IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

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DANA SCHERTZ, )

Plaintiff, )

vs. ) Case No. CV98 03 1200

TODD FISHER, )

Defendant. )

- - -



Videotaped deposition of ROBERT C. CORN, M.D., a Witness herein, called by the Defendant for direct examination pursuant to the Rules of Civil Procedure, taken before me, the undersigned, Eric G. Smead, RPR and a Notary Public in and for the State of Ohio, at the offices of Robert C. Corn, M.D., 850 Brainard Road, Highland Heights, Ohio, on Wednesday, the 28th day of October, 1998, at 9:07 o'clock a.m.

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APPEARANCES:

On Behalf of the Plaintiff:

Eshelman Legal Group

By: Thomas R. Wyatt, Attorney at Law
27 South Forge Street
Akron, Ohio 44308

On Behalf of the Defendant:

Messrs. Keller and Curtin
Co., L.P.A.

By: Phillip A. Kuri, Attorney at Law
159 South Main Street - Suite 920
Akron, Ohio 44308

ALSO PRESENT:

Jon Jastromb, Video Technician

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# I N D E X

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| Witness | DX | CX | RDX | RCX | Further |
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| Robert Corn, M.D. | 4 | 25 | | | |


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(Off the video record:)

MR. KURI: Initially let the record reflect that this is the deposition of Dr. Robert Corn which is being taken pursuant to notice, and that it is my understanding that the statutory and procedural formalities of notice, service and the filing of this deposition will be waved; is that correct?

MR. WYATT: Yes.

(On the video record:)

ROBERT C. CORN, M.D.,

of lawful age, a Witness herein, having been first duly sworn, as hereinafter certified, deposed and said as follows:

MR. KURI: This deposition is being taken upon direct examination in order to preserve the Doctor's testimony, Dr. Robert Corn, for use at time of the trial brought by Dana Schertz against my client, Todd Fisher.

This action is bearing case number 98-03-1200 before the Honorable Judge Murphy in the Court of Common Pleas Summit County, Ohio.

DIRECT EXAMINATION

BY MR. KURI:

Q. Doctor, would you please state your full

name for the record?

A. My name is Robert Curtis Corn, C-o-r-n.

Q. And what is your current professional address?

A. My main office address is at 850 Brainard Road in Highland Heights, Ohio.

Q. Are we at that address here today?

A. Yes.

Q. Doctor, what is your profession?

A. I'm an orthopedic surgeon.

Q. When were you first licensed to practice medicine in the state of Ohio?

A. In 1976.

Q. It is my understanding that your specialty in the field of medicine is orthopedic surgery, correct?

A. Correct.

Q. Would you please explain to the ladies and gentlemen *of* the jury what is involved with that specific specialty?

A. Orthopedic surgery is the branch *of* medicine which involves the medical and surgical treatment of diseases, disorders, injuries and tumors of the musculoskeletal system.

We deal with a number of -- a wide

variety of the age groups from young children to the more senior members of our societies. We deal with problems related to injuries, both soft tissues and bone, degenerative conditions, developmental conditions, the conditions that necessitate reconstructive type of surgery, whether it's related to sports or degenerative conditions, joint replacements, hand surgery, spinal surgery. These are all -- fall into the realm of orthopedic surgery.

Q. Are you board certified?

A. Yes.

Q. When were you board certified, Doctor?

A. I was certified on -- in September of 1980.

Q. What is involved in board certification of an orthopedic surgeon?

A. Orthopedic surgery involves a step-wise process. You have to complete a residency, which is a training program, in which you basically learn the ropes.

You learn how to make appropriate orthopedic diagnosis, how to interpret x-rays, what tests that are appropriate, and then you also learn surgical techniques.

And as you learn more and you develop more responsibility, you get to do more so that by the later stages of the training you're actually doing most of the surgeries done at the training facilities.

After that you -- I had to be in the clinical practice of orthopedic surgery for one calendar year in one geographical location. During that time a peer review took place. Doctors would watch you in the operating room. The would review what you're doing. You would go through some interviews, and then would you sit for a series of oral and written exams.

And after passing the exams and fulfilling the other requirements, you would be board certified.

Q. Is board certification one of if not the highest achievement attainable in your specialty?

A. Yes.

Q. Would you please give the ladies and gentlemen of the jury a little of your background including college through medical school as well as your internships and residencies up to the present time?

A. I received my bachelor of science in

biology from the Albright College in Reading, Pennsylvania in 1971. I then moved back to my home town, Philadelphia, Pennsylvania, where I attended the Hahnemann University School of Medicine from 1971 to 1975.

I received my M.D. degree in 1975. I then moved out here to Cleveland where I started my orthopedic residency at the Cleveland Clinic. I was at the Clinic from 1975 to the middle of 1979 when I graduated from the program.

And from August of 1979 to the present I have been a private practice orthopedic surgeon working primarily on the east and southeast side of Cleveland.

Q. Are you a member of any medical organizations, societies or associations?

A. Yes.

Q. What are those, Doctor?

A. I am a Fellow in the American Academy of Orthopedic Surgeons, a Fellow in the American College of Surgeons, a Fellow in the American College of Forensic Medicine and the American College of Forensic Examiners.

I'm a member of the Orthopedic Research Society, the Cleveland Orthopedic

Society, the American Medical Association, our Ohio State and our local medical associations as well as a number of other groups.

