[EDITOR'S NOTE: An excerpt of trial testimony of a physician in an injury case.]

The DISCOVERY DEPOSITION of W.C. FOSTER, M.D., taken before Medford W. Howard, Regi3tered Professional Reporter and Notary Public for the State of Virginia at Large, deposition taken on Tuesday, September 21, 1999, beginning at 5:25 p.m., at 9000 Stoney Point Parkway, Richmond, Virginia, pursuant to notice and agreement of counsel and in accordance with the Rules of the Supreme Court of the State of Virginia.

MR. ATTAWAY: We're on the record at approximately 5:25. Will counsel introduce themselves.

MR. FIRM ATTORNEY: My name is Francis Firm attorney and I represent the plaintiff, William Lewis, in this matter.

MR. GREGORY: My name is Roger Gregory, I represent the defendant, CSX Tran3portation.

MR. ATTAWAY: Would you please place the doctor under oath.

THE COURT REPORTER: Would you raise your right hand, sir. Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

DR. FOSTER: I do.

W.C. FOSTER, M.D., the witness, first being duly sworn, testified as foliows:

DIRECT EXAMINATION

BY MR. FIRM ATTORNEY:

Q Doctor, would you please tell the jury your full name and your business address.

A William Christopher Foster, Box 980153 MCV Station, Richmond, Virginia.

Q Could you summarize for the jury your educational background, with an emphasis on your medical training.

A T received a medical doctor degree from the medical college of Virginia in 1976; I then did a surgical internship until 1977; I did an orthopedic surgery residency from 1977 until 1981; I did a fellowship in musculoskeletal tumor surgery from 1981 to 1982; and I was certified by the Anerican Board of Orthopedic Surgeons in 1984.

Q And of course you're licensed to practice medicine here in the Commonwealth of Virginia?

A I am.

Q What does your specialty concern?

A Orthopedic surgery primarily concerns the medical and surgical management of disorders of

bones, joints, and surrounding connective tissue structure suc@i as muscles, ligaments and nerves.

Q And do you operate regularly concerning that area?

A I do.

Q Is Mr. William Lewis a patient of yours?

A He is.

Q Do you understand the term reasonable degree of medical certainty?

A I do.

Q Will you so answer my questions?

A I will.

Q When did you first see Mr. Lewis?

A I first saw Mr. Lewis on May 5th, 1998.

Q How did you come to see him?

A Mr. Lewis was referred to me by one of my partners, Dr. Vincent Dalton, who had been treating him prior to my seeing him.

Q And why did he want you to see Mr. Lewis?

A Mr. Lewis had pain in his right stioulder and some pain running down his right arm. Dr. Dalton had been treating him for his shoulder

pain for an injury to the tendoris of his shoulder. Mr. Lewis also had evidence of degenerated and bulging discs in his neck, which can also be a

source of shoulder pain, and Dr. Dalton wanted me to evaluate him for his neck to see if treatment of that might help alleviate his shoulder pain.

Q And what history did Mr. Lewis give you when you first saw him?

A Mr. Lewis told me that he had injured himself on December the 8th, 1997, while pulling on some kind of a railroad switch; he told irle that Dr. Dalton had been treating him for an injury to his rotator cuff; and that he had had surgery in January of 1998 for his rotator cuff disease; he had continued to have pain in his right shoulder that went down his right arm into his hand with nuffbness into his long finger; he had been doing some physical therapy for his shoulder but his symptoms had gotten worse; he related to me that he hadn't had any of the above symptoms prior to his injury in December of 1997.

Q And did you perform an examination?

A I did.

Q And what did that reveal?

A I thought that motions of his neck

were painful for him; I thought that he had weakness of both the biceps and triceps muscles of his arm; and I thought he had a diminished reflex of his triceps muscle, which is the big muscle on the back of the arm, which would be indicative of some type of nerve problem; and I thought that he had some diminished sensation in his long finger on the right hand.

Q What was your diagnosis?

A I thought that he had degenerated and bulging discs between his fifth and sixth cervical vertebrae and between his sixth and seventh cervical vertebrae.

