The State of Ohio, :
: SS:
County of Cuyahoga.:

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IN THE COURT OF COMMON PLEAS

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JOANN SANDERS,
plaintiff,

vs. case No. 109181.

FUNTIME, INCORPORATED,
defendant,

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Deposition of MALCOLM A. BRAHMS, M.A.L., a witness herein, called by the defendant for the purpose of direct examination, pursuant to the Ohio Rules of Civil Procedure, taken via videotape and court reporter, taken before Janice L. Andrews, a Notary Public within and for the State of Ohio, at the offices of Dr. Malcolm A. Brahms, Mount Sinai Medical Building, 26900 Cedar Road, Beachwood, Ohio, on Wednesday, the 6th day of July, 1988, commencing at 5:35 p.m., pursuant to agreement,

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Also present:
Len Gavlen,
Videotape Technician

I N D E X

WITNESS: MALCOLM A. BRAHMS, M.D.

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MALCOLM A. BRAHMS, M.D.

of lawful age, a witness herein, called for direct examination by the defendant, as provided by the Ohio Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, was examined and testifies as follows:

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DIRECT EXAMINATION

BY MR. TUREK:

Q. Dr. Brahms, my name is James Turek. I'd like to, first of all, if you would, to give us your full name and spell your last name for the record?

A. Dr. Malcolm A. Brahms, B-r-a-h-m-s.

Q. Dr. Brahms, could you please tell us your professional address?

A. 26900 Cedar Road, Beachwood, Ohio.

Q. You are a medical doctor?

A. I am.

Q. Doctor, do you have a specialty?

A. I do. Orthopedic surgery.

Q. How long have you been an orthopedic surgeon?

A. Since 1955.

Q. Doctor, what briefly, if you would describe for the jury, what that particular specialty involves?

A. Orthopedic surgery is that branch of medicine

that deals with the investigation, preservation, and the restoration of the form and function of the musculoskeletal system by medical, surgical, and rehabilitative means.

Q. Doctor, could you please give the jury a brief summary of your educational background?

A. Yes. I'm a graduate of Case Western Reserve University Medical School. Served a year of internship at Cleveland City Hospital, now known as Cleveland Metropolitan General Hospital; followed by a year of general surgical training at that same institution; followed by three more years of orthopedic surgical training, one at Mt. Sinai Medical Center in Cleveland, Ohio, and two at the Indiana University Medical Center in Indianapolis, Indiana.

Q. Doctor, after that training did you commence your private practice as an orthopedic surgery?

A. That is correct.

Q. Surgeon, excuse me.

A. Yes.

Q. Doctor, are you certified in the field of orthopedic surgery?

A. I am.

Q. Would you, first of all, explain what is meant by the term "Certified"?

A. Certification entails a completion of an A.M.A. approved residency in orthopedic surgery, followed by a written and an oral examination, then a manditory two years of the practice of orthopedic surgery, followed by another written and oral examination. The successful completion of all of those requirements entitles one to become certified.

Q. Doctor, when did you become certified in orthopedic surgery?

A. 1958.

Q. You have been so ever since?

A. That is correct.

Q. Doctor, do you currently have any hospital affiliations?

A. I do.

Q. Would you tell the jury what those are?

A. Yes. Mt. Sinai Medical Center, and I have privileges at Suburban Community Hospital.

Q. Doctor, are you currently teaching in any capacity?

A. Yes. I'm on the staff at the Case Western Reserve University Medical School, department of orthopedic surgery, assistant clinical professor.

Q. Now, Doctor, as you know this case involves claims that the plaintiff sustained an injury to her

cervical spine as the result of stress or trauma to that area. Have you had any particular experience in those kinds of complaints?

A. I think I have a pretty wide experience in the treatment of injuries of that nature.

Q. Doctor, have you ever acted as physician for any of the sport teams of Cleveland?

A. Yes. I was the orthopedic consultant for the Cleveland Bulldogs, the Cleveland Indians, and the Cleveland Browns.

Q. Doctor, during the course of your activities with those particular teams, did you had occasion to examine and treat patients claiming, or involved in injuries to the cervical spine?

A. I think by the nature of the contact sport of -- of football, cervical. *spine* injuries axe rather frequent.

Q. Now, Doctor, you were asked to examine the plaintiff at my request; is that coxrect?

he That is correct.

a. Doctor, you have examined patients involved in litigation numerous times in the past; is that correct?

A. That is correct.

Q. Now, Doctor, regardless of whether or not a

patient is being examined by you that is involved in litigation or not, do you approach that examination the very same?

A. No different.

Q. So no difference whether the patient is involved in litigation or not from your standpoint?

A. Not a bit.

Q. Is that true, Doctor, whether or not you have been asked to examine the plaintiff or -- strike that. Examine the patient by the plaintiff or by the defendant?

A. Doesn't make any difference. The details of the examination for anyone is virtually the same.

Q. All right. Now, Doctor, finally along those same lines, by and large you do charge patients for the services that you render for them?

A. I don't charge members of my family or good friends, but everybody else does pay.

Q. All right. Doctor, in this case the defendant has requested the examination of Miss Sanders, and you charged them for that, didn't you?

A. Yes. That's correct.

Q. All right. The further services you have rendered in this particular matter, you are charging for as well; is that correct?

A. Yes. I think we all charge for the time that we put into doing things that we do in our businesses.

Q. All right. Doctor, you may feel free to refer to whatever notes you have, material that you have generated in your involvement in this matter.

Did you have an occasion to examine JoAnn Sanders, the plaintiff in this lawsuit?

A. I did.

Q. Do you recall the date, Doctor?

A. Yes. The 20th of October of 1987.

Q. Doctor, prior to that examination of the plaintiff, did you have an opportunity to review any written material, records, depositions, or anything else pertaining to this incident?

A. I did not. I don't make a habit of reviewing any records until after I have examined the patient, and then review the records. That's the general manner in which I do things. There are occasions perhaps in the past that I have examined the records prior to that, but that's not my usual method.

Q. Just to be clear, in this particular instance you did not review any material before examining the plaintiff?

A. I did not.

Q. All right. Doctor, could you describe for the

jury the examination process as it relates to JoAnn Sanders? We know that it was October 20th, 1987. Doctor, do you -- and again, feel free refer to whatever notes you have -- what was the first thing you did in that examination?

A. I took a history.

Q. Now, Doctor, when you took that history from the plaintiff, was there another person present besides you and the patient?

A. Yes. She was accompanied by her attorney, Mr. Paul Newendorp. I hope I spelled -- I pronounced his name correct.

Q. Newendorp.

A. Newendorp.

Q. Was Mr. Newendorp present, physically present throughout your examination --

A. Yes.

Q. -- and conversation with the plaintiff?

A. Yes, he was.

Q. Now, Doctor, what is a history that you referred to before?

A. A history is the information obtained from the patient referable to the reasons for coming to a doctor's office. It's the whys, the wheres, the hows, and the wherefores associated with their chief

complaint.

Q. Doctor, could you tell the jury what history you obtained from JoAnn Sanders?

A. Yes, She told me that on the 20th of August of 1985, that she was at the Geauga Lake Park and she was getting on a ride, because of a previous operation tu her left arm, she was wearing a splint on her left arm as well as a sling.

She reported that the foot of her child was caught in the ride and in attempting to help release the child's foot, she lifted the child overhead, She experienced immediate pain in her neck, back, and her left leg.

Several days later she was seen by Dr. Figgie. She didn't recall whether or not any x-rays were taken, She does not recall whether she was fitted with a cervical collar, Approximately two weeks later she was hospitalized at the University Hospitals because she would, "Blinkout for a second," She inferred that she had difficulty with her visual acuity and dizziness,

She was hospitalized for one week. She stated, "They couldn't pinpoint, she -- they couldn't pinpoint it, a Meaning that a diagnosis was not established. Later ahe experienced numbness in

her left leg. There was pain in her Sack and in her neck, accompanied by radicular pain into both upper extremities.

She reported that she was treated with physical therapy for one and a half months. She experienced constant pain in hen: legs, as w as her back, All the tests were repeated. On the 25th of August of 1987, following studies including an MRI and a discogram, she had cervical spine surgery, which included a bone graft, and this was performed by Dr. Wilber.

She wore a two-posted collar until two weeks prior to the time that I examined her, and since then she had been wearing a soft collar. At the time that I examined her she reported that she has low back pain, which is now only occasional; however, was formerly severe. She no longer has any pain in her left leg since her cervical spine surgery. The pain in her upper extremities, to include her hands, is no longer constant, only occasional.