Q. Do you have staff and courtesy privileges at any area hospitals?

A. Yes.

Q. What are those?

A. We have active staff privileges at the Meridia Hospital System, which November 1st will be called the Cleveland Clinic Health Care System. That includes the Hillcrest Hospital, the Euclid Hospital and Huron Hospital.

I also have privileges at University Hospitals, Bedford Medical Center, the Lake County Hospital Systems and the PHS, Mount Sinai Hospital System.

Q. Are you involved in any teaching or publications in your specific field?

A. Yes, I am currently a clinical instructor in orthopedic surgery at the Case Western Reserve University School of Medicine, and I have had a number of publications over the years but most of them were in the early years of my practice.

Q. Doctor, as part of your professional

practice do you have occasion to examine individuals who are not your patients for the purposes of evaluation including for the purposes of consultation, second opinion evaluation in legal matters and/or Bureau of Workers' Compensation proceedings?

A. Yes.

Q. Would you please tell the ladies and gentlemen of the jury whether you had an occasion to examine the Plaintiff in this particular matter, Dana Schertz, at my request?

A. Yes, I did evaluate him.

Q. When did that examination take place and where did it take place it?

A. It took place earlier this month on October 9th of 1998 at our Summit County office.

Q. As part of your office records do you have a copy of the report prepared and dated October 18th, 1998 with regard to your examination of the Plaintiff, Dana Schertz -- Schertz and your findings upon that examination?

A. Yes, **I do.**

Q. Doctor, feel free to refer to that report or any other records you have available during your testimony in answering any of my

questions as well as those of counsel for the Plaintiff.

A. Sure.

Q. Upon your first meeting with Dana Schertz did you obtain a history?

A. I did.

Q. And what was that history?

A. The history was that there was a motor vehicular accident that he was invo ved in in November -- on November 26th of 1996. This occurred in the Akron/Cuyahoga Falls vicinity.

He was at a red light. He was rear-ended. During the course of the excursion after he was hit, apparently he went forward and backwards, and he believes that his right shoulder may have been injured when he was coming in a recoil or in a backward direction.

He stated that the driver seat was slightly bent, and there was some mechanism problem that they found when they tried to do the repair work.

He initially had some neck discomfort, upper back discomfort. He was evaluated at the scene but basically his wife drove him home. He was first seen that -- later

that day at the Akron City Hospital emergency room.

The primary complaints were neck and low back, and he had some right arm numbness. That was not the major source of worry at that point in time, but they didn't -- he didn't have any specific pain in his right shoulder at that time.

Basically only other care he -- he has had was with Dr. Raymond Acus, an orthopedic surgeon in the Akron/Cuyahoga Falls area. He saw the other -- Dr. Acus about two weeks or so after the accident, maybe a week or so after the accident.

The appropriate x-rays were done. He was started on physical therapy, and he basically was managed conservatively for a period of time for what was felt to be a traumatic tendinitis. That is an inflammation of a tendon from a blunt injury to the shoulder.

Ultimately after physical therapy did not eliminate the symptoms he had an **MRI** scan in February of '97. This did not show a full thickness tear but was compatible with either tendinitis or a partial thickness tear **of** his

rotator cuff, and he ended up going through a surgical procedure, an arthroscopic surgical procedure, in which there was a debridement and inspection done of the right shoulder area.

The diagnosis was tendinitis and arthritis in the acromioclavicular joint, which is the joint between the collarbone and the scapula. That was the so-called Mumford procedure where he actually physically removed part of the joint, Dr. Acus did that.

Post-operatively he went through therapy again and actually did fairly well through the early months of 1998. There was an incident in either early June or late May of 1998 where he rolled over in bed and had a flare-up of his shoulder.

He has had some problems with his shoulder since that time, but initially he seemed to be doing well, and that's basically the history that was presented.

Q. Doctor, did you discuss his past medical history with him as well as his employment history?

A. Yes, I did.

Q. And what did that reveal, Doctor?

A. He said he didn't have any previous problems with his right shoulder. He did have a previous knee injury in which he developed a very severe post-op complication from.

His employment history was that he was in the sales capacity selling fire control systems and extinguishers.

Q. Doctor, did you perform a physical examination?

A. Yes.

Q. What were your findings upon examination?

A. The physical exam revealed a pleasant 41-year-old male who did not appear in any acute distress, that is he didn't appear to be in a tremendous amount of discomfort. However, he did have some ongoing symptoms and some ongoing stiffness in his right shoulder area. What I did was basically limit the exam.

He had some neck and back problems. Originally they went away very quickly and were not the source of any ongoing problems, and so I didn't really look at those areas. The right shoulder was really the primary area of concern.

The exam of the right shoulder showed

two of the three arthroscopic incisions. I couldn't find the third one. He had some soreness in the front of the shoulder to palpation in the region of the acromioclavicular joint. That is the collarbone scapular joint.

He had actually a fairly good range of motion but a definite diminished movement of the right shoulder.

Normally there is a 180 degrees of movement forward. He had 160, so he was lacking about 20 degrees of movement which is about ten percent, ten, 15 percent from his movement. And he had about 140 degrees of abduction, which is the movement out -- out to the -- to the side.

He had good rotational movement inward, but he had discomfort rotational movement outward. He also had some discomfort when he did a cross-over sign. And these were all signs of what I felt were mild frozen shoulder, some scar tissue that had built up since the -- probably since the June early -- June, late May of 1998 incident when he -- when the shoulder flared up again.

