New Expert Rules under HB 153 and other Expert tips

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1. MISSOURI'S EXPERT RULE IS CHANGING

Trial lawyers use expert witnesses to provide testimony and evidence to a jury that will assist them in determining the issues in the case, where the evidence and testimony presented by the expert is beyond the average knowledge of an average juror, and where the witness qualifies as an expert. Missouri has recently enacted a new expert statute. This changes the standard from the *Frye* standard to the *Daubert* standard.

The law goes into effect August 28, 2017, and requires Missouri courts to follow the "*Daubert*" standard when admitting Expert testimony. This is a heightened standard of evidence and will require courts to engage in "*Daubert*" hearings to approve the expertise of scientific witnesses. These new hearings will require Courts to weigh the scientific evidence and analyze the merits of the proposed testimony.

The *Daubert* standard was first articulated by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals*, in which the Court stated that Federal Rule of Evidence 702 overturned the previous *Frye* standard of evidence.

2. MISSOURI'S OLD EXPERT RULE

Missouri's old standard of evidence stated in **RSMO. 490.065**, required that experts testify on scientific evidence which was, "reasonably relied upon by experts in the field", and states:

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be **of a type reasonably relied upon by experts in the field** in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

3. MISSOURI'S NEW EXPERT RULE

The new law signed by Gov. Greitens adopts verbatim the language of FRE 702 The new language combined with the Supreme Court's jurisprudence dating back to *Daubert* will raise the standard required for parties to introduce expert testimony. **Here HB153 in full:**

Section A. Section 490.065, RSMo, is repealed and one new section enacted in lieu thereof, to be known as section 490.065, to read as follows:

490.065.

1. In actions brought under chapter 451, 452, 453, 454, or 455 or in actions adjudicated in juvenile courts under chapter 211 or in family courts under chapter 487, or in all proceedings before the probate division of the circuit court, or in all actions or proceedings in which there is no right to a jury trial:

(1) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise;

(2) Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact;

(3) The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable;

(4) If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless

the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

2. In all actions except those to which subsection 1 of this section applies:

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) The testimony is based on sufficient facts or data;
(c) The testimony is the product of reliable principles and methods; and
(d) The expert has reliably applied the principles and methods to the facts of the case;

(2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;

(3) (a) An opinion is not objectionable just because it embraces an ultimate issue;
(b) In a criminal case, an expert witness shall not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone;

(4) Unless the court orders otherwise, an expert may state an opinion and give the reasons for it without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

3. The provisions of this section shall not prevent a person, partnership, association, or corporation, as owner, from testifying as to the reasonable market value of the owner's land.

4. <u>FRE 702</u>

The new R.S.Mo 490.065 adopts **Federal Rules of Evidence 702** which provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

5. JUDGE'S ROLE UNDER DAUBERT

As Judge Kozinski explained in his remand opinion of the *Daubert* case, this higher standard puts judges in an "uncomfortable position" and requires judges often untrained in science to weigh the merits of scientific evidence, rather than submitting all relevant evidence to the jury. He states:

> Federal judge's ruling on the admissibility of **expert** scientific testimony face a far more complex and daunting task in a post-***Daubert*** world than before. The judge's task under *Frye* is relatively simple: to determine whether the method employed by the experts is generally accepted in the scientific community. *Solomon*, 753 F.2d at 1526. Under ***Daubert***, we must engage in a difficult, two-part analysis. First, we must determine nothing less than whether the experts' testimony reflects "scientific knowledge," whether their findings are "derived by the scientific method," and whether their work product amounts to "good science." 113 S.Ct. at 2795, 2797. Second, we must ensure that the proposed **expert** testimony is "relevant to the task at hand," *id.* i.e., that it logically advances a material aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the "fit" requirement. *Id. Daubert v. Merrell Dow Pharmaceuticals*, Inc., 43 F. 3d 1311 - Court of Appeals, 9th Circuit 1995.
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> The first prong of ***Daubert*** puts federal judges in an uncomfortable position. The question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular scientific field; here, for example, the Supreme Court waxed eloquent on the impressive qualifications of plaintiffs' experts. *Id.* Yet something doesn't become "scientific knowledge" just because it's uttered by a scientist; nor can an **expert's** self-serving assertion that his conclusions were "derived by the scientific method" be deemed conclusive, else the Supreme Court's opinion could have ended with footnote two. As we read the Supreme Court's teaching in ***Daubert***, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."

