

Nutley - Plaintiff - Redirect

1 sworn, was examined and testified as follows:

2 THE CLERK: State your name and address.

3 THE WITNESS: My name is Raz Winiarsky. My
4 address is 5911 16 Avenue, Brooklyn, New York 11218.

5 THE COURT: You may inquire, counselor.

6 MR. CHENG: Thank you, your Honor.

7 DIRECT EXAMINATION

8 BY MR. CHENG:

9 Q Good afternoon, Dr. Winiarsky.

10 A Good afternoon.

11 Q Doctor, are you licensed to practice medicine in
12 the State of New York?

13 A I am.

14 Q And how long have you held your license?

15 A From the State of New York since 1999, so it's nine
16 years, ten years.

17 Q Now, is there a particular branch of medicine in
18 which you specialize?

19 A I'm an orthopedic surgeon.

20 Q And what does an orthopedic surgeon deal with?

21 A We essentially -- what our jobs are to fix bones.
22 We take care of torn soft tissues and broken bones and we try
23 to mend them.

24 Q And any particular parts of the body?

25 A We -- I don't do spine surgery but I do everything

Dr. Winiarsky - Defendant - Direct

1 else below the neck: Shoulders, elbows, hips, knees, also
2 not toes. I don't do toe work, that's podiatry.

3 Q Now, can you just tell us your qualifications as a
4 doctor, in other words, your educational and medical
5 background?

6 A I went to Albert Einstein College of Medicine,
7 that's where I got my degree in medicine. And then I went to
8 University of Pennsylvania in Philadelphia and that was five
9 year stint of internship and residency, and then I did a
10 joint reconstruction fellowship at the Hospital for Special
11 Surgery in New York.

12 Q Have you received any awards or honors?

13 A When I was in medical school, I was in the top five
14 percent, so that's call Alpha Omega Alpha; that's an honorary
15 medical society. When I was NYU, I was Phi Beta Kappa.
16 Those are some of the awards most people would know, but I
17 received multiple awards.

18 Q Are you Board certified?

19 A I was Board certified in 2002.

20 Q What does it mean to be Board certified?

21 A It essentially is a two part test given by
22 orthopedic surgeons by the Academy and if you pass it, it
23 means you passed their qualifications of what the standard
24 orthopedic surgeon should know and how you should know how to
25 do it.

Dr. Winiarsky - Defendant - Direct

1 Q Is that a state or national certification?

2 A A national certification.

3 Q Are you a member of any associations or committees?

4 A I'm a member of the American Academy of Orthopedic
5 Surgeons, American Medical Society.

6 Q Do you have any hospital appointments?

7 A I am an attending at Lutheran Hospital, Beth Israel
8 Hospital, and the North Shore system.

9 Q Now, can you describe your current practice?

10 A I do general orthopedics. In Lutheran, I deal with
11 trauma. I specialize in joint reconstruction, knee, hip,
12 elbow, shoulder revision or surgeries, and do a lot of sports
13 cases, too.

14 Q So, you're actively engaged in treating patients?

15 A Absolutely, yeah.

16 Q Now, do you have experience treating people with
17 hand and wrist injuries?

18 A I do.

19 Q And have you ever treated carpal tunnel injuries?

20 A Hundreds of times.

21 Q And how about carpal tunnel release surgeries?

22 Have you ever performed those?

23 A About a hundred.

24 Q And before today, have you testified in court?

25 A I have.

Dr. Winiarsky - Defendant - Direct

1 Q How many times, approximately?

2 A Between 30 and 40 times.

3 Q In those 30 or 40 times, was it for plaintiff or
4 defense or both?

5 A 90 percent defense, 10 percent plaintiff.

6 Q Have you been previously accepted as an expert by
7 the Courts of New York State?

8 A Yes.

9 Q Which courts?

10 A Supreme Civil and also I testified in Federal
11 courts.

12 MR. CHENG: Your Honor, defense tenders Dr.
13 Winiarsky as an expert in the field of orthopedics.

14 MR. MAIOLICA: No objection.

15 THE COURT: Any objection?

16 MR. MAIOLICA: No objection.

17 THE COURT: Okay.

18 Q Doctor, are you being paid for your appearance in
19 court today?

20 A I am.

21 Q How much?

22 A \$5,500.

23 Q Were you retained to conduct an examination of
24 plaintiff, Michael Nutley?

25 A I was.

Dr. Winiarsky - Defendant - Direct

1 Q And were you paid to conduct that examination?

2 A I was.

3 Q And how much were you paid?

4 A Between 150 to 200; I don't recall.

5 Q Before coming here and testifying today, did you
6 review anything in preparation for testifying?

7 A Outside the courthouse -- outside these doors I
8 reviewed some materials with you.

9 Q Do you know what specific materials?

10 A I reviewed my report which I have to my left. I
11 also reviewed the op. note.

12 Q Now, did you examine Mr. Nutley?

13 A I did.

14 Q And when did you examine him?

15 A Can I refer to my notes?

16 MR. CHENG: With your permission.

17 THE COURT: Yes, you may refresh your
18 recollection.

19 A February 7th, 2007.

20 Q And where did the exam take place?

21 A In Queens in Flushing.

22 Q Is that your office?

23 A No, I was hired by a company where I go once a
24 week, once every two weeks and I see claimants for this
25 company.