She reported that she doesn't have, "Full use of the neck yet." She only occasionally has a headache, All the pains in her neck, her back, and her leg have improved and she staked, "So Ear to me it's a little better." She reports that she wears her

collar constantly. That was the immediate and present history.

Q. All right. Doctor, did she recite to you any past history of problems?

A. Yes. She told me that she had had no previous neck problems; however, in 1983 she was involved in a motor vehicle accident and experienced left elbow pain. The pain in her left elbow was in the distribution of the ulnar nerve and has been present from one to two years. An ulnar nerve transposition, that's an operation, was performed in August of 1987. She denied paresthesia or elbow pain. Her medication included a muscle relaxant and an analgesic preparation. That was the history that she gave me.

Q. Doctor, just to clarify, she indicated that she was involved in a motor vehicle accident in 1983.

A. That's correct.

Q. That of course was two years before the Geauga Lake incident?

A. Yes.

Q. That as a result of that motor vehicle accident, she had left elbow problems, ultimately resulting in surgical. corrective measures?

A. Yes, And I said 1987, That operation was in 1985. The operation on her elbow was 1985.

Q. Doctor, through your history, the history given to you by the plaintiff or through your review of records, do you know whether or not that ulnar nerve surgery took place before the Geauga Lake incident?

A. Yes, it did.

Q. All right. Do you know about how long before?

A. Yes. The operation that she had on her elbow was on the 30th of July of 1985. The injury was in August of 1985.

Q. Now, doctor, did you conduct an examination?

A. Yes, I did.

Q. Could you tell the jury what the result of that examination was?

A. Yes. The physical examination revealed that we were dealing with a 27-year old, 138 pound, five foot, four and half inch female. She told me that at the time of this examination that she was not working. At the time of her injury in August of '85, she was a college student. She told me that she's right-handed. The physical examination referable to the range of motion in her cervical spine, could not be determined. The patient reluctantly removed her collar but would not perform any movements of her cervical spine.

The glenohumeral motion, the motion of shoulders, were normal. Motions of left elbow were

noted to be within normal limits. Pronation and supination were also normal. Wrist joint motions were normal. The reflexes in her upper extremities were physiological, meaning they reacted normally. There was no evidence of any motor weakness. We checked her with a dynamometer, which is a grip strength instrument, and she was able to compress the dynamometer seven pounds per square inch on both sides. She had no evidence of any trapezius muscle soreness or scapular angle tenderness. Because of the protection of her neck, the Adson sign and the hyperabduction tests could not be performed.

The low back examination revealed that she was able to stand on her heels and toes, and bend forward 90 degrees, which represents normal motor movement. It was noted that she was hypermobile.

Q. Doctor, what does that mean, if you would?

A. Hypermobile means that individuals of this nature are more flexible than the average individual. Their joints move to -- not only to a full extent but to an increased amount of movement.

For example, if one can straighten his elbow out, these individuals can hyperextend their elbow, or their finger joints are more flexible than the average individual.

Q. Okay.

A. Straight leg raising sign was permissible to 80 degrees. This is a bilateral degree, without any evidence of muscle spasm. There was no evidence of any sensory loss to pinprick. She demonstrated no motor weakness. Her reflexes were normal physiological at the knees, and hypoactive at the ankle bilaterally. There was no evidence of any measurable atrophy.

Q. Doctor, what do you mean by atrophy?

A. Atrophy means a lost of girth. The size of, for example, if one measures the calf muscles or the upper arm, the biceps region of the arms, if one measures more or less than the other, the one that is of a lesser amount, unless a patient is engaged in an activity which causes muscle hypertrophy, that represents atrophy in her lower extremities; and no evidence of any difference in the circumference of her lower extremities.

Q. Okay.

A. The pulses in her lower extremities were palpable. Her leg lengths were equal and her hip joint motions were carried out to a normal range.

That was the physical examination that I performed.

Q. Now, Doctor, was there any significance attached in your mind to her refusal to permit range of motion testing?

MR. POMERANTZ: Objection.

A. The patient had had an operation in August and that was carried out in October, and I presume that she was reluctant to move her neck, although the range of motion should not have been greatly restricted in that area of time. There may be some apprehension about the movement, but the motion should not be restricted.

Q. Doctor, do you have some x-rays obtained pertaining to the plaintiff's spine?

A. Yes. We had some x-rays taken of her neck and her back. The x-rays of the cervical spine revealed that there was a -- evidences for a bone graft between the 4th and 5th cervical vertebral bodies; and the balance of the cervical spine, x-rays were within normal limits. X-rays of lumbar spine were also within normal limits.

Q. Now, Doctor, as a result of your examination and the history that you obtained from the plaintiff, did you conclude that there were -- strike that. Were you at all cognizant of any paradoxical symptomatology?

MR. POMERANTZ: Objection. Let

the record show that this is reading from the doctor's reports, and that this is language used by the doctor and that I think therefore the questions are leading in its nature.

A. I thought that some of the symptoms of this patient were somewhat paradoxical. The reference or pain following the transposition of the ulnar nerve, the record reveals she had hypesthesia in the area of the thumb, which is unexplanable by anatomical reasons, The pain in her legs, which subsided after the cervical. spine, doesn't have any sound anatomical basis; which arc two of the examples that I think are the most pertinent.

Q. Doctor, just so that we're clear on what you're testifying about at this point, these were complaints or descriptions of a condition given to you by the plaintiff?

A. Yes.

Q. That you could not match up properly from a clinical or anatomical standpoint?

MR. POMERANTZ: Objection, Leading.

A. One of the references that I made is not what she told me but after reviewing before compounding this report, after compounding this report, I read the

records of Dr. Figgie and it seemed to me that the symptoms were somewhat bizaare and had no anatomical basis, and the reference of pain that she gave me referable to the neck and the left lower extremity have no anatomical basis as well.

Q. All right. When you say "basis," is that the same as connections?

MR. POMERANTZ: Objection. Leading.

A. That doesn't have any sound reason of actual distribution of symptoms referable to the sensory nerves to the lower extremities, or the sensory nerves to her thumb. The result of the ulnar nerve transposition, for example.

Q. Now, Doctor, you have just mentioned the fact that you did -- you did review other records after the examination of the plaintiff?

A. That is correct.

Q. All right. Now, Doctor, during the course of the history and the examination of the plaintiff, she did mention to you that she was in an accident, an automobile accident in 1983?

A. That's correct.

Q. At that time did she indicate that the only injury she sustained was that left arm problem?

A. Yes, that's right.
Q. She did not indicate to you that she sustained an injury to her thoracic spine, basically her spine in the area of the shoulder blades?
A. She did not mention any injury to her neck or upper or lower back as a result of the 1983 accident.
Q. Doctor, have you since reviewed records that have confirmed the plaintiff sustained an injury to her back in the area of her shoulder blades in 1983?
A. Yes. I think that there is at least two records that suggest that there were injuries to her neck and upper back prior to the injury of August of 1985, of which we're concerned with tonight.
Q. All right. Doctor, during the course of that examination, did the plaintiff indicate to you that one year after the 1983 accident and one year before the Geauga Lake incident, the plaintiff went to an emergency room complaining of pain in the right side of her neck?
A. Yes. She didn't tell me that, but I did see records referable to that.
Q. All right. Doctor, did she indicate to you during the course of your examination or the history, that three and a half months after the automobile accident of 1983 she received physical therapy for

complaints of pain in her arm and her back in the shoulder blade area?

A. I have no knowledge of that, since it wasn't told to me.

Q. She did not tell you that?

A. That's correct.

Q. All right. Now, did she advise that the 1983 accident, the auto accident, was severe enough to create a problem in her ulnar nerve that two years later required surgical correction?

A. Yes.

MR. POMERANTZ: Objection, Leading.

A. Yes, The patient did have an ulnar nerve transposition done in June of 1985.

MR. POMERANTZ: Objection. Str ke as not being responsive to the question.

Q. Doctor, the plaintiff during the course of her examination, did she indicate that she did sustain an injury to her arm in that 1983 accident?