There was no atrophy of the arm, in other words, the muscle size and function

appeared to be normal other than the stiffness. No instability or abnormal movement was noted in the shoulder, although there was definite discomfort in a very reproducible area which is compatible with my -- my diagnosis. And there was really no other abnormalities.

So basically he was a little bit stiff. He had resolved his neck, upper back and low back problems, and he had a minor degree of stiffness in his shoulder.

Q. Doctor, have you detailed all the tests performed?

A. Yes.

Q. And are these tests approved and accepted within your field and performed by other orthopedic surgeons?

A. Yes, they are.

Q. Doctor, did you have sufficient time in which to perform a full and complete orthopedic evaluation of this particular patient?

A. Yes.

Q. Doctor, did you have an opportunity to review additional medical records available either prior to or subsequent to your examination of the Plaintiff in this particular matter?

A. There were records reviewed that were done after the examination.

Q. Doctor, what records did you have available to you?

A. The records reviewed included the Akron City Hospital records, Dr. Acus' office notes and letters, the operative and outpatient records from the St. Thomas Hospital, and the results of MRI scan were reviewed.

Q. Doctor, could you please go through some of the records and the findings that you -- that you found in there that were significant regarding your evaluation?

A. The -- initial problems that they were registered in the emergency room were fairly typical for a motor vehicular collisions. The shoulder was not a primary area of concern, but that is not terribly unusual if there a non-structural injury, in other words, if there is a physical tear of, let's say, the rotator cuff or some other tendon or fracture, it would be virtually immediate pain.

I do agree with Dr. Acus that this was probably a tendonitis and that it didn't develop instantaneously. It was probably a soft

tissue sprain or strain, and essentially the appropriate care and treatment was rendered by both the ER and by Dr. Acus.

He tried to manage it conservatively, which is the appropriate thing to do. When it really wasn't getting as good as it should have been getting with the appropriate treatment, then an MRI scan was ordered, and that was appropriate.

Because the failure to improve and the questionable findings on the MR, the surgery was performed, again, his choice, Dr. Acus' choice was an arthroscopic procedure.

It was an appropriate -- an appropriate, accepted procedure, although my personal bias is to do it in an open procedure because you can just see more and do more, but I have really no criticism if someone is a good arthroscopic surgeon to do this procedure. And he did well post-operatively for a period of time.

He -- I think that the records clearly indicate there was appropriate surgical procedure and appropriate medical care rendered for what developed after the injury, and I think

he still needs to go through some additional treatment to get rid of some more of the stiffness in his shoulder.

Q. Doctor, based upon your review of the records and your discussions with the Plaintiff, were you able to review the type of therapy or -- or the types of programs the Plaintiff underwent after surgery and even before surgery to try and alleviate some of his problems?

A. The therapeutic measures for this were to maintain motion, to work on strength and hopefully to diminished inflammation.

Part of the problem with Mr. Schertz was the fact that he could not tolerate anti-inflammatory medicine as it bothered his stomach. So that really makes things go a little bit slower.

But the therapy was appropriate that he had preoperatively. The therapy was appropriate postoperatively. I believe it only when on for a number of months after the surgery, and he really from that point on did not have any other therapy.

Since the flare-up in June -- late May or early June of '98 he has not had any

additional therapy. There was a Cortisone shot administered but no formal therapy for stretching or to eliminate the -- the developing stiffness that occurred after this flare-up.

Q. Doctor, from your examination of the Plaintiff, from the oral history provided by him, from the records reviewed were you able to make a diagnosis within a reasonable degree of medical certainty as to his condition at the time of your examination?

A. Yes.

Q. And what was that?

A. My impression was that he had a resolved neck, mid and low back stretching or pulling injuries of the muscles known as a strain. He had a probable sprain of the right shoulder and developed a post-traumatic impingement syndrome, which was what -- exactly what Dr. Acus' concept was.

He initially did well and then had a flare-up and now has a mild -- very mild stiffness sometimes called a frozen -- partial frozen shoulder, and that's basically where he is today.

Q. Doctor, when -- when you say a

"flare-up," in this situation I think the records in June of 1998 indicate that he rolled over on his shoulder.

How does that type of process affect the Plaintiff to date?

A. I didn't know that that incident had occurred when I saw him because I had not had the opportunity to review the records, so I didn't get to question him on that.

But what probably happened was that he rolled over, and he pinched or caught a piece of either scar tissue from surgery or part of the lining of the joint may have been pinched.

I don't know, and I'm not sure anybody knows exactly what it was because really no other diagnostic tests were done after that time. But it did set up another type of pain pattern, and that has been persistent with some stiffness since that time.

Q. Doctor, would the diagnosis that you gave be based upon the assumption that all the medical records which you reviewed as well as all the oral history provided by the individual were true statements?

A. Yes.

Q. Doctor, again, based upon the results of your examination, your review of the records and history provided by the Plaintiff, are you able to express an opinion within a reasonable degree of medical certainty as to the prognosis for this individual at the time that you examined him?

A. Yes, I was.

Q. And what is that prognosis?

A. My prognosis was that, and remains, that the long term -- in the long term he can be improved. I do not believe that the diminished range of motion is permanent in that he had better motion after surgery.

I do believe that with an appropriate therapy program and including a maintenance program, that is to keep the shoulder stretched out, that a significant improvement in both subjective pain and stiffness as well as objective stiffness can be realized.

I think he can get a lot better than he is. He may not be 100 percent, but I think he will be definitely be improved in a better functional range of movement with less pain. I do not think he has reached his maximum improvement.