Dr. Winiarsky - Defendant - Direct

1 Q Now, did anybody accompany Mr. Nutley to that
2 examination?

3 A I have a chaperone in the room but I don't recall
4 if he came with -- with the wife or child, is that what
5 you're referring to?

6 Q No, anyone at all if you remember, if it's
7 reflected in your notes.

8 A I don't recall.

9 Q Was there a specific condition or part of the body
10 that you were supposed to evaluate in your examination?

11 A Yes, I believe he underwent carpal tunnel surgery
12 in 2005 and the purpose of the examination was to evaluate
13 the injury or injuries to his right upper extremity.

14 Q Now, during your examination, did you ask Mr.
15 Nutley how he sustained his injury?

16 A I did.

17 Q And how did he respond?

18 A He did not want to give too much information
19 regarding about the care he received at Jamaica Hospital. He
20 held back his medical history. He just didn't want -- he
21 refused to comment on it. I think he said -- he just didn't
22 want to talk about it so I had very limited history.

23 Q Did he make any complaints to you of any pain or
24 injury at the time that he saw you?

25 A His biggest -- the biggest complaint was that he

Dr. Winiarsky - Defendant - Direct

1 underwent surgery for carpal tunnel release and there was not
2 much discussions because he didn't want to talk about it and
3 my job was to simply to evaluate him, the injury.

4 Q Now, what did you do to examine Mr. Nutley?

5 A Well, every time I examine a patient for an injury
6 for carpal tunnel, you have to assume that the injury to the
7 hand when it comes to nerve can come anywhere from the brain
8 down the neck, down the right upper extremity to the finger.

9 So, if it's a hand injury, I have to examine the
10 neck just because it's simply one electrical cord that starts
11 from the brain down to the fingers. So, if someone has any
12 numbness or tingling, it could have led to a carpal tunnel
13 release and you have to examine the neck; so I examined his
14 neck.

15 We do range of motion exercise, we do range of
16 motions where we look for any muscle spasm. We look for any
17 kind of muscle wasting. Specifically the paracervical
18 muscle, the trapezius muscle; the deltoid, the triceps, the
19 biceps, the forearm muscles. And then we have certain
20 pressure points that we touch such as the funny bone, as you
21 might know, which is on the medial aspect of the elbow; it's
22 where the ulnar nerve is.

23 Then we tap on the median nerve itself which is
24 really superficial on the volar aspect of the wrist where you
25 tap the median nerve. Specifically after carpal tunnel

Dr. Winiarsky - Defendant - Direct

1 surgery, the median nerve is more exposed and that's called a
2 Tinel test, and you can do a Phalen's test to see if there's
3 any undue tension on the median nerve.

4 Q Now, the range of motion test that was done to
5 which part of --

6 A The neck. The neck and I believe also the lumbar
7 spine.

8 Q How exactly do you conduct that; what do you do?

9 A We ask him essentially to move their chin to their
10 shoulder, we ask them to flex, we ask them to extend, put
11 their ear to their shoulder. That's basically how we do it.

12 Q And you conducted these tests on Mr. Nutley?

13 A Yes, I did.

14 Q And what were the results?

15 A Essentially he had a normal cervical spine exam.

16 Q Now, with respect to the pressure points, where are
17 the pressure points?

18 A The cubital tunnel which is by the elbow. If it
19 was positive, I would have noted in it in my report and the
20 volar aspect of the wrist where the median nerve is exposed
21 after surgery.

22 Q The median nerve, where is that located?

23 A The median nerve essentially if you want to think
24 about it is located right here, but it's encased it's like a
25 bony tunnel and on top of the bony tunnel is a roof and that

Dr. Winiarsky - Defendant - Direct

1 roof is a ligament called the transverse carpal ligament.

2 And inside this tunnel are your flexor tendons;
3 they make you flex; they're superficial and deep. And on top
4 of them in this little bed of flexor tendons is where the
5 median nerve is. So, it's a very confined space where you
6 have tendons, nerve, and a roof.

7 Q Now, how is the median nerve involved with carpal
8 tunnel syndrome?

9 A Essentially, what carpal tunnel syndrome is means
10 that there is pressure on the median nerve so that the median
11 nerve, for whatever reason -- it can be a spacious thing
12 like, for example, if you have a mass that develops in one of
13 these flexor tendons that builds up on the median nerve and
14 you've got a confined space, then the median nerve starts
15 acting funny.

16 The way a nerve acts funny is it sends you a signal
17 such as -- tingling is the first thing that comes along. If
18 you don't take care of it, then the muscles that the nerve
19 innervates starts to atrophy and when you look at the muscles
20 specifically, it's called atrophy, that muscles right here,
21 you start noticing that these muscles become small.