A. Yes.

Q. What was the ultimate outcome of that injury?

A. An ulnar nerve transposition done by Dr. Figgie in June of 1985.

Q. We've already discussed the time of that,

-orrect?
A. Yes. That is correct.
Q.
occurred at Geauga Lake Park, did the plaintiff tell you that at that very time she was wearing a brace on her left arm as a result of that surgery?
A. Yes. She was wearing a splint and a sling.
Q. All right. Doctor, did she make any complaints to you during the course of that examination, that she reinjured or aggravated the problem in her recently -- in that left arm that had just undergone surgery?
A. I'm not aware of any information of that nature.
Q. All right. Your notes don't reflect any such?
A. They do not.
Q. Now, Doctor, I'd like to direct your attention, if I could, to the incident itself, and for the purposes of -- for all purposes relating to your further testimony on my questioning, I want you to assume that the incident occurred as follows, and this version is disputed, I might add, but this is the plaintiff's version through her deposition, and I'd like you to assume, even though it's still in dispute what exactly happened, I'd like you to assume it happened as follows: That it involved her two-year old daughter, and that her daughter and the plaintiff

were about to get on a ride at Geauga Lake Park, that the car in which they were about to get in unexpectedly moved in an upward motion, that the plaintiff herself was still standing both feet on the ground but that her daughter had already climbed onto the car when it began to go up, and that the plaintiff undertook an effort to get her child off that particular ride, and in the process had her hands extended above her head in an effort to first lift the child and then pull the child down into her arms; and then, in fact, she did accomplish that; she pushed her daughter up a bit to loosen her foot that had been caught and pulled the child down into her arms.

I want you to assume that the child never left her physical contact; that is, throughout the entire episode, the plaintiff, Mrs. Sanders, never lost physical contact with her child through all the activity that she undertook. The child did not drop into her arms, falling through the air in a freefall fashion with the plaintiff catching her. I also want you to assume that her daughter was completely unhurt then and now.

Doctor, keeping that in mind, making that assumption that's how the incident occurred, did you note when the plaintiff first obtained treatment

for injuries alleged to have occurred in this incident?

A. It's my understanding that she was seen by Dr. Figgie, I think that her examination was -- I can't recall exactly, but probably in the neighborhood of six or seven days later. I'm not exactly sure.

Q. Through the testimony of Dr. Figgie and Dr. Wilber, who have already testified in this matter, I want you to assume that in fact she was first examined by Dr. Figgie on August 26, 1985; so six days after the accident --

A. Yes.

Q. -- was her first treatment for any injuries she alleges she sustained in this incident. Doctor, I'm handing what I'd asked -- first of all, off the record.

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(Discussion had off the record.)

(Defendant's Exhibit A marked for identification.)

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MR. TUREK: Let's go back on the record.

Q. Now, Doctor, you have been provided with copies of office records by Dr. Figgie and Dr. Wilber; is that correct?

A. Yes. That's correct.
Q. Have you had an opportunity to reviews those records?
A. I have.
Q. Doctor, do you have them sitting in front of you now?
A. I do.
Q. Doctor, I'd like to direct your attention to what we have marked as Defendant's Exhibit A, and that is the office note dated 8-26-85 from Dr. Figgie. Do you have that in front of you?
A. I do.
Q. Now, Doctor, have you reviewed this particular notation?
A. Yes.
Q. Doctor, could you read in the second paragraph of that particular entry, Dr. Figgie, his comments about the plaintiff's complaints on that particular day?
A. Yes. "Today the patient relates complaints of neck pain with radiation down the forearm. This is consistent with an injury she received two years ago and a recurring injury suffered within the last week at Geauga Lake Park. Today physical examination reveals the neck extension, lateral bending,

reproduces a pain into the arm. She has tingling and numbness in the thumb and the index finger. The brachioradialis reflexes are slowly diminished on the left with respect to the right, the bicep strength is four plus out of five."

Q. Okay. Thank you, Doctor.

Now, following that initial examination, Doctor, are you aware of any tests that were taken of the plaintiff during the course of her subsequent treatment?

A. Yes. I'm aware she was hospitalized for approximately one week's time; and had studies, which included a CT scan, an MRI, and a myelogram done.

Q. Doctor, let's first of all, if we could, take these one-by-one. First of all, have you an opportunity to review x-rays obtained of the plaintiff taken since this incident occurred?

A. The x-rays that I had taken here in my office, yes.

Q. All right. Doctor, have you also had an opportunity to review radiological reports prepared for x-rays taken by other physicians in the course of their treatment of the plaintiff?

A. Yes, I have.

Q. Doctor, in all of those x-rays, are you aware of

any finding within those x-rays, either through your own observation or by reviewing the radiological reports, indicating anything but a normal finding?

A. The CT scan, the MRI, and the myelogram, were all reported to be within normal limits. The MRI, a question of degenerative change at the C-5/6 level.

Q. All right. Doctor, let's, if we could take these through then, what is an MRI? Would you tell the jury what that is?

A. An MRI is a fairly new radiological examination. Does not entail x-rays, per se. It's magnetic resonance. It, in essence, is really spectroscopy. It's alignment of molecules and protons and it gives off an image which can be recorded on film similar to a CT scan, but a CT scan is an x-ray, and this gives different details of the bones and the soft tissues of the body. Excellent examination for the brain, an excellent medium for the spine, and it has certain qualities, which in combination with CT scan provides radiologists, orthopedic surgeons, neurosurgeons, and perhaps other specialties, an opportunity to gain an insight into the organ systems better than we've had until now.

Q. Doctor, are you aware that two separate MRI's were conducted on the plaintiff in this case?

A. Yes, I am aware of that.
Q. Doctor, what is your understanding of the findings of the first one that was obtained?
A. The MRI is, really both off them, are relatively within normal limits. There's some -- the first one was a questionable change at the C-5/6 level, and the second one is virtually similar to the first one. No dramatic, obvious abnormalities in either of those two examinations.
Q. What did show up?
A. Some degenerative, questionable degenerative changes at the C-5/6 level of the cervical spine.
Q. Doctor, again, just so we keep definitions clear, what do you mean by "Degenerative changes"?
A. If one looks at x-rays of the spine in older individuals, the inner spaces, the space between two vertebra wherein the disks reside, in an aging situation the disks lose their normal liquid quality; and to best describe it to nonmedical personalities, if you look at a sidewalk that's old and it develops little cracks in the sidewalk, that's what happens to disks. When that happens, there is a change in the histological pattern. The structure isn't as young as it was once upon a time. These are described as a change, a degenerative change, because there's a loss

of the fluid, the liquid content, the collagen, the scaffolding fibers, which we call collagen, which is the basket workup, they change in character, losing some of their good quality and show some changes that can be picked up on an MRI better than in any other study.

Let's equate that in even better terms: If one looks at the face of a baby, it's smooth, it's succulent, there's no wrinkles. As we get older, those wrinkles represent degenerative changes; a loss of some of the supporting structures and we get a little bit wrinkled up. That's degenerative change.

Q. Is it part of the natural aging process?

A. Yes, but not in a 27-year old.

Q. What is the significance of that condition in a 27-year old?

A. Well, in a 27-year old, we would expect, without any significant trauma, that the disks would be normal in their appearance on an MRI study.

Q. And the reference to the age of 27, is the plaintiff's age; is that correct?

A. The plaintiff's age is 27, right. 27 at the time that I examined her, and younger than that at the time that the surgery was done.

Q. Doctor, it's unusual to find degenerative changes in a spine of that age?

A. Unless the patient is a wrestler or a football player, someone who traumatizes the cervical spine by sports activities, or somebody stands on his head rather than on his feet.

Q. Doctor, is it impossible for a 27-year old to have degenerative changes --

A. It's not impossible.

Q. -- without trauma?

A. Without trauma, unless there's a disease process to explain it, you know that there are people in certain diseases that age even before they reach their teens. So if it's a process which is abnormal, the answer to that question is it can occur; but not normally do we except to find any degenerative changes in the cervical or in the lumbar region at that age group.

Q. [redacted] ultimately underwent a cervical fusion operation?

A. I am, yes.

Q. Have you reviewed the operative notes for that procedure?

A. I did.

Q. Doctor, in reviewing all the x-rays that were

provided by all the physicians that have treated the plaintiff, and in reviewing all the reports generated by those films and various x-rays, did you come across any film taken during the course of that surgery, that fusion surgery, that would clearly show the condition that the disk was in immediately before it was removed?

A. No. The only thing that one can see at the time of surgery was what is known as a localizing film. Surgeons, when they operate on the lumbar or the cervical region, in order to identify the exact area that they work on, put a metal object in, for example, a needle, and an x-ray is taken at the time of the surgery so the doctor can identify the exact inner space that he wants to work on.