> The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.
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> Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such **expert** testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task. [1]

6. EXPERT RULE CHANGE PART OF TORT DEFORM EFFORT

Currently Federal courts and 38 states use the *Daubert* standard. [2] A 2002 study conducted by the RAND institute for civil justice has shown that since the Daubert standard was articulated by the Supreme Court in 1993 the percentage of scientific testimony excluded from evidence significantly rose and successful motions for summary judgement doubled, 90% of which were against Plaintiffs. [3]

Gov. Greitens and other proponents of the law state that it will encourage more business and jobs to come to Missouri. However, Missouri trial judges have opposed the bill arguing that these new evidentiary hearing will clog up trial dockets and slow down the civil court system. In addition, the Missouri Supreme Court has already found that Missouri Judges have an independent duty ensure that expert witnesses are testifying on a generally accepted scientific idea.

This law was passed as part of Gov. Greitens tort reform initiative. Gov. Greitens has also proposed changing the collateral source rule to limit plaintiffs claimed medical

[1] https://scholar.google.com/scholar_case?case=14286809434668137766&q=daubert+test+expert+forensic&hl=en&as_sdt=2000000002

[2] https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/.

[3] http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1439.pdf

expenses to the amount actually paid for in medical care, overhauling the Missouri Merchandising Practices Act, and changing the Missouri employment discrimination standard from the current "contributing factor standard" to the federal "motivating factor standard". These sweeping "pro-business" changes stand as a great threat to Missouri plaintiffs seeking fair compensation for their injuries.

7. PRACTICING UNDER THE *DAUBERT* STANDARD

The Supreme Court determined in *Daubert* that federal judges must act as gatekeepers and that they must insure that proffered expert testimony is both **relevant and reliable**. [4] *Daubert* actually takes a three-pronged approach: courts are to consider the "validity" or "reliability" of the evidence in question, its degree of "fit" to the facts and issues in the case, and the risks or dangers that the evidence will confuse the issues or mislead the jury (the concerns embodied in Rule 403). All three of these factors are important and each can prove critical in any given case, but it is the reliability standard that presents by far the greatest challenge. Relevant factors in determining reliability include whether the theory can be tested, "whether the theory or technique has been subjected to peer review and publication," "the known or potential rate of error," and the theory's "general acceptance". [5] In *Kumho Tire Co., Ltd. v. Carmichael*, the Supreme Court expanded this standard to all expert testimony not just scientific expert testimony.

[4] *Anderson v. Raymond Corp.*, 340 F.3d 520, 523 (8th Cir. 2003) (no abuse of discretion in concluding that expert was not qualified, and his opinion was not reliable); *Dancy v. Hyster Co.*, 127 F.3d 649, 652 (8th Cir. 1997).

[5] *Polski v. Quigley Corp.*, 538 F.3d 836, 838–40 (8th Cir. 2008) (no error in excluding testimony which rested on an untested and unproven theory); *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686–87 (8th Cir. 2001); *U.S. v. Kime*, 99 F.3d 870, 883–84 (8th Cir. 1996) (listing Daubert factors and concluding that trial court did not abuse its discretion in concluding that proffered testimony about the unreliability of eyewitness identification did not qualify as " 'scientific knowledge' under Daubert's first prong."); *Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) (reviewing these factors and holding that trial court did not abuse its discretion in excluding proffered testimony); *Gier By and Through Gier v. Educational Service Unit No. 16*, 66 F.3d 940, 942–44, 12 A.D.D. 717, 103 (8th Cir. 1995) (reviewing trial court's assessment of these factors); *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382, 384–85 (8th Cir. 1995) (reviewing trial court's assessment of these factors and concluding that it did not abuse its discretion in concluding that "testimony was not scientifically valid and would not aid the jury in its fact finding.").