22 So essentially what carpal tunnel disease is is
23 pressure on the nerve and the first signs are numbness,
24 constant tingling. Patients who say they wake up in the
25 middle of the night and they try to shake their hand and if

Dr. Winiarsky - Defendant - Direct

1 you don't take care of it, that you will get atrophy or
2 muscle wasting of the muscles that are innervated by the
3 median nerve.

4 Q Now you indicated during your exam you checked Mr.
5 Nutley's median nerve?

6 A I did. The way you check it is you look at the
7 muscles that are innervated by the median nerve and you look
8 at the thenar muscles and you see if there's any atrophy;
9 that's very easy, you look and compare.

10 The next thing you do is evaluate the innervation.
11 The median nerve innervates the volar aspect which is the
12 palm of the three and a half radial digits, your thumb, your
13 pointer, your middle finger and half of your ring finger.
14 This is where it innervates as far as sensation.

15 This is a very subjective test where essentially I
16 ask him, "Is there any difference if I touch your pinky and
17 your thumb?" And if someone has a real carpal tunnel problem,
18 then they would feel more sensation over the pinky than the
19 thumb. Very, very subjective test because they could say yes
20 or no; it's very hard to measure.

21 The only thing you can measure is finger strength.
22 There are gauges out there that a hand surgeon has -- I did
23 not have this exam -- that can measure how much strength a
24 pound per square inch that you can actually measure between
25 the pointer and the thumb.

Dr. Winiarsky - Defendant - Direct

1 The other thing you can do is ask them to hold a
2 paper and ask him not to let it go and you compare between
3 both hands.

4 Q And you performed that test?

5 A I did. Essentially I believe -- I go back to my
6 report again. I think he had besides the small scar on the
7 palmer aspect of his wrist, I do believe he had completely no
8 atrophy of the muscles and he had a normal Tinel test was
9 negative. Motion digits were full. There were no atrophy of
10 the thenar muscles, so everything was normal.

11 Q You mention the Tinel test; what is that?

12 A Essentially, that is tapping on this part right
13 here where the median nerve lives and a positive test is that
14 it sends a shock, electric shock down the radial three
15 digits.

16 Q So, if there was a problem, there would be a shock
17 or if there was no problem?

18 A If there was a problem, there would be a shock.

19 Q When you performed this test, was there a shock?

20 A Though he was slightly tender as most people are
21 after carpal tunnel release; but there's no positive
22 response.

23 Q You mentioned a Phalen's test.

24 A Yes.

25 Q What is that?

Dr. Winiarsky - Defendant - Direct

1 A Holding their wrist in this position, and what that
2 does is it squeezes the tunnel which has certain elasticity
3 to it and if you bring undue tension, you can increase the
4 pressure in the canal by doing different things with your
5 wrist, whether it's maximum flexion or maximum extension, and
6 that's why after surgery, they leave it in neutral; that's
7 the way that there's the least amount of pressure in this
8 bony canal.

9 Q So, if there was a positive signal in the Phalen's
10 test, what would that mean?

11 A That they would start to feel in this position
12 tingling and numbness in the radial three digits.

13 Q What was the result of the Phalen's test you
14 performed on Mr. Nutley?

15 A Negative, I believe.

16 Q So, what were your findings with respect to Mr.
17 Nutley's hand and wrist?

18 A My findings were he underwent carpal tunnel release
19 and that he had issue with his C-spine, it was resolved. If
20 he had issue with his back, it was resolved and his -- he had
21 full function of his wrist after his carpal tunnel release.

22 Q How about the strength in the right hand?

23 A I thought he had excellent strength in his right
24 hand.

25 Q Was that the test that was the paper test that you

Dr. Winiarsky - Defendant - Direct

1 explained?

2 A No, I just -- no. There's no -- I didn't mention
3 in my note the paper test. Just looking at it, there was no
4 atrophy of the thenar muscle so his thenar muscles were
5 excellent.

6 Q Where are those muscles?

7 A They're the muscles that are right here; there's
8 three muscles right here and they help you do the pinch.

9 Q Now, did you make a conclusion as to whether Mr.
10 Nutley was disabled at that time?

11 A I didn't think he was disabled. I thought he
12 underwent surgery, I thought the surgeon did a good job, and
13 I think it was like several months after I saw him, like
14 eight months after the surgery, and I thought he made a nice
15 recovery.

16 Q In terms of daily living and working activities,
17 did you feel he had any restrictions?

18 A Nope.

19 Q And at that time, February '07, did he have, in
20 your opinion, need for any further treatment?

21 A Nope.

22 Q We've discussed basically what carpal tunnel
23 syndrome is. Can you explain what carpal tunnel release
24 surgery is?

25 A Sure; it's a simple concept. If you just can use

Dr. Winiarsky - Defendant - Direct

1 your imagination to again, a bony canal with a roof and
2 inside the canal, all your flexor tendons and the nerve
3 sitting on a bed of these tendons. So, all we do is a very
4 simple surgery; it literally takes five minutes where we
5 press down a little bit on the nerve.

6 We don't want to obviously cut the nerve, the worst
7 thing you can do in carpal tunnel release is the nerve right
8 there and we essentially push down a little bit and cut the
9 roof. If there's any pressure on the nerve whatsoever, it's
10 just released.

