misunderstood you. Before you said some-
20 thing about 100 percent disability?
21 A Right -- that's a 15 percent impairment disables
22 him from doing heavy activities 100 percent.
23 Q Heavy activities?

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A Yes.

Q Such as what?

A Such as heavy lifting.

Q When he had the disc still you said 15 to 30 pounds, what do you say now?

A I would now say not certainly not much more than that.

Q Anything else he can't do?

A All specifics of heavy things, long periods of walking, long periods of standing, these things will weigh down on the low back.

Q For instance when you say long period of walking now --

A (Interposing) Standing on his feet for an hour, two or three, he is going to hurt.

Q Where?

A In the low back.

Q How about walking?

A It is difficult to give you an exact point, several blocks, several miles; it's hard for me to tell you where the cutoff point is. Walking for long periods of time, an hour or two will be uncomfortable.

Q For an hour or two?

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A It is hard to tell you how far or how long, it's --

Q (Interposing) Let me ask you this. Does it depend on the condition to some extent of the individual, of the physical condition they are in as far as their muscular condition in general and supportive structures of the low back?

A To some degree but not to a -- I would say a mild degree.

MR. GESCHICKTER: I have no further questions.

THE COURT: Any redirect?

MR. HOLMES: No, Your Honor, that is all I have.

(Witness excused.)

Whereupon,

EILEEN MAXWELL,

was called as a witness by and on behalf of the plaintiff, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOLMES:

Q Would you state your full name please?

A Eileen Maxwell.

Q What is your present address?

A 1500 Army-Navy Drive, Apartment 701, Arlington, Virginia.

1 A The way he acts, the way he sits sometimes and he
2 does say that the pain is fairly constant.
3 MR. GESCHICKTER: I have no further questions.
4 MR. HOLMES: No redirect.
5 THE COURT: You may be excused.
6 (Witness excused.)
7 MR. HOLMES: Your Honor, at this time may I
8 approach the bench?
9 THE COURT: You may.
10 (Whereupon, the following bench conference
11 was held out of the hearing of the jury.)
12 MR. HOLMES: Your Honor, Dr. Levin who is the
13 expert witness is to be here at 3:30. I would like at this
14 point to discuss with you a hypothetical question I am going
15 to give to the doctor --
16 THE COURT: (Interposing) Let's take a few minutes
17 recess.
18 (Whereupon, a brief recess was taken.)
19 MR. GESCHICKTER: If it please the Court, as far as
20 the question is concerned, I don't know what Dr. Levin's
21 qualifications are. I know he is an orthopedic surgeon.
22 I don't know if he is a chiropractor.
23 MR. HOLMES: Your Honor, I will establish that. If

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1 you want me to represent right now what he is, I will be
2 glad to do that.
3 THE COURT: Go ahead.
4 MR. HOLMES: He is an orthopedic surgeon. He is
5 an expert in the art of manipulation. He has studied it
6 thousands of hours. He has made speechs, given talks and
7 he has done these back maneuvers on thousands of patients.
8 He has talked to chiropractors. He has given lectures. He
9 has talked to his patients and he will testify that what he
10 does is the same thing chiropractors do.
11 MR. GESCHICKTER: First of all, Your Honor, I would
12 object to Dr. Levin saying the following conduct of --
13 MR. HOLMES: (Interposing) On that score, Your
14 Honor, I have a memorandum prepared about his acceptability
15 as an expert witness.
16 THE COURT: You object to the form of the
17 question, Mr. Geschickter?
18 MR. GESCHICKTER: Yes, sir. As far as the form of
19 the question itself is concerned, Your Honor, Mr. Holmes asked
20 about the manipulation and then Mr. Holmes includes in his
21 hypothetical question the fact that a disc was removed. I
22 think the hypothetical question is framed in such as way as
23 to ask Dr. Levin as to whether or not he has an opinion as to