The second element is the degree of fit between the case and the proffered evidence. The degree of "fit" between the proffered testimony and the facts and issues in the case is an aspect of relevancy. Expert and scientific testimony usually reflects, and brings to bear on the case, theories, tests, and experience generated in situations unrelated to the events in litigation. Hence its utility turns partly on the degree of resemblance between the transactions in suit and the situations in which the science or expertise was generated. Expert testimony also extrapolates or draws conclusions resting on theories, tests, and experience, and its utility turns in part on how closely the conclusion is connected to the underlying data—whether it is but a short step from data to conclusion or a long inferential leap. The closer the connection, the better the fit, although this criterion does not demand that there be a perfect congruence between the proffered testimony and the facts or issues in the case.

The third element to be considered is whether or not the proffered evidence will mislead the jury. This element is not so much a requirement as a reference to other considerations affecting admissibility: Most importantly, the technicality and complexity of modern science and technological learning bring concerns that such proof may be more confusing, time-consuming, or misleading than it is worth. For such reasons, proof of this sort may be excluded under Rule 403 even if it would otherwise qualify, as *Daubert* makes clear and as the Rules mandate more generally.

In *General Electric v. Joiner*, the Supreme Court held that all decisions under *Daubert* are reviewed for abuse of discretion. The burden of laying a proper foundation is on the party offering the testimony. The trial judge has broad discretion in making determinations regarding the admission of expert testimony. A decision to admit or exclude expert testimony is reviewed for abuse of that discretion and will therefore be reversed only if manifestly erroneous. The Eighth Circuit has said that "doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility". [6] Further the Eight Circuit has stated, "When the district court sits as the finder of fact, [t]here is less need for the gatekeeper to keep the gate when the

[6] *Williams v. Wal-Mart Stores*, Inc., 922 F.2d 1357, 1360 (8th Cir. 1990).

gatekeeper is keeping the gate only for himself" … "Thus, we relax Daubert's application for bench trials." [7] Also, "The exclusion of an expert's opinion is proper only if it is so fundamentally unsupported that it can offer no assistance to the jury." [8]

Trial courts may determine whether an expert is qualified in a *Daubert* hearing, where parties may appear and actually argue the factors described above. More often than not a full hearing is not required, and the parties will instead argue the above factors solely through written memoranda.

Treating Physicians may or may not be subjected to a *Daubert* challenge depending on how their testimony is used in evidence. For example, if a treating physician is testifying solely about treated injuries for the purposes of establishing damages, then the witness will be treated more like an eyewitness. However, a *Daubert* challenge may be brought if a treating physician is testifying about the cause of Plaintiff injuries, such as in a toxic tort case.[9] In such cases, the Eighth Circuit, along with most other circuits, have found that a reliable differential diagnosis made by the treating physician will satisfy the *Daubert* standard as long as such a diagnosis was made to determine causation. [10] Thus it is important to clarify what treating physicians will be testifying about and ensuring that if they are testifying about causation, they performed a proper differential diagnosis and may have to issue a report. Ask in every conference how the judge treats treating medical providers – a judge told me last week that treaters were not experts and I have had other federal judges insist on reports from treaters. Can physical therapists testify?

Treating physicians go both ways under the Daubert standard. Some Judges need full reports and disclosure while others do not consider them experts and do not require reports.

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[7] *David E. Watson, P.C. v. U.S.*, 668 F.3d 1008, 1015 (8th Cir. 2012).

[8] *Polski v. Quigley Corp.*, 538 F.3d 836, 838–39 (8th Cir. 2008).

[9] *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1208 (8th Cir. 2000).
[10] *Id*.

I tried a case April 2016 with John Simon and Kevin Carnie against General Motors. As part of that case, we had numerous expert Motions under Daubert – including product defect and statistics experts. The briefs were voluminous and I would be happy to provide them to you if you email me. Judge Shaw's Order is appended to this paper.