11 So all we're doing is releasing this ligament
12 called the transverse carpal ligament and it's called that
13 because the way the fibers are going transversely and you
14 catch a look at them, it looks like a very taught ligament
15 that's about 2 centimeters by 1.5 centimeters attached to the
16 wrist bones and it's very easy to release the distal and
17 proximal end of it, and you can feel it and you can hear it
18 when you're done with it. It's a certain sense you gain.

19 Q So essentially the symptoms that you experience
20 with carpal tunnel syndrome, the numbness the tingling, that
21 would be due to the pressure as you said?

22 A That would be due to the pressure on the nerve.

23 Q And now once the release is done, then the roof, as
24 you said, is cut and that releases the pressure?

25 A Correct.

Dr. Winiarsky - Defendant - Direct

1 Q Now, as part of your examination, did you review
2 Mr. Nutley's operative report from his carpal tunnel release
3 surgery?

4 A Let me just check to see if it was part of the
5 records that I reviewed. Yeah, I did. It was a submitted
6 medical report, so I was able to review it.

7 Q Do you know who performed his surgery?

8 THE WITNESS: With your permission?

9 THE COURT: Yes, you may.

10 Just tell us what you're looking at.

11 THE WITNESS: I'm looking at the operative
12 report on Michael Nutley dated 12/19/2005 done at St.
13 Francis Hospital, Roslyn, New York; and the surgeon, I
14 believe, is Peter Stein.

15 Q Now, can you explain what was done during Mr.
16 Nutley's surgery?

17 A He received anesthesia, the anesthesia I believe
18 was local. And then he made a small incision; he used a
19 standard incision which is about 2.5 centimeters and then he
20 cut skin and then he cut a superficial ligament called the
21 palmer fascia and then he cut the transverse carpal ligament
22 and then he mentioned something about exuberant tenosynovium
23 that was around the median nerve and the flexor tendons, and
24 he excised that.

25 Q He took it out?

Dr. Winiarsky - Defendant - Direct

1 A Yes he excised the tenosynovium.

2 Q Can you explain what that is?

3 A Yeah. Every tendon that we have has certain amount
4 of extrusion which means it moves, it has to glide. Our
5 tendons are long in this position and they get shorter in
6 this position, so they have to glide sometimes 4 centimeters,
7 so what we have is a sheath. that surrounds the tendon and in
8 it is a liquid and then tendon slides back and forth.

9 So, this tenosynovium is a sheath that essentially
10 engulfs the tendon or the nerve so that permits it to slide.
11 Some people believe, and this is very debateable in the
12 literature, that if this synovium gets hypertrophied or if it
13 gets larger or for whatever reason due to scarring, it limits
14 the space again in this specific space so they would resect
15 this exuberant synovium.

16 Q So, essentially it's giving the median nerve --

17 A More space.

18 Q -- more space?

19 A Correct.

20 Q Now, is there any indication that there was any
21 damage to the nerve during the procedure?

22 A No, because he had no atrophy of his muscles. If
23 you cut the nerve, the nerve is cut in any fashion, the first
24 thing you're going to do is see severe atrophy of the thenar
25 muscles. It's like an all or none mechanism. If the nerve

Dr. Winiarsky - Defendant - Direct

1 is cut, if it's damaged, you're going to have atrophy of the
2 muscles.

3 MR. CHENG: Thank you, Doctor.

4 THE COURT: Cross-examination.

5 MR. MAIOLICA: Your Honor, could I get five
6 minutes to look at the doctor's chart?

7 THE COURT: We will take a five minute
8 recess.

9 COURT OFFICER: Jurors, please rise.

10 (Whereupon, the jury exits the courtroom.)

11 THE COURT: Five minutes.

12 (Whereupon, a brief recess was taken.)

13 THE COURT: Ready for the jury.

14 COURT OFFICER: The jury is entering.

15 (Whereupon, the jury entered the courtroom.)

16 THE COURT: Thank you. Please be seated.

17 Cross-examination, Mr. Maiolica.

18 CROSS EXAMINATION

19 BY MR. MAIOLICA:

20 Q Good afternoon, Doctor; how are you this
21 afternoon?

22 A I'm doing great.

23 Q You testified on your direct testimony that 90
24 percent of the time that you testify in court, you testify on
25 behalf of the defendant, correct?

Dr. Winiarsky - Defendant - Cross

1 A Approximately.

2 Q Okay. And you talked about how much money you get
3 paid to do that, correct?

4 A If you ask me I'll tell you.

5 Q I'm sorry?

6 A If you ask me, I will tell you.

7 Q Well, on direct you said 5,500 to come in and
8 testify?

9 A That's correct.

10 Q That's for half a day, is that correct?

11 A That's correct.

12 Q If it went to a full day, it would be 11,000?

13 A 8, 9, 10; it varies.

14 Q Now, you testified that you were hired by some
15 claim service to perform the examination on Mr. Nutley, isn't
16 that true?