We can count that the limited exposure, the anatomy, you're working through a small hole, while we can identify certain levels by anatomical knowledge, in order to be certain, a localizing film is done; and it was done in this particular case.

Q. Doctor, is there any significance that you attach to the film, the localized film, that you reviewed?

A. No. It's something that's done by all surgeons.

Q. All right. Now, Doctor, have you reviewed the report, the pathology report, prepared after that fusion operation?

A. Yes.

Q. Do you recall what that report indicated?

A. Yes. That's a report that would be pathologically noted in most instances, in any disk that is removed in the cervical or in the lumbar region. It was reported to demonstrate some chronic degenerative changes. Again, this is something that we would expect, unless it was an acute process, an infection or a tumor, which would show some different histology at the time that it was examined. Nothing unusual about that report. That's what we would see in almost any -- in any, I wouldn't say in almost any, in any disk material thats's removed.

Q. All right. Doctor, just so we're clear on this, the pathology report indicates fragments of degenerating fibrocartilage in bone.

A. Yes.

Q. And it is your testimony that given the age of the patient, 27, that the description on this pathology report cf what was removed would be similar in any 27-year old?

A. Yes. Be it 27, 45, 65, wouldn't be very -- any

Q. All right. Now, Doctor, have you reviewed the report, the pathology report, prepared after that fusion operation?

A. Yes.

Q. Do you recall what that report indicated?

A. Yes. That's a report that would be pathologically noted in most instances, in any disk that is removed in the cervical or in the lumbar region. It was reported to demonstrate some chronic degenerative changes. Again, this is something that we would expect, unless it was an acute process, an infection or a tumor, which would show some different histology at the time that it was examined. Nothing unusual about that report. That's what we would see in almost any -- in any, I wouldn't say in almost any, in any disk material thats's removed.

Q. All right. Doctor, just so we're clear on this, the pathology report indicates fragments of degenerating fibrocartilage in bone.

A. Yes.

Q. And it is your testimony that given the age of the patient, 27, that the description on this pathology report of what was removed would be similar in any 27-year old?

A. Yes. Be it 27, 45, 65, wouldn't be very -- any

different unless, unless there was infection or tumor; or unless the doctor took out something other than a disk? If he took out something else, we'd see it.

Q. Now, Doctor, I would like to ask you some questions, and I would ask as a preface to those questions, that you responds as follows. That is, when I ask you a question, I would like you to respond in terms of reasonable medical probabilities, and do you understand what I mean by that particular comment?

A. Yes.

Q. Now, Doctor, based on your examination and history of the plaintiff, based upon your review of all the records and all the material generated, both the x-rays and all tests, and everything else associated with the treatment rendered to the plaintiff, do you have an opinion within a reasonable degree of medical probability as to whether the incident at Geauga Lake Park on August 20, 1985 was a proximate cause of the alleged problem at the C-4/C-5 disk space, which resulted in the fusion operation?

First of all, do you have an opinion?

A. I have an opinion.

Q. Doctor, what is that opinion?

A. It's my opinion that the injury that was sustained in August of 1985 at Geauga Park was not the

cause of her degenerative change in the cervical spine.

Q. Doctor, was it a cause?

A. I do not think that in any way, shape, or form could result in a degenerative disk problem in the C-4/5 level of her cervical spine.

Q. Doctor, again, do you have an opinion within a reasonable degree of medical probability as to whether it is more probable that whatever problems the plaintiff had within her cervical spine, they all pre-existed the August 20, 1985 incident at Geauga Lake?

Q. Doctor, what is that opinion?

A. It's my opinion that the accumulative effect the previous injuries, plus the aggravating effect whatever happened in Geauga Park, accounted for her symptoms.

Q. Now, Doctor, do you feel that -- do you have an opinion, Doctor, within a reasonable degree of medical probability that as to whether or not the incident at Geauga Lake Park aggravated a pre-existing condition in her cervical spine?

A. I have an opinion.

Q. Doctor, what is that opinion?

A. I think if there was any aggravation, it was a minor one.

Q. All right. Now, Doctor, finally, I'd like you to assume that Dr. Wilber has already testified and in his testimony he indicated that he believed the fusion operation was a success. Assume that it was. Based upon your knowledge of that procedure, and upon your experience as an orthopedic surgeon, and based upon your knowledge of the plaintiff in this case, do you have an opinion within a reasonable degree of medical probability as to whether the plaintiff sustained -- will suffer from any permanent injury as a result of this incident?

A. I have an opinion.

Q. What is that opinion, Doctor?

A. The surgical procedure which was done is a success and should eliminate all the problems referable to her C-4/5 level.

Q. Doctor, would you agree with Dr. Wilber when he says the only residual, the only remaining problem would be occasional stiffness in that area?

A. I have an opinion. There can be no stiffness in that area, simply because a fusion would eliminate all the movement in that -- in that level. So there can't be any stiffness in that level if it's already

completely removed.

Q. Doctor, would there be any restricted movement then, if not pain, restricted movement in that area?

A. Well, the answer is yes, but not to any significant degree. Simply because in the cervical spine in a person of this age the range of motion should be at least 45 to 55 degrees of movement, both forward and back; and a loss of one segment of seven means that the amount of motion that would be lost would be somewhere in the neighborhood of seven to nine degrees. That isn't very much when one considers the normal range of movement. So the answer is yes, there is a certain degree of loss, but it wouldn't be of any functional importance.

Q. Doctor, do you have an opinion as to whether or not, within a reasonable degree of medical probability, as to whether or not the plaintiff could not undertake a further career in real estate sales, for instance?

A. I have an opinion.

Q. What is that, Doctor?

A. She could play football, as well; so that she could do real estate, yes.

Q. Doctor, now that you mentioned football.

A. Yeah.

Q. Again, did the quarterback for the San Francisco 49ers undergo a fusion operation?

A. Yes, but in the lumbar spine.

Q. So this was in the cervical and his was in the lumbar, and did he return to play football?

MR. POMERANTZ: Objection. It's totally irrelevant. It's a different fact situation, and I object to any further comments be made on this, unless his records are introduced in here and we can equate the two, I think it's totally improper.

A. We can come back to Cleveland. Milt Moren had the operation that I did on his back --

MR. POMERANTZ: Likewise, for Milt Moren.

A. -- and he played football that same year.

Q. All right. So Doctor, let's assume that the plaintiff is not contemplating a career in professional football --

A. Yes.

Q. -- and instead let's talk, first of all, about is there any reason why she can't work, functionally speaking, as a secretary or in a clerical capacity?

A. There should be no limitation to anything she wants to do.

MR. TUREZ: Thank you. I have

no further questions.

MR. POMERANTZ: Do you want to take a break or just continue.

MR. TUREK: Go ahead.

MR. POMERANTZ: Okay. Doctor, as you know, my name is Norman Pomerantz, and I represent the plaintiff JoAnn Sanders in this case.

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CROSS-EXAMINATION

BY MR. POMERANTZ:

Q. When we were here last week taking your deposition, you had given me a copy of your office notes. Would you compare those to the notes, your notes, to make sure that they are --

A. They're exactly the same.

MR. POMERANTZ: They're exactly the same, okay. Would you please mark that as Plaintiff's Exhibit A. I just want to do that so we done forget to do it.

MR. TUREK: May I see that, please?

MR. POMERANTZ: Thank you.

- - - - -

(Plaintiff's Exhibit A marked for identification.)

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Q. Now, Doctor, when we were here last you had indicated to me that there were certain things that you had reviewed and that there were supposedly some other documents that were given to you for your review also. Did you review any other documents since the last time that we had this, we took your deposition?

A. Yes. I saw an emergency room report in 1984 and in 1983.

Q. Now, those emergency room, was that part of the Army record that she had?

A. I don't know where they're from, but I did see the reports.

Q. Well, I'm going to hand you a packet. Would you look over those records, and are those the records that you examined?

A. I did not --

Q. I think the section --

A. -- see this report at all.

Q. You didn't see that?

A. No. This record, I did see. This one, 23-year old in automobile accident last p.m. now with pain in the mid back between scapula, and that's dated -- I can't tell you what the date is.