8. PRACTICAL EXPERT TIPS

Here are some important, some obvious and some not so important points to remember:

- You want your expert to be able to testify that something like this is the kind of stuff they learned in graduate school and the ideas here are long established in science and in their specialty and they are applying the facts of this case to well establish scientific and professional principles.
- Make sure that the opinions expressed fall well within the established opinions and theories of the profession. The positions testified to by the expert must be pre reviewed and long established in their area. New theories or unconfirmed ideas won't pass muster under a *Daubert* standard.
- They need to testify that the matters to which they are testifying are to a reasonable degree of medical, engineering, or scientific certainty within their profession.
- They need to have reviewed all the relevant materials, be knowledgeable about all the relevant articles or other professional articles on the subject, and reach their conclusions in writing.
- They do not want to plow old ground already testified to by another expert. For instance, we have an expert reconstructionist in truck-auto case, and I do not want him to testify about the same stuff that the MO Highway State Trooper reconstructionist has already testified to. That does not add anything to the jury's understanding of the claim.
- Don't use an expert if you don't have to. It can be very effective for defense lawyers to not use a vocational rehabilitation expert or an economist. The defense can often make the same points through good cross exanimation of the plaintiff's expert and it presents more effective to the jury that way anyway.
- For a liability expert, you want to establish what safety rules are applicable to the situation. You need to establish that these are safely rules that have been long established in the area and that they are clear and no one disagrees with them, and show how the defendant violated the safety rules. Examples of this are don't cut what you can't see and do a sponge count in a medical malpractice case, have slip and fall policies that are taught to employees and administered consistently in a premises liability case, and the rules of the road and statutes in an

automobile accident case. It is important to note and say that the safety rules are to protect everyone, and including the plaintiff in the particular situation they were in.

- Have the expert have citations in their pocket about the ideas and theories that they are using showing they are well established in literature.
- Ask the experts "Do you have formed beliefs in this case?", "Do you think the opinions you hold will help the jury understand the issues in this case", "Can you explain how?"
- A very effective way in presenting an expert testimony is as a professor teaching the courtroom about the matters at issue. Not as a condescending talk at you type of lecture, but as a teacher hoping to bring everyone along with them and letting the jury reach the conclusion with them.
- If you have problems in the case, use your expert to help address them. For example, you say "We were concerned in this case that our client might have a prior degenerative back condition so we asked Dr. Smith to help look at the facts on this matter and to help us see how the degenerative condition had played a part in this case" or from the defense side, "We are worried that this rear end collision might had injured the plaintiffs neck, so we hired a doctor to come in and look at this independently".
- Don't put what you want the expert to say in any letter or correspondence to the expert.

9. PRESENTING THE EXPERTS TESTIMONY AT TRIAL

In presenting your expert, start with his background and credentials, but don't over do it. After they are established as an expert, talked about what they reviewed and why they reviewed it. Then, ask them if they have arrived at any opinions, whether they hold those opinions to reasonable degree of medical certainty, and what those opinions are. Have that expert tick off the opinions. Then come back to them and go into more detail and drill down on them. Take the wind out of the defendant's sales and talk about the problems that they are going to bring up, like degenerative conditions or possible other causes from the accident or that this was not a dangerous condition in the product. Have them talk about why they looked at that and what conclusions they drew. Then talk about causation and how the negligence of the defendant or the rule violations by the defendant caused the damages to plaintiff. Talk about why that rule is there and how that rule is supposed to prevent injuries like what occurred in your case. How do you know that those deviations from the standard of care or the violations of safety rules

caused those problems? Had they been complied with would such compliance prevented the incident?

In cross examining the witness, try to be as short and tight as you can. Make the points you can and move on. Be very careful when you are dealing with a professional testifier as they may be very good at responding to your questions. Research and get other copies of depositions transcripts of the expert and ask them things that they have literally said in other depositions or in the deposition in the instant case. I write out the questions and then after it I will put a page and line number cite to exactly where they said that so I can easily get that information should the expert stray. Talk about money with the expert.

All experts are scientists and there is a scientific method to analyzing any situation. The principle of that is that you start from a position of neutrality in testing out a hypothesis. Be completely neutral. Then you weigh the evidence for and against a principle and assess that. Many times, defense experts do not start with a position of neutrality and they do not weigh the evidence for and against causation from this incident, or degenerative or asymptomatic condition that became symptomatic with the incident, or that the product did not have a defect. Sometime an effective technique is doing this. There are other resources and many other ways to affectively cross an expert. The question becomes, who is going to bear the risk if the defense expert is wrong? Who is going to pay for that surgery in the future if the doctor says that they not need it? On the opposite side, a defendant should only pay for the damages that they caused and the plaintiff has the burden to prove and to show those damages. So, has the plaintiff really sustained their burden with the testimony of their experts. Have they proved more likely than not that all the damages have occurred, causation occurred, and the need for future medical or other future damages. Defendants should make it more than just saving a buck for the defendant- that it really sends a message that this store has a safe and effective trip, slip and fall program or that this manufacture manufactures good products that it relies on and their families use it. I had a trucking company once put on an in house expert and talk about how they are a big company but really are a group of families and their drivers are part of their company family and that is how they look at it

and that they adequately taught safety programs and tried to teach everyone so that their drivers and their families and everyone on the road were safe. It was very effective.