Q. Doctor, based upon the records you reviewed and your discussions with the Plaintiff was that type of therapy initiated for the length of time necessary or at the proper times for Mr. Schertz to obtain a maximum medical improvement?

A. Well, I believe that the therapy that was done and ordered for him was appropriate, but he really has not had any treatment other than home -- whatever he is doing at home exercises, and he wasn't able to clearly define that to me, since about three months after the surgery.

So he really has not had any therapy since this June 1998 aggravation or flare-up.

Q. Doctor, based upon your physical examination of the Plaintiff you have described some minor lacks of movement in the arm and in the shoulder area.

Can you discuss the functional level of those -- those movement problems?

A. The deficiency in movement would be only in the extremes **of** overhead work or prolong work above his shoulder level. Anything from approximately head level down could be done without any difficulty. **He** had full painless movement.

It was only when you get up to where the stiffness was catching that he was uncomfortable. That was very reproducibly noted during the examination, and this is where the therapy needs to be worked on, in other words, to stretch out that stiffness.

He had it stretched out before, and there is no reason why that can't be improved.

Q. Doctor, at the time that the findings you just discussed, his overhead movements, that was upon your physical examination at the time you looked at him, correct?

A. Right.

Q. Now, can those findings be improved by physical therapy and what level of improvement would you expect to find from the physical therapy?

A. Again, the therapy should improve that by at least 60 to 70 percent, so he should probably get up into the 170, mid 170 range for inflection and probably the mid 160 range, 170 -- almost 170 in his ability to go outward, and he would also improve in his ability to rotate outward.

This is what I would do for him if he

was under -- coming to me for a second opinion and for treatment. That's what I would work on for at least three to six months before I would consider any other injections or any other treatment.

Q. Doctor, you have had to take out time from a very busy orthopedic practice in order to present testimony this -- this morning, and I would like you to advise us as to whether or not you will charge for the time that you had to take out from your practice and obviously not see any patients in order to present this testimony?

A. Yes.

MR. KURI: Thank you, Doctor. At this time I don't have any further questions.

CROSS-EXAMINATION

BY MR. WYATT:

Q. Doctor --

A. Yes.

Q. __ I'm over here.

A. I know.

Q. Okay. You're looking right in the camera. It's kind of throwing me off a little.

Have you been trained to look into the camera?

MR. KURI: Objection, move to strike.

THE WITNESS: No.

BY MR. WYATT:

Q. Okay. I just -- it's a little disconcerting to me. Maybe other people are used to it.

You have got your file on Mr. Schertz there in front of you?

A. I do.

Q. Okay. Does that contain all the records you reviewed in preparation for your testimony today?

A. Yes.

Q. Okay. Can we take a look at that record?

A. Sure.

MR. WYATT: Can we go off the record for a minute.

(Discussion had off the record.)

BY MR. WYATT:

Q. Doctor, Mr. Schertz became or came to you as a result of Mr. Kuri requesting you examine him; is that correct?

A. Yes.

Q. What kind of contact did you receive

from Mr. Kuri's office in reference to that referral, you receive a letter, a telephone call?

A. I don't know who was scheduled. Typically there is a phone call to schedule it. There may have been an introductory letter, but I don't typically keep any letters, any communication.

Q. Do you -- do you know whether or not Mr. Kuri sent you a letter concerning Mr. Schertz?

A. I don't remember.

Q. Okay. If you did receive a letter, would you have destroyed that?

A. I don't typically keep it, so I guess I would have destroyed it. I don't keep any legal communications in the charts.

MR. WYATT: Okay. Mr. Kuri, did you send Dr. Corn a letter?

MR. KURI: Move to strike. This isn't my deposition. Objection.

MR. WYATT: Okay. We will request that.

BY MR. WYATT:

Q. You have all the records there in front of you that you say you reviewed in preparation for your testimony here today?

A. Yes.

Q. One thing, and maybe I'm -- maybe I'm just being a little picky or I don't understand the medical significance of it, but you testified that when Mr. Schertz went to the emergency room he did not have any complaints of shoulder pain, is that your testimony?

A. Yes.

Q. And that if he did have complaints of shoulder pain, that would be significant in determining the nature and extent of the injury, is that true?

A. No, that is not what I said. I said if there was a structural damage such as a torn tendon or a fracture, those symptoms are typically immediate --

Q. Okay. So --

A. -- but the fact that it started a couple days later is more toward what -- essentially what Dr. Acus believes, that this was an inflammatory condition related to the trauma, but nothing was torn or fractured related to the trauma.

Q. Well, let me -- I'm trying to even remember what the question was. I -- I recall

the question being that if there were complaints immediately of pain in the shoulder, that would indicate that that's a more serious injury?

A. I mean, it may have. I don't -- I don't know.

Q. Okay. In fact, Doctor, you're incorrect in that, in fact, Mr. Schertz did complain of pain immediately and did complain of pain in the emergency room, is that true?

A. The --

Q. I put it right there on top for you, right underneath your report.

A. He -- it looks like he may have said that to the --

Q. Triage nurse?

A. -- triage nurse or the secretary, but the doctor did not think that was significant.

Q. Well, wait a minute. We don't know what the doctor thought.

A. Well, the doctor's notes are here.

Q. Wait, wait, wait. The doctor doesn't say what he did or didn't think was significant.

In fact, in that triage note, and let's go back to the triage note, read to me what that triage note says in reference to pain in the

right shoulder and the right arm.