17 A Yes.

18 Q Are you telling us that you weren't hired by the
19 New York City Transit Authority to come in and testify
20 against Mr. Nutley?

21 A I don't understand your question.

22 Q My question is: Didn't the New York City Transit
23 Authority retain a claim service company merely to schedule
24 an appointment? In fact, isn't it true that the Transit
25 Authority is paying your fee to be here today?

Dr. Winiarsky - Defendant - Cross

1 A I tell you the check is written by Support Claims.

2 Q Are you saying you don't know where the check comes
3 from?

4 A I'm telling you that there are companies that hired
5 me to do different things, and for me it makes no difference
6 if it's Geico, Allstate. It doesn't make the slightest bit
7 of difference to me if it's the MTA; makes no difference at
8 all.

9 I'm telling you that that's companies that hire me
10 and checks come from various places and I perform a service
11 and I get paid for it.

12 Q Okay. My question is this: Did you know whether
13 or not you're testifying on behalf of the Transit Authority
14 when you came to court today?

15 A I did not know that it was the MTA until two days
16 ago. As a matter of fact, because Support Claims does 90
17 percent I believe of their business with Geico, so I thought
18 that when Support Claims called me and asked, "Are you
19 available to testify today?" I thought it was going to be
20 about an automobile accident.

21 Q And 90 percent of the time you come into court,
22 it's on behalf of an insurance company, is that what you're
23 saying, Geico?

24 A It can be some sort of defense; it can be Allstate,
25 it can be MTA, it can be someone falling. It's defense,

Dr. Winiarsky - Defendant - Cross

1 whatever it is most of the time.

2 Q So, you didn't learn until two days ago that this
3 was a Transit Authority case, is that your testimony?

4 A Until I got the call from -- Support Claims called
5 me I believe -- today is Tuesday -- I think they called me on
6 Friday.

7 Q Doctor, did you bring your report here with you
8 today?

9 A Yes, but you can't -- can I complete my answer to
10 you?

11 Q Sure, I thought you were done.

12 A No. They called me on Friday and they asked me if
13 I'm available on Tuesday. And it was from Support Claims and
14 I think -- somewhere along the line when I got my report, I
15 might have figured out it was the MTA but I don't know what
16 you're getting at.

17 Q My question is very simple: When did you first
18 learn that you were testifying on behalf of the Transit
19 Authority?

20 A Within the past week, 100 percent.

21 Q Does your signature appear on your report?

22 A That is not my signature.

23 Q So you didn't sign this report?

24 A I did not sign this report.

25 MR. MAIOLICA: Objection to the doctor's

Dr. Winiarsky - Defendant - Cross

1 testimony.

2 THE COURT: Counsel, approach.

3 (Whereupon, an off the record discussion at
4 the bench was held.)

5 THE COURT: There's been an objection by
6 plaintiff's counsel. The Court will give counsel an
7 opportunity to place your objection on the record when
8 we take our next break.

9 You can proceed.

10 MR. MAIOLICA: Fair enough.

11 Thank you, your Honor.

12 Q So, the report that you brought with you here today
13 you did not sign, correct?

14 A Correct.

15 Q Did you review the contents of it at any time?

16 A I did..

17 Q Did you make any handwritten notes concerning your
18 examination of Michael Nutley?

19 A I did.

20 Q Where are they?

21 A I don't know.

22 Q You don't know?

23 A I don't keep -- I see the patient or the claimant,
24 I make notes, a report is made from my notes from the
25 examination and then I don't know what happens to the.

Dr. Winiarsky - Defendant - Cross

1 handwritten notes.

2 I didn't get an opportunity to review my report
3 that you sent me via Email and if I tell them I reviewed it,
4 then they print it and I guess they have the authority to
5 sign it or put my signature --

6 Q Do you give them the authority to --

7 A Yes.

8 Q You do?

9 A Yes.

10 Q Is it your testimony that you reviewed this report
11 and you agree with everything that's contained in the report,
12 is that correct?

13 A That is correct.

14 Q So, you just told me before that the first time you
15 learned you were coming in to testify on behalf of the
16 Transit Authority was within the last week, correct?

17 A That's correct.

18 Q I want to direct your attention to that report and
19 look at the race section of the report where it says SES
20 number, and doesn't it say NYTA-2007-1, and doesn't that
21 stand for New York Transit Authority?

22 A It doesn't make a difference. When I examine
23 him --

24 Q Doctor, with all due respect --

25 THE COURT: Excuse me, don't interrupt the

Dr. Winiarsky - Defendant - Cross

1 witness.

2 A If you ask me --

3 THE COURT: Excuse me. While I'm speaking,
4 silence.

5 THE WITNESS: I'm sorry.

6 THE COURT: You may complete your response.

7 A If you ask me what the NYTA-2007-1 is, I have no
8 clue.

9 Q You don't know that NYTA stands for New York
10 Transit Authority?

11 A Now that you told me I do. I don't look at this
12 material. This is not important to me which every time I see
13 a claimant it's for a different insurance company. Whether
14 it's Tower Insurance or Geico, Allstate, I'm trying to tell
15 you it makes no difference to me, so I don't understand where
16 you're going.