Q Doctor, I'm going to hand you a chart. Can you point out to the jury where those areas are.

A This would be his fifth cervical vertebra right here. The little blue line between that and the bone below it would be the disc between his fifth and sixth cervical vertebra. The next little blue line down would be the disc between his sixth and seventh cervical vertebra, those are neck bones, and I thought those were the two degenerated and bulging discs that he had.

Q Now I'm going to hand you another

diagram and I'm going to ask if you can identify that for the jury as to what that represents.

A This actually is a diagram of the lumbar spine, not the cervical spine. Although other than being larger the lumbar vertebrae are reasonably similar. This area iS a 3chematic representation of a disc. A disc is composed mostly of two structures: an outer area that is dense, fibrous tissue like one would think of as sinew or a ligament; t@ie inner structure is a much softer cartilaginous tissue, we often relate its consistency to something like crabmeat. When the disc bulges, as is showing here, some of the simple portion of the disc bulges out into the ligamentous portion of the disc, which can impinge on the nerve root as it exits from the vertebral canal at that level.

Q Thank you. We already marked that as Exhibit No. 1 and we move to have that introduced.

NOTE: The above-referred-to diagram of vertebrae was marked as Plaintiff's Exhibit No. 1.

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BY MR. FIRM ATTORNEY (Continuing)

Q Now, based on this diagnosis of degenerative and bulging discs at these two levels, what treatment did you arrange for Mr. Lewis?

A Mr. Lewis and I discussed the possibility of surgical removal of the disc and fusion of those bones, which means putting bone in between the bones where the disc was to get those bones to grow together. I discussed with him the procedure and the complications and left it with him that he would call me if he wanted to schedule the surgery.

Q And did you eventually schedule and perform the surgery?

A Yes, I did.

Q And what is involved in that surgery?

A An incision is made on the front of the neck. We go down beside the voice box and the esophagus, which is a tube that goes from the mouth to the stomach to the front of the spine. The discs

are marked with a marker and an X-ray obtained so that we know what level we're at. We then remove the disc and replace it with bone so that the bones where the disc was will not be moving on each other and it relieves the bulging portion of the disc

where it abuts the nerve root.
Q And was this done at two levels for Mr. Lewis?
A That was done at two levels.
Q Where do you obtain the bone that's used for these fusion procedures?
A I obtain the bone from a bone bank.
Q And is the patient placed under a general anesthetic?
A The patient is placed under a general anesthetic.
Q How did Mr. Lewis handle the surgery?
A He seemed to tolerate the surgery satisfactorily in terms of his acute course. In terms of his chronic course, the surgery improved some of his symptoms and didn't improve others of his symptoms. The pain below his shoulder into his arm and hand seemed to be improved, ancl the pain around his shoulder was not significantly improved.
Q Did he require additional medication after the surgery?
A He has been treated 3ince the surgery fairly regularly with pain medications.
Q What types of pain medication?
A The most recent medication that I saw

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was Tylenol No. 3 which is -- and soffie Percocet, which are narcotic pain medications.
Q Now, based on the history you obtained, your examination, your findings, the surgery, and your subsequent treatment, do you have an opinion as to whether or not the problems that you described for Mr. Lewis were related to his railroad injury of December 8, 1997?
A I don't believe that the injury itself injured his neck or caused his discs to degenerate or bulge. I think though that the shoulder pain, which is what he presented with, is what eventually led him to having his neck operated on to a large degree. I don't think that his neck probably was the major source of his 5houlder symptoms and treating it didn't dramatically change them, but I think had he not had the shoulder pain he probably would not have had the neck surgery. To

that degree, they're related.
Q Now, have you continued to treat Mr. Lewis?
A I have.
Q And have you focus3ed mainly on the neck and hand problems?
A That's correct.