Q. Well, in any event --

A. I saw that.

Q. -- the document is dated, these were the documents that you referred to in your direct examination --

A. Yeah. These two documents, yes.

Q. -- is that correct?

Doctor, I might state to you that this whole packet that I gave to you, was a packet that purports to be her Army record when she was in the Army, and that these were copies that were given to Mr. Turek and I think these are the records you looked at. Would you look through these records and familiarize yourself with all of these records, since you've now testified at least on part of them, and see whether or not there is anything in there that causes you some concern so that you would like to comment on it?

A. Do you have anything specific?

MR. TUREK: Let me show an objection to that.

MR. POMERANTZ: Well, let's go off the record.

MR. TUREK: No, before we go off the record, let me show an objection -- you did go off?

VIDEOTAPE TECHNICIAN: No, I'm on.

they are being described as [illegible].

That is not necessarily the case. The plaintiff, as I have been told by the plaintiff's attorney, had these records in her closet throughout the pendency of this lawsuit, and that they were provided -- that she provided, she found them and sometime in the last four months or five months at the most, turned those over to her attorney, who turned those over to me, in the sense -- turned some records over to me. What the Army actually generated in terms of her overall treatment, what was lost, what is missing, whether that's a complete and accurate record, remains somewhat unknown; but that is the background upon which I received those records.

MR. POMERANTZ: I concur with you on that, but what I'm concerned about is that since you did testify as to those records, I want -- these were the records that were turned over to Mr. Turek and these were the records that I assumed were presented to you, and I want to make sure that we're talking about the same records because you did place part of your opinion or stressed part of your opinion on these records; is that not correct?

A. No, that's not correct. I saw two emergency room records only. I did not see the rest of these records.

Q. In other words,--

A. I saw these first two sheets referable to the injury to her neck and her back. That's the only thing I saw.

Q. These are records that were given to you by Mr. Turek --

A. That's correct.

Q. -- is that correct?

A. Yes, that's correct.

Q. Do you, in looking over those records, find any further comments in relation to the area that we're concerned about now?

MR. TUREK: Objection.

Yes. I see that in this first sheet that the patient reported, her complaint or chief complaint when she reported, whatever this date is -- does someone know what the date of this record is -- that it was pain on the right side of her neck. A female 24 years of age and she was seen at 2355, which is Army terminology for time; and she was released at 2400. She also had pain in the right TM joint, and she was given some medication. The next record -- do

you want me the continue on with this?

Q. No. Doctor, may I ask you just one question.

A. Yeah.

Q. The pain that she had was commonly referred to as temporomandibular joint dysfunction?

A. No. The chief complaint is pain on the right side of neck.

Q. Yeah.

A. That has nothing to do with TMJ.

Q. Well, but when you read further, that's what it was, it was TMJ.

MR. TUREK: Objection. Are you asking or stating?

MR. POMERANTZ: I'm asking.

A. The chief complaint that she registered at the triage was pain on the right side of her neck. The examination, the man who examined her, then put down in his notes, "Pain at the TMJ, tender right TM joint; ENT, nect, "F.R.O.M.", means free range of motion. I don't know what "S" means. There's a question mark. TMJ arthritis, meaning there is a question in that doctor's mind whether or not she had some arthritis in that joint, and he gave her some Motrin and follow-up somewhere, and I can't read his writing, but I know that terms says follow-up.

Q. In other words, the findings were that she had a TMJ suspicion by the doctor?

MR. TUREK: Objection.

A. The answer is , with a chief complaint of pain in her neck.

Q. Which they interpreted to mean a TMJ?

MR. TUREK: Objection.

A. No, that's not true at all. What it means is, when the patient reported to the emergency room, she told the person who took this ledger that she had pain on the right side of her neck. The doctor who examined her then wrote down his findings referable to her TMJ joint.

Q. Okay. He did not find anything wrong with her neck?

A. had a normal range of motion, that's right.

MR. POMERANTZ: All right. Would you please mark that as Plaintiff's Exhibit B. In fact, do the whole record and make -- but I want each sheet marked separately. Okay. We can do that later. We don't have to do it right now because I'm not going to ask any further questions on it right now.

Q. Doctor, you mentioned both Dr. Figgie and Dr. Wilber. These two doctors are orthopedic doctors

who are practicing in the Greater Cleveland area?
A. Yeah. At the University Hospital.
Q. And I take it, that they're also specialists, i.e., orthopedic specialists like yourself?
A. That is correct.
Q. And they both enjoy good reputations for competency in the Greater Cleveland area, to your knowledge?
A. Yes.
Q. Now, Dr. Figgie was treating Mrs. Sanders prior to August 20 of 1985 for a left elbow problem, correct?
A. Yes.
Q. In fact, on the day of the accident, Mrs. Sanders was wearing a sling on her left hand?
A. Yes.
Q. She did tell you that history?
A. Yes.
Q. Now, did you have an opportunity to look over all of Dr. Figgie's records?
A. I have records of Dr. Figgie's from the 25th of July, 1985, through the 4th of September of 1985.
Q. Now, Doctor, in review of Dr. Figgie's records, prior to August 20 of 1985, which is the date of this incident here, is there any indication on his record

which would indicate that she was having problems with her cervical neck?

A. Prior to the 25th?

Q.

A. No. There's no -- there's no information. I only have one record on the 25th of July, 1985, and the 5th of August of 1985, referable to the treatment, which was principally to her elbow.

Q. In other words, your answer is that there is no mention whatsoever of any complaint in her neck?

A. That is right.

Q. Now, you had mentioned that you had seen some records that Mr. Turek had given you where she was involved in an automobile accident in 1983.

A. Yes. She reported that to me.

Q. And you looked over the records and you found that the doctors stated in there that she had a pain in the mid back area near her scapula. Can you tell us what the scapula is, Doctor?

A. Yes. Scapula are the two wing bones which are connected to the muscles which go to the neck.

Q. Doctor, is the neck, when we say the "Neck," the cervical spine area is in close proximity to the scapula?

A. Yes.

Q. Isn't there the thoracic spine in between?
A. The thoracic spine -- the scapula is located on the area of the back, which is all thoracic spine. The level is about three finger breadths from the top of scapula to the bottom of the cervical spine, and the muscles which connect the thoracic -- the scapula are all muscles which go to the neck as well.
Q. Doctor, in reviewing of that record, was there ever any complaint of the cervical spine?
A. In Dr. Figgie's notes that I reviewed?
Q. Not in Dr. Figgie's notes. In the notes you read concerning the accident that occurred in August of 1983?
A. Yeah.
Q. In 1983?
A. Yeah. There is a record revealing that she had pain in her upper back region.
Q. Upper back?
A. Yes.
Q. Is that the same as her -- it was the mid back, Doctor, if I'm not mistaken. Would you please check the record?
A. It says here, "23-year old black female was in automobile accident last p.m., now with pain mid back between the scapula."

Q. That's right, Doctor --
A. That's not the --
Q. -- it's not the upper back?
A. That's not mid back. That's upper back.
Q. Doctor, the person who wrote that, was that a doctor or someone else?
A. I don't know. I wasn't there. I have no idea.
Q. But the report was mid back, not the cervical spine?
A. Mid back between the scapula, and the scapula is not in the mid back. The scapula is in the upper back.
Q. Okay, Doctor. The fact is, though, that the cervical spine does not extend to the scapula?
A. Mr. Pomerantz, we can't dissect the neck away from the scapula, because the scapula is connected to the neck by the same muscles which go up into the neck and into the scapula, all the way down in the low back region, as well.
Q. That may be true, Doctor, and I'm not arguing with you. All I ask you, though, does the cervical spine extend as far down to the scapula?
A. The cervical spine does not extend down to the scapula. I know of no incident where automobile accidents are referable principally to the mid back

region. They are instances where the injuries to the neck cause pain in the upper back region.

MR. POMERANTZ: I ask that the last part be stricken as not being responsive to the question.

THE WITNESS: It may not be responsive, by it is a fact.

MR. TUREK: I will object to the objection. It is a proper response.

Q. Now, Doctor, isn't it true that you didn't see Mrs. Sanders from the period of August 20, 1985, to August 25, 1987, when she was making or had complaints of difficulties with her neck? You never saw her during that period of time?

A. I did not. I saw her only one time in October of 1987.

Q. This was a time, however, when both Dr. Figgie and Dr. Wilber were seeing her, weren't they?

A. Yes. That's right.

Q. Now, wouldn't you agree that actually seeing Mrs. Sanders when she was symptomatic and being able to discuss with her, her aches and complaints as well as doing tests during that period of time, would give the examining doctor a decided edge in evaluating the patient?