17 It's someone who got hurt. An insurance company
18 asked me to see these claimants and I do. It makes no
19 difference if it's NYTA or Geico, Allstate or Tower or it
20 makes no difference to me.

21 MR. MAIOLICA: Move to strike that portion
22 that is nonresponsive to the question.

23 THE COURT: Overruled. Proceed.

24 Q Doctor, the portion above that says claim number,
25 "TA 2005-10080014001," are you telling me that TA, you don't

Dr. Winiarsky - Defendant - Cross

1 know stands for Transit Authority?

2 MR. CHENG: Objection, Judge.

3 THE COURT: Sustained. Asked and answered.

4 Q Okay. You said that one or two times a week you
5 see claimants at this medical office located in Flushing;
6 it's not your office, right?

7 A That's incorrect.

8 Q What did you say?

9 A I said once every two weeks in Flushing.

10 Q And how many do you see that one time every two
11 weeks approximately in a day?

12 A 30.

13 Q About 30, right? Isn't it true that those
14 appointments are scheduled about every 15 minutes?

15 A It varies but I would say every 15, 20 minutes.

16 Q Why don't you take me through the exam.

17 When Mr. Nutley appeared in that office -- not your
18 office but that office -- on February 7th of 2007, he's got
19 to produce identification, correct?.

20 A Not to me.

21 Q Well, the report says that he produced -- his New
22 York State driver's license was presented prior to
23 examination. You okayed the contents of this report,
24 correct?

25 A Can I explain?

Dr. Winiarsky - Defendant - Cross

1 Q Sure.

2 A When they come in, they meet the staff and before
3 he sees me, they have a process where they want to identify
4 the claimant, so they usually use some form of ID, whether
5 it's his driver license or whatever it may be, so they
6 identify the right person.

7 Once that happens, there is a certain paperwork
8 that he or she has the opportunity to fill out if they want
9 to and once that's done, then they come to see me. So, I
10 personally don't ask someone to show me your ID again. I
11 know how the process is done.

12 Q My question is this: You only have 15 minutes
13 between appointments to see each claimant. Part of that 15
14 minutes is occupied by them showing their driver's license
15 when they first come to the desk and getting a sheet
16 concerning their history to fill out, isn't that true?

17 A Incorrect again.

18 Q Tell me what happens.

19 A They come in and they meet the staff, and it has
20 nothing to do with my 15 minutes. They meet the staff, they
21 present their ID, they do their thing. When I'm ready, when
22 I'm done seeing the previous claimant, that process already
23 been done.

24 My 15 minutes or 20 minutes or whatever it may be,
25 the necessary amount of time to make my full evaluation of

Dr. Winiarsky - Defendant - Cross

1 these claimants, has nothing to do with asking someone,
2 "Please take your wallet out and show me your identification
3 who you are."

4 Q Did you anywhere in your report or in your notes
5 record the exact time that the examination started?

6 A I don't have a reason at all to record a time when
7 someone comes in the room.

8 Q Is that a no?

9 A I don't do it.

10 Q Is that a no? Does that mean you did not record
11 the time?

12 A I didn't record the time.

13 Q Did you record the time when the examination
14 concluded?

15 A No.

16 Q Now, isn't it true, Doctor, that you did this
17 examination over a year and a half after the accident
18 occurred?

19 A The accident was October 8th, 2005 and I saw him
20 February 7th, 2007. So I guess it's about a year and a
21 half.

22 Q And since the February of '07 examination of Mr..
23 Nutley, we're now here in November of '08, are you telling me
24 or can you tell me do you have a specific recollection, an
25 independent recollection of how long you spent in the room

Dr. Winiarsky - Defendant - Cross

1 examining him?

2 A No.

3 Q Now, you said on your direct testimony that he
4 had -- before I get to that -- withdrawn.

5 Don't you agree, Doctor, that when you're asked to
6 give a diagnosis of someone, that it's good accepted medical
7 practice to review their medical records before you perform
8 the examination?

9 A To review their medical. It definitely helps.

10 Q Absolutely no question about it, right?

11 A It helps.

12 Q Now, what medical records did you review in
13 connection with your examination of Mr. Nutley?

14 MR. CHENG: Objection, Judge.

15 THE COURT: Overruled.

16 A I'm going to look at my submitted records.

17 Q Please do.

18 A I had an operative note that was dated 12/19/05. I
19 had clinical neurophysiology laboratory -- in other words, an
20 EMG dated 11/16/05 and I had a Verified Bill of Particulars,
21 and that's all that I had.

22 Q What's a Verified Bill of Particulars?

23 A Those usually, it's the complaints of what the
24 plaintiff -- it's a summons produced by a lawyer. I'm not a
25 lawyer so I don't exactly know what it is.

Dr. Winiarsky - Defendant - Cross

1 Q It's a legal document or a medical document. It's
2 a legal document. And did you receive -- withdrawn.

3 Did you review the entire Bill of Particulars or
4 just the part that pertains to the injuries claimed by
5 Michael Nutley?