Q Now, have you discussed with Mr. Lewis the possibility of him returning to work?
A I have.
Q And are you familiar with his prior job as a conductor and his duties?
A I am as roughly familiar with it as a person who doesn't do the job and hasn't been involved in the job can reasonably be, I suppose.
Q And do you have an opinion as to whether or not he can return to work?
A I don't believe that he can return.
Q What kind of limitations have you placed upon Mr. Lewis?
A I have limited the amount of use of his right arm that he can do, and that I don't believe that he is going to be able to lift and carry heavy objects or do things like pulling switches like he was doing. I have limited his walking and standing to some degree, although that's not as related to his neck as it is his other medical problems. I have limited him from bending, stooping, twisting, and climbing, and reaching above shoulder level.
Q Let me hand you a forrri, Doctor. Is that a form that you completed?

A Yes. That's what I was looking for and I found half of it.
Q Is that an accurate reflection of the limitations that you've imposed upon Mr. Lewis?
A I think that it is.
Q And do you believe that he's able to return to any kind of work?
A I think based on his neck problem, shoulder problems, medical conditions and history of a myocardial infarction, that he's not going to return to work.
Q Now, you mentioned the myocardial infarction, did you treat him for that problem?
A I did not.
Q Are you aware of his recovery?

MR. GREGORY: Object to the form of the question as leading.

BY MR. FIRM ATTORNEY (Continuing)
Q You can go ahead and answer.
A I've seen him in my office on several occasions since he had it, so I'm aware that he recovered. I'm not specifically aware of the medical implications of it.

Q Now insofar as the limitations that you just recited, is the myocardial infarction a factor in those limitations that you've imposed?
A It is. Yes, I think it is.
Q And to what extent?
A I don't know how much, to be perfectly honest. I mean, I think it limits strenuous activities. I think his major limitation is use of hi3 right arm, and the myocardial infarction contributes to his overall limitations. But the major limitation that I've placed on him and t@iat I think is impacting him is his right arm.
Q What do you see as his future?
A I believe he's going to continue to have right shoulder pain. I don't believe that that is likely to significantly change in the future. I don't have enough information to comment on his medical future in terms of his diabetes and his heart disease.
Q Do you think his shoulder will get better or worse?
A I don't think it will change dramatically.
Q How about his future insofar as pain is concerned?

A I think it's most likely to remain stable at current levels.
Q Will he continue to require medication?
A I think so.

MR. FIRM ATTORNEY: I will move to introduce the form that the doctor's identified, as Exhibit 2. And that's all the questions I have.

NOTE: The above-referred-to form dated 11/3/98 was marked as Plaintiff's

Exhibit No. 2.

CROSS-EXAMINATION

BY MR. GREGORY:

Q Dr. Foster, based on the history that was given to you, do you have any history of Mr. Lewis having shoulder pain before this accident?

A That sounded like two questions to me, so let me be a little obtuse. Based on the history given to me, no, but based on information

that I have, yes.

Q All right. So as to the first where you ariswered the history, based on what Mr. Lewis told you, he never told you about shoulder pain, did he?

A That is correct.

Q Now, you said but on -- independent of Mr. Lewis you have seen some records that he did have shoulder pain before this accident?

A That is correct.

Q Do you also see evidence based on the records you've been able to look at that he had arm pain, right arm pain before this accident?

A I do.

Q But Mr. Lewis didn't tell you of the arm pain either, did he?

A He did not.

Q Is it important for a patient, any patient, to be as accurate and as truthful with their past history as they can be in terms of your treatment and your diagnosis?

A It is.

Q For example, Doctor, your estimates of what might happen to a patient in the future in terms of having pain or di3ability or limitations is

i determined in part by what they give you as a past

and present history of symptoms; is that correct?

A That's correct.

Q I guess to put it in layman's terms, they have to be, I guess, sort of accurate and truthful as to what pain they're reporting to you and the duration and the nature of it; is that correct?

A That's correct.

Q And I take it then from a scientific standpoint, there's no way for you to determine pain, per se, is there other than the -- I guess you can see someone grimace, but actually to measure pain, you can't, can you?

A Pain is very multifactorial. And I have a since deceased ex-partner who used to tell people that he couldn't see pain. We can't see or measure pain. Pain affects different people differently and there's no way to quantitate it.