A. The record shows that Dr. Wilber saw her in March of 1986, and the next time he saw her was December of 1986, so he really wasn't treating her in this period. Dr. Figgie was.

Q. He had been seeing her during that two-year period?

A. He did not. He saw her for the first time March the 26th. The next time he saw her was December of 1986.

Q. Isn't that within the two-year frame that we're talking about?

A. Yes, but the point is, that he didn't treat only -- he saw her in consultation once, and then nine months later re-examined her.

Q. But he had been seeing her during that period of time?

MR. TUREK: Objection. I think it's asked and answered.

A. I think I answered that, that he saw her on those two occasions.

Q. Okay. You were never called in this case to render medical service to Mrs. Sanders, were you?

A. No. We aren't expected to.

Q. You were retained by Mr. Turek for Geauga Park to give testimony in their behalf?

A. That is correct.
Q. As far as you know, will your findings or opinions ever appear in her medical charts?
A. No. I've never treated the patient.
Q. So at any time in the future, for example, five or ten years from now, if a treating doctor is inquisitive about what had transpired to Mrs. Sanders, it's the records made by Drs. Figgie and Dr. Wilber that they're going to go to, not yours?
A. That's correct.
Q. Now, Doctor, your presence in this case is not a gratuitous one, as you had mentioned. You said that you get paid for your time and all of us here do get paid for our time. Can you tell us how much you're getting paid for your time?
A. Yes.
MR. TUREK: Objection.
A. For the deposition you're talking about?
Q. For all of your time?
A. Oh, sure. I charge $125 for the examination, $150 for the report, and I am giving a deposition tonight. The first hour will be $500. Every half hour thereafter will be $150.
Q. Doctor, you and I have met frequently in the past because I limit my practice *eo* representing

injured people --

A. We haven't met frequently, Mr. Pomerantz. We've met occasionally, not frequently.

Q. Occasionally?

A. Yes,

MR. TUREK: I'm going to move to strike the entire comments just made by counsel, anyway.

MR. POMERANTZ: I didn't make a comment. I'm trying to ask a question when I was interrupted.

MR. TUREK: Based on that interruption, I will move to strike what comments you made preceding the interruption. Proceed.

MR. POMERANTZ: Do what you want.

Q. Doctor, anyways, you and I have met in the past, sight?

A. Yes, that's correct.

Q. And I am an attorney and I limit my practice to representing injured people and you frequently examine people on behalf of defendants, as you have testified?

MR. TUREK: Objection. Move the strike.

A. I examine patients more frequently for defendants. I also take care of my own patients as

plaintiffs, as well.

Q. I am not asking that.

A. Yes.

Q. You did respond and you said you do quite a few examinations for defendants?

MR. TUREK: Objection and move to strike.

A. More frequently than plaintiffs, yes.

Q. Can you tell me approximately how frequently you examine for defendants?

A. I will see as many as one or two patients every day that I'm in the office, which is usually four times a week. Sometimes as many as five times a week.

Q. And these are for defendants; is that correct?

A. Either one.

Q. No. I mean for defendants?

A. Oh, that's -- I see -- my practice is principally taking care of my own patients. This is a small part of my practice, but it is as frequent as one or two a day that I'm here.

Q. For defendants?

A. Yes. That's right.

Q. Now, did you have an opportunity to read Dr. Figgie's and Dr. Wilber's depositions?

A. I did read Dr. Wilber's, but not Dr. Figgie's.

Q. So you realize that there is a conflict between what you say and what he says?
A. I don't know that there is, but if you say so, I'll agree.
Q. Well, in essence, if I can paraphrase him, and I think what I said is correct, is that he feels that there is a proximate cause between the incident that took place in Geauga Park and the necessity for surgery that she had?
MR. TUREK: Objection.
A. Yes. There is a disagreement on that, yes.
Q. Now, you had testified on direct, Doctor, about her -- whether or not she will sustain any permanency. Since that one time that you had examined her, you had never seen her again, have you?
A. No, I have not.
Q. Have you seen any reports from other doctors who had seen her subsequent to your examination?
A. No, I have not.
Q. Then you really can't say in reference to Mrs. Sanders whether or not she is having any difficulties or problems with that cervical fusion?
A. I cannot.
Q. Nor can you say whether or not she's having any other difficulties concerned with the injuries that

she sustained at Geauga Park?
A. Obviously I cannot.
Q. Do you have any questions that there was some type of an injury that occurred at Geauga Park on August 20 of 1985?
A. I know that by history she told me that she injured her neck and perhaps her left arm, as well, at the time that this happened.
Q. And I think you had indicated to me previously that you had no reason to disbelieve this woman.
MR. TUREK: Objection.
A. No reason to disbelieve her.
Q. Doctor, I was not really clear on your direct examination, but let me ask you: It is your opinion that the degenerative disk that this patient had, came about or had its genesis from the 1983 automobile accident?
A. It may have been an accumulative effect, as I said, and one of injuries was that accident. Whatever happened prior to that or subsequent to that, is a reason that problems occurred, but not ever was it demonstrated at the C-4/5 level. The MRI alluded to the 5/6 level, not the 4/5 level.
Q. Doctor, are you saying to me that she never had an injury at the C-4/C-5 level?

A. I know of no objective evidence to support that she had an [illegible]

Q. In other words, what you're saying to me is, that as far as your [illegible] record, you did not [illegible]

A. That's exactly right.

Q. And there was absolutely no purpose or no necessity for Dr. Wilber to operate on that level?

A. I don't question Dr. Wilber's integrity or ability, and if he indeed operated and successfully performed an operation, so be it.

Q. I don't understand what you mean by that.

A. I'm just saying that I have no objections to the fact that he operated on her.

Q. But you don't see the necessity for it?

A. I certainly do not.

Q. Weren't you a little curious of the fact that after her surgery she now was relatively free from a lot of the problems that she was having prior to the surgery?

MR. TUREK: I'll object.

A. I'm not a bit suprised.

Q. Why are you not suprised, Doctor?

A. Because I think that she has gained what she wanted to gain, namely someone to treat her as best

they could to see if they could get rid of her pain, and if indeed the C-4/5 level has successfully gotten rid of her pain, that's fine. I can't account why it has successfully eliminated her pain.

Q. So in so far as you're concerned, what happened in 1983 or before or after or even in the incident that we're concerned about, is of little concern to you because you feel there was no injury to the C-4/C-5 level?

A. I don't think that there were very many neurosurgeons or orthopedic surgeons that would in the face of a negative MRI, negative CT, negative myelogram, would do surgery in a patient of this nature.

Q. Doctor, that was not my question. Would you --

A. It's my answer.

Q. In other words, whether it's responsive or not, it's your answer?

A. It's my answer.

Q. Okay. Doctor, you know that a discogram was performed and that discogram was positive. It was on the strength of that discogram that Dr. Wilber did operate?

A. Yes.

Q. Do you know that?

A. Yes. I'm aware of that, yes.
Q. Now, did you ever use a discogram for diagnosing patients?
A. I have never and will never.
Q. Is it an accepted practice?
A. In some -- in the hands of certain individuals who believe in it, yes.
Q. In fact, it is not only used at University, but it is used in many other hospitals, as well?
MR. TUREK: Objection.
A. Not in many other hospitals. In some other hospitals.
Q. What other hospitals, Doctor?
A. It's used by one particular surgeon in this city.
Q. Who is that?
A. Dr. Collis.
Q. Is it used at the Cleveland Clinic?
A. No.
Q. Doctor, I am --
A. It is used at the Cleveland Clinic, and now I would qualify that. I'm not certain that I know everybody at the Cleveland Clinic who does neurological surgery. To my knowledge, the orthopedic surgeons at the Cleveland Clinic, to my knowledge, the

orthopedic surgeons that I know at the Cleveland Clinic, do not use discograms.

Q. How about the neurosurgeons?

A. I don't know about the neurosurgeons.

Q. Doctor, let me tell you something.

MR. TUREK: I'm going to object to this.

MR. POMERANTZ: You may.

THE WITNESS: I don't need a lecture,

MR. POMERANTZ: I'm not lecturing you. I'm saying to you that I *had* a discogram that was done at the Cleveland Clinic.

THE WITNESS: Fine.

MR. POMERANTZ: So for your knowledge, I'm just saying it is done --

THE WITNESS: When?

MR. POMERANTZ: -- it is done other places.

THE WITNESS: When?