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1 whether the conduct of the average -- he says the average
2 practitioner in the field of manipulative therapy in
3 Northern Virginia and I don't know what that is and then
4 he describes how he manipulated; the fact he had a disc
5 removed I don't think has anything to do with the manipula-
6 tion, whether it is acceptable to manipulaters in Northern
7 Virginia and for that reason I think the question is improper.
8 I think if the question is put to the doctor at all, it
9 should be phrased as to manipulation. The fact that a disc
10 was later removed might or might not have any significance
11 and I don't see how it should be included in this question.
12 That is one problem and the second problem I have, the use
13 of the phraseology, average practitioner of manipulative
14 therapy in Northern Virginia. Dr. McCaffrey is a chiropractor
15 and I don't know who else does manipulations besides
16 chiropractors but certainly I don't think he should be held
17 to any other standard other than the ones the State of
18 Virginia requires of him in order to be a chiropractor.
19 The instruction says people in like practice, medical men
20 in like practice is the way the instruction of the law reads,
21 Your Honor. Again what the law says is a chiropractor, a
22 poditrist or doctor are held to the standards of people in
23 their profession in the community.

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1 THE COURT: The things that worry me are, is
2 this doctor going to say the things that were wrong with
3 the treatment by the defendant was the pushing of his knee
4 up to the chest?
5 MR. GESCHICHTER: If it please the Court, as far
6 as this question is concerned I was hoping to get to that
7 on a motion to strike. I don't know if Dr. Levin is even
8 prepared to address himself to that question or not.
9 THE COURT: This question does not cover the facts
10 in this case.
11 MR. HOLMES: Your Honor, Dr. Levin will testify
12 there is a relationship between what happened and the
13 herniated disc. I have a report that says that.
14 THE COURT: You mean he is going to contradict
15 Dr. Bortnick?
16 MR. HOLMES: Dr. Bortnick said he felt the disc
17 was herniated with that manipulation. Dr. Bortnick was
18 clear though that he was not certain as to what was done
19 and what the real causation was.
20 THE COURT: (Interposing) I'm sorry, Mr. Holmes,
21 but you asked him the question as to whether or not within
22 the realm of medical certainty he had an opinion as to the
23 cause of this treatment with the injury and he said yes he

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1 did and you said what is it and he said, I thought -- and
2 I was surprised. I don't know if you were but he said, the
3 cause of this injury was the knee,pushing the knee up to the
4 chest.
5 MR. HOLMES: I think he said, Your Honor, the cause
6 was the manipulation.
7 THE COURT: Well whatever the manipulation was --
8 the manipulation he was talking about was pushing the knee
9 up to the chest.
10 MR. HOLMES: But he also said had "added insult
11 to injury." He wasn't exactly prepared to pin himself down on
12 it.
13 THE COURT: Anyway, I don't think your question is
14 proper in view of the testimony today.
15 MR. HOLMES: Well, Your Honor, Dr. Levin is prepared
16 to go into the question of causation. He is an expert in
17 orthopedic surgery.
18 THE COURT: If he does, then you will have another
19 thing. You will have two doctors contradicting one another --
20 come back in ten minutes.
21 *
22 (Testimony of Dr. Steven Levin.)
23

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1 (Whereupon, at 3:30 p.m., the trial was
2 concluded.)
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1 Whereupon,

2 DR. STEPHEN LEVIN,

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. HOLMES:

8 Q Doctor, would you state your name, please?

9 A Stephen Levin.

10 Q Dr. Levin, what is your occupation?

11 A I'm an orthopedic surgeon.

12 Q Could you state what specialty or specialties you

13 have?

14 A Well, orthopedic surgery is the study of bones

15 and joints, and the muscular skeletal system.

16 Q Are there any other medical skills with which you

17 are acquainted?

18 A Yes, sir, part of that skill is the use of

19 manipulative techniques in treating muscular trouble disorders.

20 Q What do you mean by manipulative techniques?

21 A This is the application of force to joints. My

22 concept of it is to restore motion in these joints.

23 Q Dr. Levin, how long have you been practicing

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1 medicine?