A. Complains of neck, back, right shoulder pain, right arm numbness.

Q. Okay. So that is a complaint of pain in the right shoulder?

A. It says right shoulder pain, yes.

Q. Okay. Thank you. That's different than what your testimony was earlier, I believe?

A. Well --

Q. Okay. Just yes or no.

A. It is different that -- that I did not remember that, that's correct.

Q. Okay. Thank you. So he complained of pain immediately and not a couple days later as you testified earlier?

A. Well, he did make a --

Q. Just yes or no.

A. He made a note -- or there was a note by the triage nurse that he did have shoulder pain. It was not mentioned by the doctor.

Q. Okay. But it -- we will let the jury sort that out.

MR. KURI: Object. Move to strike.

BY MR. WYATT:

Q. Now, you have other addresses for your

business?

A. No, this is my main business address. I have two satellite offices that I spend -- that are part-time offices.

Q. You saw Mr. Schertz at one of those satellite offices?

A. Correct.

Q. And where are those two satellite offices located?

A. One is at the Meridia Euclid Hospital in Euclid, Ohio, and the other is at the Meridia Medical Center campus in Sagamore Hills.

Q. All right. Now, you testified that you're an orthopedic surgeon, but if I understand correctly, you last performed any sort of suryery in 1994; is that correct?

A. No, that's not true. Last surgery I did was last Friday. I had two cases last Friday. I haven't done any spinal surgery since 1994 -- or early 1995, but it's around that time period.

Q. Okay. So you quit doing neck and back surgery in 1994 and 1995?

A. I stopped doing neck surgery in 1981, but I stopped doing low back surgery in either late 1994 or early 1995.

Q. When was the last time you did a shoulder surgery similar to the one performed on Mr. Schertz?

A. I don't do arthroscopic surgery. The last shoulder surgery I did was a couple weeks ago. It was a Friday two weeks ago or three weeks ago.

Q. What patient was that?

A. Her name -- I don't think that's appropriate to say on the record. I will be glad to discuss that with you off the record, but there is a certain patient confidence that has to be maintained.

Q. I -- I understand. And you are a clinical instructor at Case Western Reserve University?

A. Correct.

Q. You don't actually do classroom teaching but as people come through?

A. Correct.

Q. All right. Now, in your review of the records of Mr. Schertz and your conversations with Mr. Schertz you do agree that he injured his shoulder in this accident?

A. Yes.

Q. Okay. And you do agree that he suffered this impingement syndrome as a result of this accident?

A. Probably, yes.

Q. Probably, I mean --

A. I didn't see him before the surgery, so -- but I'm going by Dr. Acus, and I think that's why I'm saying probably.

Q. So you would defer to Dr. Acus on that --

A. Yes.

Q. -- point? And you agree that this shoulder surgery that was performed was necessary as a result of this accident?

A. It was necessary because he didn't improve from the injuries he sustained in the accident, so yes.

Q. Okay. And in your review of the records and the conversation with Mr. Schertz, everything that Dr. Acus did was reasonable and necessary as a result of this accident?

A. Yes.

Q. And you agree that Mr. Schertz still has pain and limitation of motion as a result of this accident?

A. Well, as a -- I'm not sure it's directly related to the accident, but it was -- he would certainly -- probably related to residuals of the surgery.

Q. And the surgery was related to the accident?

A. Correct.

Q. Okay. And in your examination of him you found that Mr. Schertz did have limitation of motion?

A. He did.

Q. He was not able to abduct his hand or his arm on the right arm all the way to 190 degrees?

A. 180 degrees.

Q. Okay. And he was not able to internally rotate his arm without pain?

A. I think it was external rotation that was more painful.

Q. But he had pain on both internal and external rotation?

A. Pain on external rotation it says in my report.

Q. All right. And what was the other limitation of motion?

A. Flexion, his ability to move forward.

Q. And again, that's the result of the injuries he suffered in this accident?

A. Well, indirectly. I think it's more related because he has not had any therapy since this flare-up or whatever happened in June, and that it's not entirely clear to me what happened to me at that point in time.

Q. Well, Doctor, those limitations he had follow the surgery, if you reviewed the records indicate those are the same limitations he had prior to the surgery, correct?

A. I don't remember those numbers but that would probably be -- I think -- I think he was worse before the surgery.

Q. Okay. I mean --

A. The surgery definitely helped him at least --

Q. All right.

A. -- both objectively and subjectively --

Q. So he had limitation before and some residual limitation after?

A. No, he did well after it. He had almost full movement, at least according to Dr. Acus, in early 1998, but after this June incident the

motion was lost again.

Q. Okay. Let me ask -- let me ask the question again. He had limitation before the surgery and he also had limitation after the surgery; is that correct?

A. In the generic sense, yes, but that's not entirely accurate.

Q. He has limitation today, correct?

A. He did earlier this month.

Q. And in all probability he has not gotten better spontaneously since your examination?

A. Probably not, unless he has gone through some therapy.

Q. So he has limitation today following that surgery?

A. Yes.

Q. Thank you. Now, I'd like you to assume that Mr. Schertz has pain when he attempts to thr'ow a ball, is that consistent with your findings?

A. Yes.

Q. I'd like you to assume that he has pain when he attempts to shoot a basketball, is that consistent with your findings?

A. If he's shooting overhand, yes.

Q. All right. I would like you to assume he has pain if he were to attempt to do a pushup, is that consistent with your findings?

A. Not particularly.

Q. I'd like you to assume he has pain with any overhead movement when he attempts to place anything on a shelf, is that consistent with your findings?