MR. POMERANTZ: It was done sometime ago.

THE WITNESS: When?

MR. POMERANTZ: 15 years ago.

THE WITNESS: By Dr. Collis.

MR. POMERANTZ: No, not Dr. Collis.

THE WITNESS: When he was at the Clinic.

MR. POMERANTZ: But in any event --

MR. TUREK: Objection.

THE WITNESS: It was by Dr. Collis when he --

MR. POMERANTZ: -- what I'm saying to you --

THE WITNESS: It was by Dr. Collis when he was at the Clinic. Dr. Collis was at the Clinic 15 years ago.

MR. POMERANTZ: He was not my surgeon.

THE WITNESS: And Dr. Collis, and his -- he was a neurosurgeon in charge at that time, was the chief and probably at that particular point in time discograms were done at the Cleveland Clinic. They are not done frequently at any other institution.

MR. POMERANTZ: But they are done.

MR. TUREK: I'll move to strike the exchange.

MR. POMERANTZ: And I agree with you. I just wanted to let the doctor know.

MR. TUREK: I'm glad the doctor had a response.

WITNESS: 15 years ago we didn't have an MRI.

Q. Doctor, the fact is though that the MRI, the discogram showed positive and that's the reason why Dr. Wilber went forward; isn't that correct?

A. That's a subjective test and does not have any objectivity behind it.

Q. Tell us *how* a discogram is performed, Doctor?

A. Yes. A discogram is done by putting a needle into the disk and injecting some fluid and see whether or not it reproduces pain.

Q. They take an x-ray of that, also; isn't that right, Doctor?

A. They may do it in two ways. They may use saline, which doesn't *show* -- they localize it with x-rays, but they may inject saline and *in* order to put it on screen, to put it on x-ray, they must put in a dye, and the dye then can be x-rayed to show where the *dye goes*, Depends upon where the needle is,

Q. And so what happens is that they inject a dye and then they take a picture of it?

A. Yes.

Q. Isn't that correct?

A. But the picture is taken on fluoroscopy. It's not reproduced on any x-ray that can be demonstrated. It's done fluoroscopically.

Q. It may not be demonstrated, but it was seen by Dr. Wilber; isn't that correct?

MR. TUREK: Objection.

A. That doesn't mean that it was seen by anyone else.

Q. Now, throughout all of the written records as far as you can see with the one exception, which we differ in its interpretation as to the pain in the side of her neck, there has not been any records which indicates that she had pain in her cervical spine prior to this incident of August 20, of 1985.

MR. TUREK: I'll object. Other than what he's already testified about the complaint in the right side of the neck.

MR. POMERANTZ: You can object.

A. I know of no automobile accident that results in pain in the mid back without injury to the cervical spine.

Q. Doctor, I'm asking you whether or not the records reflect, other than that one point that's in

dispute, whether or not there was any records which indicate that she had pain in her cervical spine?

A. It says that she has pain in her back between her scapula. That's in --

Q. In her mid back?

A. The scapula are not in the mid back. I think we have established that. The scapula is in the upper back.

Q. Doctor --

A. And the scapulae are attached to the cervical spine through the trapezius muscles.

Q. Yes. But Doctor, you do not see anything in the cervical spine?

A. I see only one entry. That the patient had pain on the right side of her neck.

Q. And that's a question of whether or not that was an interpretation of TMJ or not?

MR. TUREK: I'll object.

A. No. No. That's exactly what she told the individual when she registered in the emergency room.

Q. Did you ask her when she was here whether or not she ever had pain in her cervical spine?

A. She told me of no injuries at all except that she was involved in a motor vehicle accident and didn't tell me of any injuries as a result of that,

except her left arm pain.

Q. Well, and that's the same injury or accident that you're referring to where she had pain in the mid back?

A. In order for one to get pain in the arm, they have to have an injury to the neck.

Q. Oh?

A. Sure,

Q. Is that where Dr. Figgie operated or did he operate on her elbow?

A. He operated for a different reason entirely, He operated because she had a subluxing ulnar nerve which was producing symptoms in her arm, and that had nothing to do with that part at all; but the pain in her arm, the result of any accident which had to do with her cervical spine, would have to be radicular in nature,

Q. Who said it had to be with the cervical spine?

A, I'm --

Q. You're saying that?

A. I'm saying that in order for anyone to have pain in their neck in an automobile accident, in their arm in an automobile accident, without any direct trauma to the arms at all, it must come from the neck.

Q. Do you know whether or not she had trauma to the

arm?

A. I know of no reason that she had trauma to her arm, nor do I know of any reason that she had trouble with her neck, I'm only reporting what she told me. She had a motor vehicle accident: in 1983, and if she did have other injuries, mid back, upper back, it must include her cervical spine.

Q. Why?

A. Because there's no automobile accident that I know of that results in the pain to the mid back aione.

Q. Okay, Doctor. Doctor, is it your opinion that regardless of the Geauga Park incident she would have had neck pain anyways?

A. I don't know that.

Q. Doctor, you indicated previously that there was no anatomical reasons for pain in her thumb and her leg; isn't that correct?

A. That's right.

Q. And you're assuming, Doctor, that this is all associated with the pain that emanated from her neck?

A. I'm not assuming that at all. I'm disagreeing with those facts. I'm not agreeing with them.

Q. When you're saying you're disagreeing, you're disagreeing that she had pain where she said she had

pain?
A. I'm disagreeing with the anatomical site of pain in the neck or pain in the thumb. The pain in the thumb was referable to the transposition of her ulnar nerve. The pain in her leg was related to an injury to her neck, and there is no anatomical reason to explain that.
Q. Doctor, what you're saying is, there's no anatomical reason to connect this with the cervical spine; isn't that correct?
A. That's correct.
Q.
A.
but it had nothing to do with the relief of the pain in her leg as a result of the successful surgical operation in her neck.
Q. Doctor, all you're doing is you're saying is that there was a time factor. What she told you was subsequent to the surgery she was getting -- she was having relief in her thumb and in her leg, and didn't we agree further that, Doctor, that maybe the rest in the hospital at the time of the surgery would have relieved the pain in her back.
Q. I'm sorry. Would you ask me again? I'm sorry.
Q. She told you that after this accident that

occurred at Geauga Park, she also had hurt her low back; isn't that correct?

A. Yes.

Q. That the low back pain continued on and at times the low back pain, she had pain in her legs, would that be associated with the pain in her back?

A. Yes.

Q. After the surgery to her neck, when she was by necessity caused to be hospitalized and had a substantial amount of rest, could that have relieved the pain in her low back and her legs?

A. Oh, yes.

Q. Doctor, as an orthopod, it would not be unusual if a person sustains an injury to some part of their spinal column and two years later reflect a degenerating disk in the area that was traumatized, would that in and of itself be uncommon?

A. No, it wouldn't be uncommon.

Q. So that if she sustained an injury to her C-4/C-5 area in August of 1985 and it showed up in sometime subsequently, anywheres from a year to two years later, that would not be something that would be outside the realm of reasonable medical probability?

A. Yes, it is outside the realm of reasonable probability because she had a repeat myelogram done

shortly before her operation. That -- not myelogram, MRI, and that MRI was completely within normal limits at the C-4/5 level, and the MRI is as good a diagnostic test as any that we know of to demonstrate any integrity of the disk structures.

Q. Doctor, in her hospitals records, in the clinical resume which is the discharge sheet -- do you have this here? The first page. Let me just read to you essentially what they say about that.

MR. TUREK: Well, I'll object to this, but go ahead.

MR. POMERANTZ: Well, it's part of the hospital record.

Q. "She was status. Post magnetic resonance imaging showing possible herniated nuclear pulposus at C-4/C-5 or C-5/C-6."

A. That's not a true statement.

Q. Subsequent --

A. That's not a true statement.

Q. Subsequent discogram revealed a C-4/C-5 disk?

A. That is not a true statement. That's a summary written by someone. I doubt if it was written by Dr. Wilber, but if you review the MRI studies by the radiologist, there is no evidence, no evidence of any abnormality in the C-4/5 x-rays in 1985 or in 1987.

Q. Doctor, it was on the strength of that question that they did a discogram; isn't that what doctor --
A. No. I don't believe that's true at all. I think the discogram was done in view of the fact that this patient continued to complain of pain, and in the face of negative examinations, a discogram was done. The discogram done on the 30th of June of 1985, revealed that she had subjective symptoms comparable to the kind of pain that she had experienced, and on the basis of that, an operation was done.
Q. And this operation relieved those pains.
A, Yes.