Q And, Dr. Foster, you mentioned, I think you said quite candidly that the neck problems were not related to the accident, this accident, but you think that he, you think that he would not have had the surgery had he not had the shoulder problem?

A That's correct.

Q All right. Now, the degenerative changes you saw, that was pre-existing, wouldn't you say, of the accident?
A That's correct.
Q All right. And degenerative is where a lay person would call it arthritis?
A Yes.
Q All right. So he had arthritic changes that certainly they were there before December the 8, 1997?
A Yes.
Q Now, in the schematic you gave us, and you've just said it was of the lumbar section as opposed to the cervical section of the spine but very similar in terms of disc structure, you mentioned in termg of the -- when you said that, when you described sort of the viscous or crabmeat-like interior of the disc, you said that can bulge and it can impinge on a nerve, correct?
A That's correct.
Q But did you see impingement in this case?
A I think so.
Q But you said you think so, you didn't -- there was no clear indication of impingement in

this case, was there?
A Yes, I think there was.
Q You think there was?
A Yeah.
Q Okay.
A That's as definite as I can get. I'm sorry, I'm a gray kind of a person. He had an MRI scan which showed bulging disc out into the area of ttie neural frame and where the nerve root goes. He had symptoms of numbness that went into his hand consistent with where one of those nerve roots that would have been impinged goes. He had a diminished reflex in his triceps which would indicate impingement of the second one of those nerve roots that I operated on. He got better from some of those symptoais after his surgery.
Now, when I did his surgery, I left the posterior ligament of his neck intact, so I didn't actually see the nerve root itself, because to remove that ligament and expose that nerve root would have subjected him to the possibility of an injury to the sleeve of the nerve root or something for no benefit to him. So I didn't actually see the nerve root. That's why I say I think so. Based on the X-ray studies and the clinical findings and the

results of treatment, there is no question in my rrtind that he had nerve root impingement, although I never looked at his nerve root. So I think so.

Q Okay. So, Doctor, so your qualification was you didn't see it, but based on, as you said before, the symptoms given to you by Mr. Lewis would lead you to believe that there was impingement because he gave --

A No, he had physical examination findings of diminished sensation in the finger and a diffiinished reflex, and he had an MRI scan which showed it.

Q All right. Now, for example, did you do any nerve conductivity studies on him?

A No, I did not.

Q All right. Wouldn't you say, Doctor, that's a definitive test that will give you conductivity of nerve, it would be a lot more exact in terms of --

A It's a test that is virtually never done for this because it's an expensive, painful test which adds very little to our knowledge of what's going on. The physical examination findings and the MRI scan is what would be used in the overwhelming majority of cervical discectomy cases

and in very few people would we actually get a nerve conductivity test.

Q Now, you never had any consultation with a neurologist, did you?

A No.

Q And what is the specialty of neurology?

A Neurologists deal with diseases and injuries of nerves.

Q Of nerves, that's their specialty, correct?

A That's correct.

Q And Mr. Lewis never saw that specialty?

A To the best of my knowledge he didn't.

Q Also, he never had any consult with a neurosurgeon either, did he?

A No, he didn't.

Q All right. What do neurosurgeons do?

A They operate on brains and spines and nerves.

Q On spines. And many times they operate in the cervical spine area, don't they?
A They do, but so do orthopedists who

do spine surgery, and I do a lot of spine surgery and do a lot of peripheral nerve surgery for tumors. So I don't think that there was anymore expertise available to him by having seen a neurosurgeon.
Q Do you ever COn3Ult with neurologists?
A Occasionally.
Q But you didn't consult with a neurologist in this case?
A Didn't think I needed one; don't to this day think I needed one.
Q And you did surgery on this gentleman after seeing him once?
A That's correct. He had seen one of aLy partners, whols also an orthopedic surgeon, on a number of occasions, and it is common in a referral practice when you're having other specialist surgeons sending you patients to get someone whols already been evaluated, worked up, and is ready for a procedure.
Q Now, in this case, he didn't have a herniated disc, did he?
A No, he had a bulging disc.
Q All right. And would you describe for the jury what a herniated disc is.

[Remainder of deposition omitted]