2 A A little over ten years, now, sir.

3 Q Where?

4 A In Alexandria.

5 Q Have you maintained an office in Alexandria all of

6 that ten years?

7 A Yes.

8 Q Where is that located?

9 A My present office is located at 5021 Seminary Road,

10 Alexandria, Virginia.

11 Q What degrees do you hold as a doctor, in terms of

12 both orthopedic surgery and the manipulative art that you

13 spoke of?

14 A I am a graduate of medical school, which gives me

15 an M.D. degree, then took a year of internship training.

16 I have four years of special training in orthopedic surgery,

17 including a year at graduate school at the University of

18 Pennsylvania, which I did my intensive study in manipulation

19 at that time. I am Board certified in orthopedic surgery,

20 and a fellow of the American College of Surgeons and American

21 College of Orthopedic Surgeons. I am also a member of the

22 North American Academy of Manipulative Medicine.

23 Q What is the North American Academy of Manipulative

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1 Medicine?

2 A This is the group of physicians from the United

3 States and Canada, who treat the disorders of the muscular,

4 skeletal system, using the manipulative techniques.

5 Q Are these individuals all M.D.'s?

6 A They are now all M.D.'s, yes, sir. They have

7 varied backgrounds, including several who were chiropractors

8 at one time, and several who have been osteopaths.

9 Q Have you spoken to these chiropractors in this

10 organization?

11 A Yes.

12 MR. GESCHICKTER: I object, your honor. I don't

13 see how Dr. Levin, speaking to the chiropractors would be

14 relevant in this proceeding.

15 THE COURT: I will let him answer the question.

16 THE WITNESS: Yes, sir, I have discussed

17 manipulative techniques with the chiropractors who are now

18 in this group.

19 THE COURT: In what group?

20 THE WITNESS: The North American Academy of

21 Manipulative Medicine.

22 BY MR. HOLMES:

23 Q How many times have you talked with them?

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1 A I was at a three day meeting in Toronto, Canada,
2 in the Fall of this year. I spent several hours discussing
3 various aspects of it with members of the group, including
4 the chiropractors.
5 Q Do you compare the techniques that you use with
6 the techniques they use?
7 A Yes, sir, I have.
8 Q What did you find?
9 MR. GESCHICKTER: Your honor, if it please the
10 court, I would object to this category of questions that is
11 being put to Dr. Levin, on the ground, first of all, I think
12 it is hearsay, what these chiropractors may or may not have
13 told him. That would fall exactly in the realm of hearsay.
14 And secondly, on the grounds, we don't know what procedures
15 we're discussing, and what relevance --
16 THE COURT: (Interposing) I will let him go
17 ahead and answer the question, and I'll overrule the
18 objection.
19 THE WITNESS: We discussed manipulative
20 techniques. This is a teaching, training program we have.
21 As a matter of fact, we're having another one in Virginia
22 in the Fall of -- which I will be teaching some courses; and
23 we discussed and reviewed some different manipulative

1 techniques. Overall, our teaching, our manipulative
2 techniques are either the same or very similar.
3 BY MR. HOLMES:
4 Q Have you had any other contact with chiropractors
5 or chiropractic medicine?
6 A No, sir, not directly.
7 Q Have you talked to your patients about it?
8 A Yes, I have talked to patients many times.
9 Q What have you discussed with them?
10 MR. GESCHICKTER: Again, your honor, I am going
11 to object on the grounds of relevancy and hearsay.
12 THE COURT: I don't know for sure where this is
13 leading, but I'm going to let him go ahead, Mr. Geschickter,
14 hoping we will get someplace. I will overrule the
15 objection.
16 THE WITNESS: When I have used manipulative
17 techniques on these patients, they have said, my techniques --
18 THE COURT: (Interposing) I don't want to know
19 what the patients say. It is pure hearsay.
20 BY MR. HOLMES:
21 Q Have you treated your patients with manipulative
22 techniques in the low back?
23 A Yes.