10. DOCTOR QUESTIONS

I have taken hundreds of doctor's depositions in a variety of circumstances. It takes a while to be able to do this well and to be able to know the medical so you can roll with the punches and get into the nuance of what is being asserted in the case. It is important to make your best argument in these medical depositions. In deposing a treating physician, the order you like to inquire is: Qualifications; Type of practice they have; in the course of practice did they treat Plaintiff; History, Physical Exam, Tests, Diagnosis, Treatment and Prognosis; Do you hold all these opinions to a reasonable degree of medical certainty. Then take them through the treatment that did. Ask them if they hold an opinion to a reasonable degree of medical certainty as to what caused the physical condition for which they treated Plaintiff (the answer should be the incident at issue). Then take them through the treatment and find out what they did for them. At the end you want to again ask diagnosis, prognosis, need for future medical. Make sure those opinions are to a reasonable degree of medical certainly also. Ask "if you state an opinion in this deposition would you please provide them to a reasonable degree of medical certainly. If you don't hold it to a reasonable degree of medical certainty will you not tell us that please." Make sure you know the medical. If you are asking for future medical, you need to get a basis and foundation on which the doctor says that. Also, to put your medical bills in, I always ask if medical bills that they charge are reasonable and if they are reasonably necessitated because of the car crash (fall in a hole, medical malpractice). You need to have a foundation for them to be able to opine as to those-basically that they are familiar with the reasonable medical charges in the St. Louis area. Most doctors are. If you have future medical, you need get all the aspects of the future medical and have a foundation for that as well. You can have a physician or a medical practitioner testify as the reasonableness of other bills from other providers as long as you have reasonable foundation. I typically do this. Another way to get the bills into evidence is to say that they have been paid, but that always shows the jury that your client has health insurance typically.

11. EXAMPLES AND EXPLANATIONS

Q: Physicians are not allowed to needlessly endanger patients?

A: Correct.

Q: That's the standard of care?

A: Yes.

Q: When diagnosing or treating, do doctors make choices?

A: Yes.

Q: Often, several available choices can achieve the same benefit?

A: Yes.

Q: So you have to avoid selection one of those more dangerous ones?

A: Correct.

Q: Because that's what a prudent doctor would do?

A: Yes.

Q: Because when the benefit is the same, the extra danger is not allowed?

A: Yes.

Q: The standard of care should not allow extra danger unless it might increase odds of success?

A: Yes.

Q: So needless extra danger violated the standard of care?

A: Yes.

Q: And there is no such thing as a standard of care that allows you to needlessly endanger patient?

A: Yes.

Med Mal admits (eventually) cut an artery in knee surgery:

Q. Okay, thank you. You say here, "The explanation for this was that the deformity in the lateral meniscus pulled the more medial structures laterally and probably twisted this and a small pseudoaneurysm formed." Do you still believe that to be the case?

A. **Yes.**

Q. But do you have any evidence, studies, anything to base that on, that opinion?

A. **Yes.**

Q. What?

A. **The subsequent medical record.**

Q. What?

A. **Excuse me?**

Q. What record, because they found that this -- well, what medical record tells you that the lateral meniscus pulled the structures laterally and created the

pseudoaneurysm?

A. That wasn't your question. The fact that the meniscus had pulled the artery forward did not cause tl pseudoaneurysm.

Q. Right. And as we know -- do you think there was a pseudoaneurysm or do you think you cut the artery?

MR. REINERT: I'm going to object. I don't know how they're mutually exclusive, but you can answer. I think it's vague and lacks foundation.