A. Yes.

Q. I'd like you to assume that he has pain when he attempts to mow his lawn in using his -- his right arm, is that consistent with your findings?

A. Not particularly.

Q. Okay. I'd like you to assume that he has pain when he attempts to ride a bicycle, is that consistent with your findings?

A. No, not typically.

Q. Okay. What would -- so if he has pain in doing those activities, you'd say that that's something different than what you found?

A. It was not what I found, and it would not have been due to the limitation of movement that he had. The other things, the throwing, the basketball, the overhead stuff is, but nothing

that's at shoulder level or below.

Q. Raising your arms, your right arm to where you felt his limitations start, could you raise your arm and show us at what point he would start to have pain in overhead activities?

A. About -- I'm not sure where he said he had pain, but this -- I was objectively measuring how far he could go, and it was at about this level.

Q. Okay. Doctor, in your review of the records of Dr. Acus I believe it's Dr. Acus' opinion that his continued problems are not a result of incomplete physical therapy but, in fact, his problems are because he has inflammation and fibrous tissue around the subacromial bursa, did you find that in those records?

A. I don't remember that.

Q. If that was Dr. Acus' opinion, would you agree or disagree with that?

A. I agree on the probable etiology of it, but I don't -- what was the first part again? I didn't -- I wasn't -- I didn't remember what the first thing you said. The subacromial bursitis?

Q. Yes.

A. You know, it probably is stemming from that area --

Q. All right.

A. -- but that can -- that's where the adhesions typically take place. That's probably -- yeah, that probably is where it's coming from.

Q. Okay. And that again would be related to the injuries and the surgery he experienced following this accident?

A. More toward the surgery, but in that the surgery was from the injury, I guess you're gonna make me say that, so I will agree with you.

Q. Okay. Now, the only thing that you had any question about, then, was this incident where he rolled over in bed.

You think that may have been a factor in his pain today?

A. Absolutely.

Q. Okay. And that would have -- his rolling over that would have somehow aggravated the shoulder?

A. Well, it probably did, because he was doing well up to that point, at least according to Dr. Acus. He hadn't seen him or doing

anything for six months, and that really changed his clinical picture dramatically, and he doesn't appear to have recovered from that since that time.

Q. Now, do you -- do you consider that a separate accident or injury or do you consider that an ongoing part of the injuries he suffered from this accident?

A. I don't know.

Q. You don't know?

A. I'm not -- it doesn't sound like a lot to reinjure something, but I -- I have had -- I have seen that in my own patients that I have done shculder surgery with, and they do something months if not sometimes years afterwards and they, you know, they always attribute it to whatever caused the original problem, but I'm not sure that that's true.

This may have been a whole different incident where he could have pinched the bursa and set up a whole new series of inflammation. I just don't know.

Q. Doctor, you ought to be able to roll over in bed and not injure your shoulder, shouldn't you?

A. I'm sure he's rolled over many times between the time of the surgery and this incident. Why it happened that time, it's not really well documented and, you know, I didn't ask him anything about that --

Q. Okay.

A. -- because I didn't know about that until after he had left, So I really can't tell you anything more than what Dr. Acus has in his records.

Q. Well, let me ask you again: You ought to be able to roll over in bed and not injure your shoulder, shouldn't you?

A. Yes, I would think so.

Q. All right. That's a normal, daily activity?

A. For most people, yes.

Q. Okay. Well, the vast majority of people, correct?

A. Yes.

Q. And because he rolled over in bed and we ought to be able to do that with injuring ourselves and because he rolled over in bed and did injure his shoulder, and that's the shoulder that was operated on, with a reasonable degree of

certainty and probability, then, Doctor, wouldn't that be related to this injury and not a separate event?

A. I don't know. I really don't have an opinion on that. I didn't get a chance to ask him anything, and it's very poorly defined in the medical records.

Q. Well, Dr. Acus does have an opinion and Dr. Acus attributes that to the injury he suffered in this accident.

Would you agree or disagree with Dr. Acus?

A. When did he say that in the medical records? I didn't pick that up.

Q. He doesn't say that in the medical records. He says that in his testimony. Would you agree or disagree with Dr. Acus?

A. I don't have an opinion one way or another.

Q. Dr. Acus is a board certified orthopedic as you are, do you know that?

A. He probably is, yes.

Q. And because Dr. Acus has treated Mr. Schertz numerous times over the last two years would you agree that Dr. Acus is in a better

position to render an opinion concerning Mr. Schertz's condition than you would be?

A. Well, I think he has a little bit different perspective than I do, and on certain periods of time I'm sure his opinions are much more accurate, but certainly the time that I saw him, you know, Acus didn't see him at that point in time, so he is certainly entitled to his opinions.

And I can't just agree or disagree because I just didn't get an chance to do my own -- my own questions, so I really don't have a comment on that. I don't know.

Q. Doctor, you would agree that in order to properly evaluate a patient it's necessary to treat a patient more than once or at least numerous visits and numerous treatments put you in a better position to render an opinion as to a diagnosis than simply one visit?

A. I don't think that's true --

Q. Okay.

A. -- because you could do a diagnostic test and somebody else never did that before and you'll what's going on and the other guy didn't.

Q. That didn't happen in this case, did

it? You didn't do a test that Mr. Acus -- Dr. Acus has never done, have you?

A. I -- there is no indication that Dr. Acus found what I found at the time -- around the time of my examination --

Q. What's the --

A. -- so I don't know.

Q. What -- what did you find that Dr. Acus didn't find?

A. I don't know what Dr. Acus found because I didn't see any notes in and around the time that I had saw -- seen -- I saw him.