1 Q How many times?

2 A Innumerable times, I have been using the technique

3 over ten years. Probably closer to -- since training, it

4 is probably about twelve years, now.

5 Q How many patients would you say you have used

6 these methods on?

7 A I see on an average of twenty patients a day,

8 four days a week, and use some manipulative technique on

9 at least half of them.

10 Q Doctor, are you familiar with the average amount

11 of skill and knowledge of the average practitioner in

12 Northern Virginia of manipulative medicine?

13 THE COURT: I want to ask a question first.

14 What difference is there, if any, between chiropractic

15 medicine and manipulative medicine?

16 THE WITNESS: It's the primary concept of why

17 you're doing what you're doing. It is a theoretical concept

18 of a -- the purpose that manipulations are performed, rather

19 than the exact manipulative technique.

20 BY MR. HOLMES:

21 Q Are you saying the techniques are similar?

22 A I am saying the techniques are similar or identical.

23 I am saying the reason why a chiropractor manipulates goes on

1 a completely different theory than on why a medical physician
2 would manipulate.
3 Q What about the actual, physical motions themselves?
4 A The physical techniques, in my opinion, are
5 identical.
6 Q Are you familiar with the amount of skill of the
7 average practitioner of manipulative medicine in Northern
8 Virginia?
9 A Are you including chiropractors?
10 Q Yes, sir.
11 A I have an understanding of what they do, yes, sir.
12 Q Are you familiar with the amount of care ordinarily
13 exercised by the average general practitioner, that is
14 chiropractor, or individual practicing manipulative techniques?
15 MR. GESCHICKTER: If it please the court, I'm
16 going to object to that question. First of all, Dr. Levin
17 should be asked to address himself to chiropractors.
18 THE COURT: That is right.
19 MR. GESCHICKTER: Mr. Holmes is asking chiropractors
20 or --
21 THE COURT: (Interposing) I am not interested
22 in manipulative medicine.
23 MR. HOLMES: May we approach the bench, your honor?

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1 (Whereupon, the following bench conference was
2 held out of the hearing of the jury.)
3 MR. HOLMES: Your honor, I would ask if the court
4 has read the memorandum I left with him on this question,
5 because there are some exceptions in Virginia cases, and
6 there are --
7 THE COURT: (Interposing) No, I have not.
8 Where is it? When did you give it to me?
9 MR. HOLMES: Right before the recess, your honor.
10 There are some exceptions to this rule.
11 THE COURT: What I am saying, he has to be able
12 to answer the question, that he is familiar with the
13 standard of care exercised by people in the chiropractor
14 field -- that is, the care exercised by persons in that
15 field in Northern Virginia.
16 MR. HOLMES: We're not trying chiropractic
17 medicine. We're trying what this man did to my client's
18 back, and is it -- we're not trying the science of
19 chiropractic medicine. That is not on trial. What is on
20 trial is the physical activity that was involved, and there
21 was obviously negligence.
22 THE COURT: Ask him if he is familiar with the
23 standard of care and skill that is exercised by the average

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1 member of the chiropractic field in this area.

2 MR. GESCHICKTER: And then I would ask that

3 foundation be laid.

4 MR. HOLMES: I have done that, your honor.

5 (Whereupon, the bench conference was concluded, and

6 the proceedings continued within the hearing of the jury.)

7 BY MR. HOLMES:

8 Q Are you familiar with the amount of care

9 ordinarily -- the standard of care, the amount of care and

10 skill ordinarily exercised by the average practitioner of

11 chiropractic medicine in Northern Virginia?

12 A I'm not sure how to answer the question.

13 THE COURT: You have to know how to answer it.

14 THE WITNESS: I am familiar with the manipulative

15 techniques.

16 THE COURT: That is not the question. The

17 question is of the practice of chiropractic medicine, if

18 I'm using the right term, in Northern Virginia.

19 THE WITNESS: I would have to separate the

20 manipulative end of it from the other ends that they use.