A. I think the artery was damaged.

Q. (By Mr. Burger) I know. That's what you told my client. Can you be more specific? Was it damaged --

A. I have no idea how it got damaged.

Q. You already told me you cut it.

A. I didn't say that. I said it got damaged, and I said I felt it was presumed that since the arthroscopi procedure was the only thing intervening, that it was during that procedure that the artery got damaged. That's what we discussed.

Q. Haven't you said "I cut the artery"?

A. No, I never said "I cut the artery."

Q. Did you cut the artery in your arthroscopic procedure, in hindsight?

A. I would say that I damaged the artery in the procedure.

Q. Did you cut it? You didn't just bump up against it. It was completely transected; wasn't it?

A. That's all in hindsight, and that's what I'm saying.

Q. So in hindsight you know you cut that artery?

A. Yes.

Q. All right. Now, is it accurate that the explanation of how this occurred wasn't some pseudoaneurysm; it was that you cut the artery?

MR. REINERT: Again, I'm going to object to the form of the question that they're mutually exclusive. The cut artery formed the pseudoaneurysm. They're not different things. They're not A or B, so I'm going to object. It's vague, it lacks foundation, assumes facts not in evidence.

Q. (By Mr. Burger) I want you to remember everything your lawyer just said. Here's what I'm getting at, Counsel, either the question for you or for your witness. You say that it's the meniscus pulling the medial structures laterally that created the pseudoaneurysm.

A. No, I don't say that.

Q. So what you say -- all right. Well, then how did this pseudoaneurysm form? I mean read this sentence. You say, the explanation for this -- the explanation for

the pseudoaneurysm is that the meniscus pulled away and twisted that and that's how -- and twisted this, is what it says, and so a small pseudoaneurysm was formed. Is that what you believe? Or do you believe the pseudoaneurysm was formed because you cut the artery, or something else?

MR. REINERT: Again, I'm going to object. It assumes facts not in evidence. It's misleading. You can answer if you understand his question.

A. The meniscus pulled the artery out of position and made it susceptible to being damaged by the arthroscope.

Q. (By Mr. Burger) Okay. Is that what you're trying to say in this sentence?

A. That's what I did say in that sentence.

Q. Tell me where you say that.

A. I say the meniscus pulled the structures out and the pseudoaneurysm resulted as a consequence of the procedure damaging the artery because it was pulled out of position.

Q. That's not what this sentence says. What this sentence says --

A. But that's what the sentence obviously means.

Q. No, it doesn't.

MR. REINERT: He wrote it. He would know

what it means.

Q. (By Mr. Burger) So that's what you think this means, but what the sentence actually says is that the meniscus pulled the medial structures laterally and probably twisted that and a small --

MR. REINERT: Twisted this.

Q. (By Mr. Burger) -- twisted this and a small pseudoaneurysm formed, right? I thought you were trying to convey here, Doctor, that because of the medial twisting, that it had moved this artery and some weakening of the artery wall had occurred because of the pulling. But that's not what you were trying to say in this?

A. I didn't know what happened when I wrote this note. And the answer to your question, retractors can pull and damage a peripheral or a secondary artery and the traction could have done that.

Q. Did you use retractors in this procedure?

A. No. You asked the meniscus could have pulled and damaged a tributary artery. I didn't know -- at this point I did not know what had happened.

Q. So you hadn't reviewed the records to see that the vascular surgeon or subsequent surgeon had said that the artery was completely transected and the vein shredded?

A. (The witness shook his head.)

Q. You didn't know that when you wrote this note?

A. No.

Always talk about the money the other side makes if they testify a lot:

You do this independent medical exam, this medical-legal type of work; is that right?

A. I do some of that, yes.

Q. It's 15 to 20 percent of your practice now?

A. Yes.

Q. And you do 75 to 80 percent of that for either the defense or an employer or insurance company; is that right?

A. 75, approximately 15 to 20 may be as high as 25 percent of my practice involves doing independent medical evaluations . . .

Q. Okay. And you have made from medical-legal work, IMEs and testifying, you've made $550,000 in the three years prior to July of 2014; is that correct?

A. Well, I don't know where you're getting that figure from, but maybe okay, I mean, I told you, we can go through the math, if I do three a week, the charge for an independent medical evaluation is $900, if we do three a week, that's $150 a year, so what was your figure again?