Q. Okay. So you're saying as of that particular day you were in the best position to judge his -- his condition?

A. That was the only opinion that I was supposed to render, what he had on that particular day.

Q. How much did you charge Mr. Kuri's firm for this examination?

A. I don't have the exact figure, but I think it was about $1700.

Q. $1700?

A. Yes.

Q. And on that day did you perform any

other IME's?

A. I don't recall.

Q. In fact, you saw one of my client -- another one of my clients, Wendy Ankrom, on that day, do you recall that?

A. No, I don't.

Q. Doctor, just so we have an idea as to the nature and extent of your involvement in performing independent medical exams, can you tell us how many independent medical exams you have performed this year?

A. No, I can't. I can tell you how many I have done this month, but I can't tell you how many I have done this year because I haven't counted them prior to the beginning of the month.

Q. Okay. How many have you done this month?

A. 21.

Q. 21. Would that be on average the number of IME's you performed in the months preceding?

A. I don't know.

Q. You don't know. In fact, Doctor, you don't -- you don't even have records prior to October of this year as to how many IME's you performed?

A. Prior to August I don't, but I don't -- again, I don't have any specific records of the IME's prior to October 1st, yes, that's correct.

Q. Okay. Because, in fact, you destroyed any records you may have had concerning any IME's you performed prior to October of this year?

A. No, that's not true. We only get rid of the cases that have been settled or resolved. I have all the cases in our files of the active or non-resolved cases.

Q. Okay. Well, let's back up for a second. Do you know how many times you have testified for Mr. Kuri's firm since 1991?

A. No, I do not.

Q. Do you know how many times you testified for the Defendant since 1991?

A. I have no idea.

Q. Would it be ten times, 20 times, 30 times, a hundred times?

A. I'm sure it's well over a hundred times.

Q. Okay, well over a hundred times. And when you would testify you would typically testify on behalf of the Defendant?

A. If I was asked to review a case from the Defendant, yes, but I do obviously do testifying

on my own patients or patients that Plaintiff attorneys send me to see.

Q. Do you know what the percentage of Defense versus Plaintiffs it is?

A. I'm sure it's way in the majority for the Defense. I don't have the exact statistics.

Q. Okay. And, in fact, you have testified for insurance companies?

A. Indirectly.

Q. Okay. Well, in fact, you have testified for the Regional Transit Authority on a regular basis?

A. I'm not sure how regular, but I do maybe eight or ten a year.

Q. Okay. And you've testified for the Allstate Insurance Company?

A. Well, either directly or indirectly, yes.

MR. KURI: Object, move to strike.

BY MR. WYATT:

Q. Okay. You've testified for the Meridia Insurance Company?

A. I -- I don't -- again, I don't specifically know who the clients are to the Defendants are. I don't know which is an

uninsured insured motorist and which is a primary Defendant so -- and I don't keep track of that, but I've probably done over the years for most of the insurance companies that are servicing Ohio.

Q. Progressive?

MR. KURI: Object, move to strike.

BY MR. WYATT:

Q. Progressive?

A. Progressive I have seen clients that indirectly or directly came from them.

Q. State Farm?

A. Yes.

Q. Nationwide?

MR. KURI: Continue objection, move to strike.

Q. Nation -- Nationwide?

A. Yes.

Q. Okay. And then you've also performed testimony of these exams for independent businesses independent of who their insurance company is?

A. I'm sorry, independent?

Q. Businesses independent of who their insurance company is?

A. Independent businesses and also in

reference to their Workmans' Compensation stuff, too, yes.

Q. Now, when you testify for somebody, do you keep that file or do you destroy it?

A. I keep the file until I have concluded that particular case, in other words, once the cases are resolved, we don't keep any records of that.

Q. Now, these people when they come to you, they are coming to you in part because you are a medical doctor, when they come to you to be examined?

A. I don't understand your --

Q. They come to you to be examined because you are a medical doctor?

A. I'm an orthopedic specialist. That's why -- probably they come or I'm asked to see them.

Q. Okay. And you're obligated to maintain those records?

A. No, I'm not obligated to maintain the records. They're not patient records. There is no obligation to -- unless they're my own, treating patients, I have no obligation to them at all.

Q. Okay. So after you see these people you destroy the records?

A. No, that's not what I said. That's the third time you've asked me that. I said after the cases are concluded I either like -- let's say today, I would say to the -- the attorney, do you need the records, and he says yes, he takes everything with him. That's the way I -- it's been done in the past.

Q. Now, there is no record of how many IME's you've performed in the last ten years, there is no record at all?

A. No, there is not.

Q. That's because you destroy your appointment books; is that correct?

A. I do not keep my appointment books, that's correct.

Q. Okay. Keeping, destroying, same word, right?

A. Well, that's your -- your choice of words, not mine.

Q. Okay.

A. But we are keeping the appointment books as of October -- I'm sorry, actually as of August of this year.

Q. Well, Doctor, in fairness to you and in fairness to Mr. Kuri I'm looking at the transcript of a proceeding performed or done before Judge Nancy Russo --

A. Excuse me, can we go off the record, please?

Q. Yeah.

(Discussion had off the record.)

(Off the video record:)

MR. WYATT: Let's strike that last question.