6 A I don't recall what I reviewed back then.

7 Q Did you review the Jamaica Hospital Emergency Room
8 record from the date of his accident?

9 A They were not provided to me.

10 Q So the answer is no?

11 A No.

12 Q Don't you agree that that Emergency Room record
13 contains a lot of important information concerning the
14 injuries that Mr. Nutley's claiming in this case?

15 MR. CHENG: Objection, Judge.

16 THE COURT: Overruled.

17 A No, I don't agree.

18 Q I'm sorry?

19 A I don't agree that it has tremendous information
20 that I would need to understand why he might have a carpal
21 tunnel injury. I never questioned that he had carpal tunnel
22 pathology and I never questioned that he had the right
23 surgery for it. And I'm simply looking to see if the nerve
24 is functioning after a carpal tunnel release.

25 So, it has very little to do when I'm seeing him a

Dr. Winiarsky - Defendant - Cross

1 year and a half after his injury, the way he fell. And how
2 he hurt himself of his wrist or his hand has very little --
3 it's not a tremendous significance of what I'm evaluating to
4 the way it happened.

5 I say this is how it happened, this is his
6 problem. We're looking today at function; does his hand
7 work? And I'm trying to tell you that the way his hand works
8 today or on February 7th, 2007, to me the way he fell a year
9 and a half before really doesn't help me evaluate does his
10 hand work or not.

11 I can look at your hand today, your hand or
12 anybody's hand, and you tell me, "Well, you know, 15 years
13 ago I fell on my hand; don't you really want to know what
14 happened 15 years ago?" You know what? I can evaluate the
15 motion of your fingers, your grip, your muscles in your hand
16 in your elbow, in your arm, and it really doesn't make a
17 difference to me what happened a year, two years, three years
18 ago.

19 I can evaluate the hand regardless of what happened
20 a year and a half before, so that's the point I'm trying to
21 make to you.

22 Q Okay. So, is it fair to say that you're not here
23 to say that he didn't get hurt in this accident, right?

24 A No.

25 Q And you're also not here to say that the surgery

Dr. Winiarsky - Defendant - Cross

1 that he underwent wasn't necessary, correct?

2 A Absolutely not.

3 Q So, you agree with at least the operative report
4 and the EMG and the records you reviewed that the carpal
5 tunnel release surgery that he underwent was medically
6 necessary and appropriate?

7 A I believe it was.

8 Q Now, you talked about before -- withdrawn. You
9 examined his neck and his back in connection with his claim,
10 right?

11 A That is correct.

12 Q Why?

13 A I mentioned previously -- I'll be more than glad to
14 repeat it -- that the way our hands work, it's a connection
15 almost a single circuit from our brains where we decide to
16 move our fingers. It goes down the spinal cord, down the
17 brachial plexus which is your nerves down to your fingers.

18 And any point along if you have an injury in your
19 brain, whether it's a stroke, whether you have a disc -- you
20 can have a disc at C-5, C-6 which will give you numbness to
21 your thumb and to your pointer finger -- or anywhere along
22 there's some sort of impingement or some sort of injury to
23 the nerve will give you issues with sensations and
24 paresthesias and motor weakness.

25 So, any time anybody comes to you for a carpal

Dr. Winiarsky - Defendant - Cross

1 tunnel problem, you do an EMG specifically to see if it's a
2 problem in your neck, in your elbow, in your wrist; it's like
3 figuring out where the numbing problem is. Because if the
4 toilet is not working, where is the problem? Where is it
5 stuck? And EMGs help us figure out where the problem is.

6 Q That may explain why you looked at his neck but why
7 did you look at his low back?

8 A Every time I look at someone's neck I also look at
9 his back.

10 Q Are you telling us you did that in connection with
11 his wrist injury and not because you thought he was making a
12 claim for his neck and back injuries?

13 A I tell you when I reevaluate the wrist specifically
14 for carpal tunnel, I always look at the neck. 100 percent
15 look at the neck.

16 Q And --

17 A It's the reason why in my practice, I'll always get
18 an EMG again to see where the problem is.

19 Q What does "status post" mean?

20 A Status post means after something.

21 Q Correct. In your report in your diagnosis of Mr.
22 Nutley, don't you say "status post right carpal tunnel
23 release," correct?

24 A That is correct.

25 Q That means you're looking at him after he underwent

Dr. Winiarsky - Defendant -- Cross

1 a right carpal tunnel release surgery, correct?

2 A Correct.

3 Q Can you explain to me, Doctor, if the only records
4 you reviewed in connection with his case was the operative
5 report to his wrist and the EMG to his wrist, where did you
6 get the information, and this is in your diagnosis, that says
7 "status post cervical," meaning the neck, spine, sprain and
8 strain? Where did you get that information?

9 A I don't know.

10 Q So, would you be surprised to learn that he never
11 from day one of October 8th, 2005, never claimed injury to
12 his neck?

13 A I don't know. It makes no difference to me.

14 Q Your report says he had it and it went away,
15 right?

16 A That's what it says.

17 Q Okay. Same question with regard to the low back.
18 Your diagnosis of Mr. Nutley says "status post lumbar spine
19 sprain and strain resolved;" doesn't it say that?