21 They use other modalities that I am not familiar with. I

22 can testify to the manipulative treatments that they use.

23 I am not -- I don't follow the theories they use for other

1 treatment, or for that matter, manipulation. But I am
2 familiar with the manipulative techniques. I am not familiar
3 with the other modalities of treatments that they use.
4 I feel I am qualified to say that I am familiar with the
5 skill used, when they are using manipulative techniques.
6 THE COURT: Do you want to ask him some questions,
7 Mr. Geschickter?
8 MR. GESCHICKTER: Yes, your honor.
9 CROSS EXAMINATION
10 BY MR. GESCHICKTER:
11 Q Dr. Levin, what is the basis for your saying you
12 have knowledge of the standard of care required of the
13 practitioners of chiropractic medicine here in Northern
14 Virginia?
15 A I have discussed chiropractic medicine in great
16 detail with several doctors who are also chiropractors.
17 The schools of chiropracty are primarily in the midwest,
18 Iowa and Illinois. The Parma School is a national
19 chiropractic school. They, themselves, have different
20 modalities of treatment, besides this manipulative
21 technique. But I have discussed in great detail -- and
22 these are national-type standards. I am also familiar with
23 patients of mine who have been under chiropractic care and

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1 have had manipulative techniques utilized in this area, and
2 I am familiar with what has been done to them.
3 Q Doctor, are you familiar with what is required
4 for a chiropractor to become licensed to practice chiropractic
5 medicine in Northern Virginia?
6 MR. HOLMES: I object to that question, your
7 honor. That is not relevant.
8 THE COURT: I don't know until I hear his answer.
9 THE WITNESS: I know they are required to pass
10 certifying requirements of the state.
11 BY MR. GESCHICKTER:
12 Q Do you know what those requirements are?
13 A No, sir.
14 Q Doctor, do you know what training in chiropractic
15 medicine, that chiropractic doctors are forced to take after
16 they have become licensed in the state of Virginia?
17 A No, sir.
18 Q Are you familiar, doctor, with whether or not
19 practitioners of chiropractic medicine are forced to be
20 certified, recertified at regular intervals?
21 A I am not familiar with those regulations.
22 Q Are you, again, familiar with --
23 MR. HOLMES: (Interposing) I object to those

1 questions. This has nothing to do with the standards in
2 this case, your honor.
3 THE COURT: Objection overruled.
4 BY MR. GESCHICKTER:
5 Q Doctor, are you familiar with whether or not there
6 is an association for chiropractic medicine here in Northern
7 Virginia?
8 A I understand there is, sir.
9 Q What do you mean, you understand?
10 A I have heard there is an association for
11 chiropractors.
12 Q Have you ever attended any of the meetings?
13 A No, sir.
14 Q Do you know if it holds seminars or training for
15 its members?
16 A I do not, sir.
17 Q Do you know the terminology normally applied to
18 the parts of the body and procedures normally used by
19 chiropractors?
20 A No, sir.
21 Q Have you ever taken any courses in chiropractic
22 medicine in any of these chiropractic schools you mentioned?
23 A No, sir, I have not.

1 Q Have you ever taken any courses in chiropractic
2 medicine anywhere else?
3 A If you are referring to manipulative --
4 Q (Interposing) No, sir, I am talking about
5 chiropractic medicine.
6 A Being as I am not sure exactly what that encompasses,
7 if that encompasses -- if you are saying --
8 Q (Interposing) Are you saying that you don't know
9 what a course in chiropractic medicine would be?
10 A I know that the basic concepts of chiropractic
11 medicine are related to manipulative techniques of the spine.
12 There are other facets of chiropractic medicine that I am
13 unfamiliar with.
14 Q But what I am asking you, really, doctor, is this:
15 are you aware of the standards of chiropractic medicine in
16 Northern Virginia, applied to themselves, their association,
17 their board, their peers, the chiropractic peers?
18 A I do not know the details of their association, no.
19 THE COURT: Dr. Levin, is it possible that there
20 would be a different standard between your practice in
21 manipulative medicine and the chiropractors standard in
22 chiropractic medicine?
23 THE WITNESS: Sir, again, I have to get back to