Q. Let me ask you this.

A. Okay.

Q. In this case, how much -- you didn't mention this in direct exam, how much were you paid by defense counsel in this case?

A. I was paid for this case, for a record review in total, the total bill was $4,675.

Q. All right. So can you keep that Exhibit 1, can you please turn to page 106?

A. Okay.

Q. And 105 and I asked you on line 17 of page 105 and so that's right at $550,000 in the last three years, do you see that on line 17?

A. Yes.

Q. And then, and then we were going back and forth, but then on page line, page 106 line 2 I say yeah, $550,000 I was doing last the three years, and your answer was over three years, yes, I think that would add up, do you see that?

A. Yes.

Q. Let me show you what I'm going to mark as Plaintiff's Exhibit 1.

A. Okay.

Q. All right. Doctor, can you please turn to page -- this is a, you recognize this is a deposition I took of you in July of last year?

A. Okay.

Q. It's a deposition transcript?

A. Okay.

Q. And can you please turn to page 98?

A. Okay.

Q. You see line 10?

A. Yes.

Q. And I asked you, but it's 75 to 80 percent for the defense, is that correct, is that what you said, and your answer was, well yeah; is that correct?

A. Page 99, yes, yes, that's taken out of context, but yes, go ahead.

Q. And you testified to that, right?

A. Yes.

Q. Okay. Well let me get back to my question though, of the $550,000 you made, and I say it here, I can quote it to you again.

A. Okay.

Q. In all that money, 75 to 80 percent of the time you're hired by defense, employer or insurance company; is that correct?

A. Yes.

Q. So, the way I did the math, that's an extra $183,000 if you take $550 divided by three, that's $183,000 and we're almost up to a year since I took that deposition, do you think you made that much again?

A. I haven't done the math, but yes, my practice has really not changed.

Q. So we're talking about the last four years, you're talking about over $700,000 for medical-legal work like we're doing today; to is that fair?

A. Again, I'm not sitting down doing the math, but yes, I think if we're taking it by the chronology you're giving, yes.

Q. All right. And you've made $3 million or so in your career doing this medical-legal testifying work; is that fair?

A. No, I wouldn't say that, because I don't know where you're getting the figure $3 million.

Q. Turn to page 112 of the deposition transcript.

A. Okay.

Q. And do you see on line 9 where I ask you, add that to last year as we're talking $3 million or so and your answer was, yes, yes; is that correct?

A. Well, that's what this says, but I'm not sure what the question what exactly, the reason whether I didn't understand you at that time or I'm not reading this whole transcript right now, but a figure of $3 million as far as medical-legal, the

Q. Doctor, is it correct that you testified under oath on July 3, 2013 you said yes twice, when I asked you about this $3 million figure; is that correct?

A. Okay.

whole point, the figure you're using $3 million I think isn't fair, is that the amount of income that I've generated over the past 30 years, certainly I've generated income over the past 30 years.

Q. In medical-legal matters or you want to change your testimony?

MR. WICKER: Objection, form.

A. So what is your question exactly?

Q. (By Mr. Burger) It is exactly that I asked you, would you agree that I asked you, when you were sworn under oath.

A. Okay.

A. So you're saying have I generated $3 million over 34 years doing medical-legal activities?

Q. Yes.

A. I don't know, to be honest. I mean, I don't know, we've already been through what I've done the last three to four years as far as I don't know what I've done as far as medical-legal in the last 34 years.

Q. Did you testify that you've done $3 million in that type of work on page 112 of this deposition?

A. Well, again I haven't re-read all this now, well, I'll read it now if you want me to.

Q. I don't want you to, I'm just trying to get you to answer the question.

MR. WICKER: Objection to form.

A. I'm trying to answer your question Mr. Burger, I've said yes, yes there, and I'm wondering if I really understood your question at that time, to be honest.

Q. Are you changing your testimony today?

A. No, I'm not changing my testimony, I'm trying to realize where this came from, let me read this.

Q. (By Mr. Burger) You've had a chance, is it fact, to review that deposition transcript, isn't it accurate that ballpark you've made $3 million in your career from medical-legal work as -- the type of which we've been discussing here?