MR. TUREK: Is that a statement 9%'--

MR. POMERANTZ: Yeah.

A* Yes. That's right. They did --

MR. POMERANTZ: I have no further questions, Doctor.

MR. TUREK: Doctor, just a few matters on redirect,

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REDIRECT EXAMINATION

BY MR. TUREK:

Q. Some time was spent going over the first mentioning of any problems with the neck or with the

prior accident at the time that this Geauga Lake Park incident occurred. Now, Doctor, in reviewing the facts in the records, and in fact you recited to the jury already, the very first comment by Dr. Figgie when he examined the plaintiff after the Geauga Lake incident, and Doctor, what I have highlighted in this the particular sentence, would you read that? The first --

MR. POMERANTZ: I object. This was already read. This is just repeating the same thing over and over again.

MR. TUREK: It's the proper redirect.

MR. POMERANTZ: It is not proper.

MR. TUREK: We'll see.

A. The statement here says, "Today the patient relates the complaints of neck pain with radiation down the forearm. This is consistent with an injury she received two years ago and a recurring injury suffered within the last week at Geauga Park Lake."

Q. All right. Now, Doctor, we can agree, can we not, that what you just read is the very first reference to the causation of the complaints that she was making on 8-26-85?

A. There is no conceivable logic to an injury to

her cervical spine in the manner in which it was described to me, or in the manner in which you related, that can result in a degenerative in a patient 37 years of age, in a negative MRI, negative CT, negative myelogram, negative EMG; there is no conceivable reason for a prudent doctor to make that conclusion.

Q. Thank you, Doctor,

Doctor, if the plaintiff is making continued complaints today of pain in her cervical spine, would that support your suspicion that there was no need for the surgery?

MR. POMERANTZ: Objection. This is strictly hypothetical.

Q. You can answer, if you can, Doctor.

A. The answer is there is no reason for me to believe that the patient cannot suffer other injuries, despite the successful C-4/5 fusion. And the answer is, that there is no reasonable belief that a patient of this age should have had or now has any significant problems in her cervical spine.

Q. All right. Doctor, you brought up an interesting point. That is, you are unaware of any intervening, of any accidents or incidents, that have occurred to the plaintiff in between the time of your

examination in late 1987 and today?
A. Oh, yes. She did have another automobile accident in December of '87.
Q. All right. And you have been made aware of that?
A. Oh, yes.
MR. POMERANTZ: Show an objection to this.
A. Yes, I'm aware of it.
Q. Doctor, if she is making continued complaints of pain in the neck, might it not relate to that accident?
MR. POMERANTZ: Objection. Speculative.
A. She has seven cervical vertebra. They could all be fused, one at a time.
Q. All right. Doctor, I just want to clarify the subject of the discogram. The discogram is not something, when Mr. Pomerantz or Dr. Wilber or myself, when we speak of a discogram, there is nothing that you can pick up, such as an x-ray film or some sort of film, some sort of document, if you will, illustrating what Dr. Wilber says he saw at that time?
A. Yes. That's a fluoroscopy and it can be seen by those who are in the operating room, and unless a

formal x-ray is taken at that time, there is no way to document it except by just by comment. Someone's, you take someone's word for it.

Q. All right. So unlike the MRI and myelogram and other x-rays taken of the plaintiff, in which you have been able to look, actually look at the films made, that is not the case with the discogram?

A. At least, Mr. Turek, a report from a radiologist that the examination was done and the results of that examination.

Q. You at least were able to review that?

A. If it is put on film, it must be reviewed and recorded by a radiologist.

Q. And it was not put on film?

A. I find no evidence for that except that I read that the discogram was positive, and I assume that that was a report of what happened in the operating room at the time that the discogram was done.

Q. Doctor, just so we're sure, there is nothing that you have seen in the records that you can point to and say this is the discogram and this is what it shows?

A. No, I couldn't find anything.

Q. All right. Doctor, was there anything during the course of the cross-examination of Mr. Pomerantz

that makes you want to in any way modify the opinions you expressed initially?

A. None whatever.

MR. TUREK: Thank you. I have no further questions.

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RECROSS-EXAMINATION

BY MR. ROSENBAUM:

Q. Doctor, Mr. Turek did not give you Dr. Figgie's deposition, did he?

A. I didn't receive it, no.

Q. Do you think it would have been helpful if you would had read and understood what was going on with the patient or the client in this case at the very beginning right after this accident?

A. I doubt if it would be of any interest and it wouldn't have changed any of the document -- the sophisticated tests that I based my conclusions on.

Q. What sophisticated tests did you --

A. CT, MRI's, myelograms, EMG's.

Q. Did you conduct these?

A. No. I said the ones that I reviewed.

Q. The ones that you reviewed, I see. Therefore, regardless of what the clinical findings are, you make your determinations only on these tests, these

radiological tests; is that correct?

MR. TUREK: Objection.

A. That's an absolute, positive response. The answer is absolutely, in a 27-year old with a negative MRI, a negative CT scan, a negative myelogram, I would find it very difficult to believe that any other tests are necessary --

Q. Doctor --

A. -- or any surgery necessary.

Q. -- have you ever made any testing to determine the false positive of these tests, and do you understand the --

A. The answer is -- I understand what you're saying. The answer --

Q. Will you explain --

A. -- what you're saying and --

Q. -- to the jury what a false positive readings are?

A. I'll be glad to. The positive, the positivity of a CT scan is in the neighborhood of 85 percent. An MRI in the hands of a good radiologist, as they have at the University Hospital, at Cleveland Clinic, at Mount Sinai, Saint Luke's Hospital, I would think that with the modern MRI's, the new generation of MRI's, that that probably would reach closer to 90 to 95

percent. So that the chances of erring is minimal; and in the case that it would be minimal, it would be of an insignificant amount.

Q. So in other words, these tests are not absolute. They are room for mistakes on them?

A. Nothing in medicine is absolute.

Q. And therefore to a large degree a doctor requires -- I mean a doctor relies very strongly on his clinical examination of the patient; isn't that true, Doctor?

A. Not in this instance. You would have to rely --

Q. Doctor, isn't that true --

A. No.

Q. -- in all cases?

A. No, not in this instance.

MR. TUREK: Objection.

A. Not when we do surgery on the spinal cord, we don't just go on the clinical history. We must have documents of positive tests.

Q. Who better than Dr. Wilber, who actually operated and opened up and saw what was present, can testify as to what her condition was?

A. When he opened it up, he didn't see anything. When he opened it up, he opened it up on the basis of his pretesting done by these various tests. He did

not rely on what he saw.
Q. He relied --
A. He relied --
Q. -- on the discogram?
A. He relied on the tests that were done prior to his surgery to make the decision for surgery, and perhaps, perhaps, a number of other --
Q. Clinical --
A. -- surgeons reviewing that would probably come to the same conclusion that I have.
Q. You don't know that for sure?
A. I said I think perhaps --
Q. There have?
A. -- a number of them would come to the same conclusion that I have. I doubt that there would be very many that wouldn't come to the same conclusion.
Q. The fact, Doctor, is that after her surgery, her symptoms went away; isn't that a fact?
MR. TUREK: Objection. You can answer.
A. Her symptoms did go away and that means that she had a successful operation.
Q. And therefore the surgery was necessary?
A. I don't think the surgery was necessary, but her symptoms did improve.

Q. You think that her symptoms would have gone away without surgery?

A. Oh, yes, I do.

MR. POMERANTZ: Thank you, Doctor.

MR. TUREK: Thank you.

No further questions.

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(Discussion had off the record.)

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MR. POMERANTZ: We are going to mark these as plaintiff's exhibits. There is some question by defense counsel at this point as to whether or not the documents that the doctor did not testify to should be admitted. Understanding that, because we don't have much time, we will admit the documents jointly as to what he testified to, and if there are -- if the Court rules that all the documents shouldn't go in, then we will --

MR. TUREK: That isn't accurate. I do not agree to the admissibility to anything that can be determined at the time that is moved to be entered.

MR. POMERANTZ: Okay.

MR. TUREK: You can mark whatever you want. Knock yourself out.

MR. POMERANTZ: I am saying at this point that we are going to be marking these as Plaintiff's Exhibit B and C, which will be receivable if the Court so feels that's necessary.

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(Plaintiff's Exhibit B and C marked for identification.)

(Deposition concluded.)

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