1 manipulations. If you apply my standard of manipulations
2 to the chiropractors standard of manipulations, I would say
3 there is no difference.
4 BY MR. GESCHICKTER:
5 Q How can you say that?
6 A I can say that the techniques of manipulation are
7 the same.
8 THE COURT: Would it follow those standards which
9 guide and govern the practice of chiropractors, that guide
10 you as an orthopedic surgeon, in manipulating the bones of
11 a patient?
12 THE WITNESS: Yes, sir, I have said, they would
13 frequently manipulate for other reasons than for what I
14 would manipulate. So, their standard of why they do
15 manipulations would be different. The techniques they use
16 for manipulation, in my concept of manipulation, would be
17 the same.
18 THE COURT: Anything further?
19 MR. GESCHICKTER: For the record, I would have to
20 say, I would object to the question of the court, and the
21 response elicited. I don't think the doctor has shown that
22 he knows anything.
23 THE COURT: I don't think he is qualified to

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1 testify as to the standard exercised in Northern Virginia
2 in this profession. I would sustain the objection to the
3 question.
4 MR. HOLMES: May we approach the bench, your
5 honor?
6 (Whereupon, the following bench conference was
7 held out of the hearing of the jury.)
8 MR. HOLMES: Your honor, this is my last witness.
9 I have no other expert to call, and I can question him as
10 to causation and his feeling about what happened, and if the
11 standard of care was used for people doing manipulations.
12 THE COURT: I am sorry, but I don't think he is --
13 I don't think he can testify to the standard of care and
14 skill that is required of persons in this profession in the
15 Northern Virginia area. He has so testified. I am sorry.
16 MR. HOLMES: Your honor, he does not do the
17 exact same thing. He says that he has different standards --
18 I can testify as an expert -- he doesn't have different
19 standards, not as to manipulative medicine.
20 THE COURT: I cannot help it. The objection to
21 answering the hypothetical question is sustained.
22 Members of the jury, would you retire, please?
23 (Whereupon, the jury was temporarily excused.)

1 THE COURT: Dr. Levin, you may go back to your
2 seat.
3 MR. GESCHICKTER: Your honor, I don't plan to
4 call the doctor, if you wish him excused.
5 THE COURT: All right.
6 MR. GESCHICKTER: Do I understand that completes
7 the plaintiff's case, your honor?
8 MR. HOLMES: I do note my objection and exception,
9 your honor.
10 THE COURT: I understand.
11 MR. GESCHICKTER: Does that complete the
12 plaintiff's case?
13 MR. HOLMES: I have no more witnesses.
14 THE COURT: The plaintiff rests.
15 MR. GESCHICKTER: If it please the court, I have
16 a motion to make. I would move to strike the plaintiff's
17 evidence, and bring summary judgment to the defendant. If
18 it please the court, the exact same case was before Judge
19 Morris of this court. Judge Morris ruled that there must
20 be expert testimony as to the standard of care requested.
21 In that case, a physician, in order for a case to go to the
22 jury, there must be expert testimony to tell the jury what
23 standard of care must be applied to the defendant on trial --

1 malpractice or medical negligence case. I might say, your
2 honor, that I tried exactly that case previously, before
3 Judge Morris, in which a podiatrist was on trial, and in that
4 case also, your honor, no medical testimony was presented as
5 to the standard of care of a practitioner in podiatric
6 medicine, and Judge Morris granted the motion to strike.
7 Judge Morris's ruling in the latter case was
8 appealed to the Supreme Court of Virginia, and I am ashamed
9 to say to the court that I don't have the exact citation.
10 I believe it is 215 Virginia. But in that case, the
11 Supreme Court sustained the judge's ruling, and said a jury
12 must have expert testimony as to the standard of care
13 required of a practitioner on trial.
14 Your honor, here in this case, there is absolutely
15 no testimony as to the standard of care required by an
16 expert witness. The only expert witness to testify was
17 Dr. Bortnick. Dr. Bortnick gave his opinion as to whether
18 or not manipulation, a manipulation caused the herniation
19 of the disc in the plaintiff's back, and Dr. Bortnick gave
20 no opinion and offered no opinion, and was asked for no
21 opinion as to whether or not the manipulation performed on
22 the plaintiff met any standard of care and/or any other --
23 neurosurgery, for which Dr. Bortnick is qualified to testify