A. Yes, sir, I think that's correct.

Q. And we've had that number in the last four years of over $700,000, we already did that math?

A. We went through that math, yes.

Q. All right. Now, and that's -- you do two or three IMEs a week?

A. Yes.

Q. And you do three or four depositions a month?

A. Yes.

Q. So in this case, and an IME is when you actually see someone; is that correct?

A. Yes.

Q. You did not see Mr. Thomason in this case?

A. No, I did not.

When deposing doctors in personal injury and medical malpractice cases always establish before you go through any of the records what they recall apart from the records. Often there is very little recollection. They don't know the level of informed consent, they don't know whether or not they did such and such, don't know anything in addition to what's in records or don't know whether or not they consulted with a partner or another doctor. Then they are boxed into the records.

Did the lawyer provide the doctor his opinions?

Q: Dr. Rahman, my name is Gary Burger. I represent the women that you were just talking about. I am going to mark Exhibit 1—for the last four or five questions when counsel was asking you questions, you were literally looking at this document and following along as he was reading it. Is that correct?

A: No.

Q: You-you didn't have this out in front of you and were following along on the way he was asking the questions? Did I miss that?

A: It's been in front of me, but I was actually thinking about something else.

Q: What were you thinking about?

A: Just the other parts of the case. I actually was thinking about Dr. Gormen's record here.

Q: Gornet's?

A: Gornet—Gornet's record here.

Q: Weren't the last questions about what your opinions were weren't they exactly what is written in that documents that 'v just marked as Exhibit 1?

A: Yes.

Q: Word for word, right?

A: Pretty close.

Q: And that's a documents the Mr. Walsh wrote, not you; right?

A: Yes.

Q: All right. He wrote this document about what your opinions were; fair?

A: Right.

Q: All right. And when he's asking you what your opinions were, he was literally reading out of the document that he wrote?

A: Yes.

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A. I didn't have -- I didn't have acute angle closure glaucoma signs to say it is -- I didn't put a differential diagnosis at that time.

Q. So glaucoma, regardless of the type, was not in your differential diagnosis when you treated him?

A. Yes.

Q. Okay. And it was not because you believed you did not have the signs or symptoms of that, correct?

A. Correct.

Q. All right. Now, did you see in the chart that

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he had blurred vision?

A. (The witness nodded.)

Q. Is that a yes?

A. Yes.

Q. Did you see in the chart that he had headaches?

A. Yes.

Q. Did you see in the chart that he had redness in his eyes or red eye?

A. No red eye.

Q. No red eye. What does that mean?

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A. Means the white part of the eye becomes reddish.

Q. Did he have halos or blurriness?

A. No.

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A. At the time of my examination I didn't have any signs, symptoms suggesting the -- I mean strong signs, symptoms suggesting me to glaucoma.

Q. Did you have some signs but not strong signs? Just now you said I had no signs, and then you said I had no strong signs or symptoms.

A. I don't have signs to diagnose glaucoma at that moment.

Q. Was glaucoma in your differential diagnosis when you treated him?

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Q. What does that say?

A. History of blurred vision, lot of vomiting.

Q. What's the blurred vision -- what's after that?

A. OU.

Q. What does that stand for?

A. Both eyes.

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he had had headaches?

A. Yes.

Q. Did you see in the chart that he had complained of blurry vision?

A. Yes.

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you -- do you know if you noted at that time he complained of headaches and some fuzziness in eyes with some --

A. Yes.

Q. -- blurring of the vision?

A. Right.

Q. Okay. Do you know if Dr. Siddiqui at that time recommended an ophthalmology consult?

A. Yes.

Q. Okay. Do you know if you noted that at that

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time?

A. Yes.

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A. Here doesn't have eye pain, redness. Those are -- glaucoma -- acute angle closure glaucoma patient present with moderate to severe eye pain, red eye, halos. Those are the cardinal symptoms of the glaucoma. If those symptoms, complaints sees, immediately concern the glaucoma. Blurred vision with a diabetes, blood sugar

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Q. All right. And then what else -- is the results of the slit lamp exam in the top right of that page?

A. Slit lamp examination I don't see any abnormality like on the red eye cornea edema, carnea clear, and anterior chamber deep. Those are normal. These are all findings of normal. N means normal.