20 A It does.

21 Q Where in the world would you get that information
22 if none of the documents in front of you indicate that he
23 ever claimed injury to his lower back as a result of this
24 accident?

25 A It might have been -- this is just a guess because

Dr. Winiarsky - Defendant - Cross

1 I know it's been a while -- it might have been in the Bill of
2 Particulars, it might have been he hurt his neck and back
3 when he fell.

4 Q Would you like to look at the Bill of Particulars,
5 Doctor, to refresh your recollection?

6 A If it's not there, I'm going to take your word for
7 it. I didn't write these Bill of Particulars. If it's not
8 there, I don't know how I came up with it; I don't know.

9 Q Doctor, isn't the real reason that you say,
10 "Resolved cervical sprain and strain the neck and resolved
11 lumbar strain and strain," meaning he was injured but he's
12 all better is because in every case where you testify for the
13 defendant, your testimony is always, no matter what, whatever
14 they're all better, right? Isn't that what you testify in
15 all the cases you testify in?

16 A That's truly not true. Sir, you're saying to me,
17 if I understand you correctly, that basically someone gets
18 hurt or don't get hurt, I'm going to get up on the stand and
19 essentially lie to make the insurance companies -- is that
20 what you're trying to say, that they paying me to not tell
21 the truth?

22 Instead, are you going against what an independent
23 medical examination is, which is simply I'm hired by a
24 company to examine someone, to come up with a diagnosis and
25 essentially say what I believe is the truth? And I think

Dr. Winiarsky - Defendant - Cross

1 that for you to say that I'm here getting paid or whatever
2 you're trying to insinuate and essentially say that I say
3 just what the insurance company wants me to say for them I
4 think is a terrible things to do.

5 Q You make a lot of money testifying on behalf of
6 defendants, don't you, Doctor?

7 A I can make more money doing plaintiff work.

8 Q So, do you have the opportunity?

9 A Plenty times. I'd rather do defense work than
10 plaintiff work and I get called; I'm telling you, to do more
11 plaintiff work than defendant work. I feel comfortable for
12 doing more defense work.

13 Q Does part of that comfort have to do with the fact
14 that, let's say for example, if you see 30 people a day on
15 behalf of the defendants, the Transit Authority, the City of
16 New York or insurance companies, even if three of them --
17 only three go to court, you stand to make say almost \$18,000
18 just on three people who the defendant sent to you; doesn't
19 that make you more comfortable?

20 A Sir, I find this discussion very interesting but I
21 would tell you -- for example, today I did seven cases this
22 morning. And those cases are paying me approximately
23 \$21,000. I make money as an orthopedic surgeon. Orthopedic
24 surgeons make money in different ways. We can testify for
25 defense, for plaintiff; we can simply operate and do nothing

Dr. Winiarsky - Defendant - Cross

1 on none of them.

2 We make a considerably amount of money doing what
3 we have to do I don't have to do a specific thing. So,
4 before I came here, I'm going to make a minimum of \$21,000.
5 So, does that make me do anything wrong today that I'm
6 operating? Do you have anything against that today?

7 Q Do you have an opinion, Doctor, as to whether or
8 not defendants would continue to hire you to come into court
9 and testify if you started writing reports that said people
10 were permanently injured?

11 MR. CHENG: Objection.

12 THE COURT: Sustained.

13 Q Let me ask you this, Doctor: Did any part of the
14 records you review have anything to do with any prior injury
15 that Mr. Nutley sustained?

16 A I don't know. I have very limited -- like I said,
17 I only had EMG, op. note, Bill of Particulars. I don't know
18 what else I had as far as his past medical history.

19 Q Okay. I think I'm about done; give me one second,
20 please.

21 MR. MAIOLICA: I don't have anything further
22 for you. Thank you.

23 THE COURT: Thank you.

24 Redirect?

25 MR. CHENG: No redirect, Judge.

Proceedings

1 THE COURT: Thank you, Doctor. You may step
2 down.

3 THE WITNESS: Thank you.

4 (Whereupon, the witness stepped down from the
5 stand.))

6 THE COURT: Counsel, approach, please.

7 (Whereupon, an off the record discussion at
8 the bench was held.)

9 THE COURT: Ladies and gentleman, we reached
10 a point for us to adjourn. As I say, we will adjourn
11 until next week on Monday at 10:00. Now, I indicated to
12 you that we will be off tomorrow and we will have no
13 sessions again on Friday.

14 Just for clarification, that means you have no
15 jury service tomorrow or on Friday. If you do have an
16 employment situation, you can and you're certainly free
17 to return to work. But you have no jury service or jury
18 duty with respect to tomorrow and Friday.

19 So, have a Happy Thanksgiving. Don't eat too
20 much. Eat all you want. Come back on Monday fresh and
21 bright, bushy tailed, and enjoy your Thanksgiving.

22 Officer, please take charge of the jury.

23 COURT OFFICER: Jurors, please rise.

24 (Whereupon, the jury exits the courtroom.)

25 THE COURT: Did you want to put your