1 to, or any other standard. So, there is absolutely no
2 standard introduced by the plaintiff.
3 As the result of that, the plaintiff cannot go
4 forward with his case.
5 THE COURT: All right, Mr. Holmes?
6 MR. HOLMES: It is clear that Dr. Levin's
7 testimony is not going to be allowed, but there is authority
8 in this state. There is an exception to the rule that has
9 to be expert witnesses, and I have outlined this in the
10 memorandum I gave to the court. And that is where the
11 testimony of the witness, as to matters of common experience
12 and observation -- this was a case where an expert witness
13 was discussed. It is a case where the court held where a
14 matter is regarded within the common knowledge of laymen,
15 it was held that a jury may infer negligence.
16 THE COURT: What sort of case was that?
17 MR. HOLMES: It was a West Virginia case.
18 I believe it was medical malpractice, Fraizer vs. Gray, and
19 there is another one, Clark vs. United States. That is in
20 the last paragraph of the memo.
21 THE COURT: What was it, within the common
22 knowledge of laymen?
23 MR. HOLMES: I believe it was medical malpractice,

1 your honor.

2 THE COURT: I mean, what kind of malpractice?

3 MR. HOLMES: I don't know. I can look here.

4 I believe I have it with me. I believe it is in Miches,

5 your honor, under physicians and surgeons. I have evidence

6 on expert witnesses. It's not in this section, it's in

7 185 Southeast, and I can only represent that it was a

8 malpractice case.

9 THE COURT: I am familiar with the cases Mr.

10 Geschickter is talking about. It could be 217 Virginia.

11 MR. HOLMES: I reiterate, your honor, what I have

12 said in the memorandum. The law is, if the witness has

13 some qualifications to speak on the subject, then he should

14 be allowed to have his say, as long as --

15 THE COURT: (Interposing) I think he has the

16 qualifications. That is not where you and I part company.

17 It is that this witness, Dr. Levin, does not know what the

18 standard of care is that is exercised in this community, as

19 to chiropractic medicine. He said so. That is the question

20 I asked him, and that's the question he answered "I don't

21 know." The motion is granted.

22 MR. HOLMES: Thank you, your honor.

23 THE COURT: Would you bring the jury in, please?

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

2 THE COURT: Members of the jury, in a malpractice
3 case such as this, it is necessary for the plaintiff, the
4 injured party, to prove that the -- by expert testimony,
5 that the doctor who treated did not exercise the standard of
6 care which the average member of the profession in good
7 standing, at this locality, exercises, and Dr. Levin, who
8 was called as the expert to testify to that fact, said that
9 he does not know what the standard of care is, insofar as
10 the practice of chiropractic medicine is concerned. He
11 felt that manipulative medicine is similar to chiropractic
12 medicine; so far as the standard existing in the profession
13 in which the defendant makes his living, he did not know.
14 And for that reason, the court would not let him testify.
15 Because he didn't testify, there is no expert testimony on
16 which you could base a verdict for the plaintiff, and which
17 would be to the effect that the defendant was negligent in
18 his practice, and thus injured the plaintiff. So, there is
19 no case to go to you.

20 The court has struck the plaintiff's evidence in
21 the case. There is no evidence to be submitted to you,
22 and there will be a judgment entered for the defendant.
23 And that concludes your participation in the case.

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1 We thank you very much for the time and attention
2 you have given the case.
3 (Whereupon, the proceedings in the above-entitled
4 matter were concluded.)
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