(On the video record:)

BY MR. WYATT:

Q. Doctor, you testified that this last month of October you performed 21 independent medical exams?

A. So far this month, yes.

Q. All right. Do you have any more scheduled this month?

A. I have -- let's see, today is Wednesday. I have one today and one tomorrow and two if they show up on Friday.

Q. One today, one tomorrow --

A. And these are scheduled. The other ones were performed.

Q. Okay. So that would put you at 25 a month -- this month?

24 or 25.

Q. Okay. And is that representative typically of how many IME's you perform in a month?

A. It is no representative, no.

Q. Is that high, low?

A. I really don't know.

Q. Okay.

A. It seems high to me, but I don't -- I don't have any other specific data.

Q. Okay. And you said your average charge per IME is $1700?

A. No. They range from about 900 to about 1850 now. I would say the bulk of them are in the 1300 to $1700 range --

Q. Okay. So --

A. -- depending on how long it takes and how -- how involved it is.

Q. Now, that's -- that's for the exam itself?

A. No, no, no. That's for the whole thing. That's for the exam, the review of the medical records, the writing of the report, the

review of the medical literature, the rewriting of the report, about the three, four, five hours it takes to produce the final product. There is just one bill for that entire service.

Q. What about your testimony here today, how much is that?

A. That's a separate. That's $900 an hour and that's been the same for years.

Q. Okay. And if I was the one to take your deposition, that is how much it would cost me?

A. Unless we would work something out ahead of time.

Q. Okay. How many times do you think you've testified this year?

A. I have no idea. I have testified eight times this month so far. One of them was Plaintiff, the rest of them were defense.

Q. So one day -- one to seven ratio, is that typically the ratio in general of how many times you testified for the Defense versus the Plaintiff?

A. Well, it varies from month to month. It depends on when my patients' cases may come up. But I would still say it's the majority of them are for the Defense simply just because that's

what's needed.

Q. Okay. All right. Let's go back to Mr. Schertz then and rap this up.

You feel that the pain that Mr. Schertz is having now is limitation of motion related to scar tissue in his shoulder, is that true?

A. Probably some degree of scar or inflammatory tissue in his shoulder, yes.

Q. Now, you testified earlier about -- and the word arthritis is kind of -- is a bogeyman, I think, because people don't typically understand it.

When you talked about arthritis, what you're really talking about in this case is the normal wear and tear that a person experiences as they get older; is that correct?

A. You know, I don't know in Mr. Schertz's case what it was, but he had definite arthritis in his **AC** joint which preceded the injury, and that's one of the things that was addressed during the surgery that Dr. Acus performed.

Q. We're not -- we're not -- Doctor, listen to me, please, and in fairness to me, **1** want you to listen to my question and answer my question

and not answer the question you think I asked or give an explanation of the answer.

Doctor, arthritis -- the term you used, arthritis, as it relates to a shoulder joint or a knee joint or any other joint really refers to the natural aging process that one experiences as they get older, is that what you mean by arthritis, yes or no?

A. No, that's not what I mean by arthritis. Arthritis has a lot of different etiologies and --

Q. Wait, wait, wait. Stop. Okay. There are different kinds of arthritis then?

A. Yes.

Q. All right. If someone has some wearing down or degeneration of joint is that the type of arthritis that occurs as one gets older?

A. Well, as one gets old or if one has had excessive stress or excessive usage at a --

Q. Okay.

A. -- at a younger chronological age.

Q. Now, because you did not actually see Mr. Schertz's shoulder and because you did not actually see what was in his joint, you can't say whether or not that was an normal aging or normal

wear and tear, can you, just yes or no?

A. I have no idea.

Q. Okay. Dr. Acus who actually performed the surgery would be in a better position to testify concerning that -- just yes or no?

A. I don't know. He certainly would have a better idea of what he found. I'm not sure if his concept of why it was there would be any different than mine --

Q. Okay.

A. -- but what it looked like, certainly he would be able to tell you that --

Q. so you --

A. -- that doesn't necessarily mean that's where it came from.

Q. All right. But you would defer to him in at lease as to what's there?

A. Sure.

Q. Okay. And is there any indication in your review of all the medical records you have, and your attorney has had access to all the medical records, and your review of your -- your examination of Mr. Schertz, is there any indication prior to this accident that Mr. Schertz ever had any long term or pain related to

in arthritic changes in any other injury in his right shoulder?

MR. KURI: Object and move to strike. Doctor -- I am not Dr. Corn's attorney.

BY MR. WYATT:

Q. Okay. I'm sorry. Doc, in your review of all the records provided to you by Mr. Curtin's firm and your testimony or your conversations with Mr. Schertz and your review of the medical records and everything you have seen in this case, have you seen anything that indicated that Mr. Schertz prior to this accident had any long-term, chronic or problems in his right shoulder prior to this accident, just yes or no?

A. No.

Q. Okay. Now, Doctor, is-- and I'm almost done here. As I understand it as we stand here tod'ay it is your opinion that Mr. Schertz either has to go through physical therapy or he may need a surgery to remove a part of the acromion?

A. I'm not sure what the surgery would involve. I don't think that's real high on my list, but I would say for sure some physical therapy and some ongoing maintenance exercise

that he does every day for the rest of his life.

Q. Okay. So you're talking either physical therapy or perhaps a surgery if that doesn't work?

A. Some sort of surgical procedure if it doesn't work, yes.

Q. Versus Dr. Acus' opinion that physical therapy will not work and Dr. Acus is of the opinion that he's going to need to have the bursa removed, which is the fibrotic tissue you referred to earlier, do you disagree with that opinion?

A. Well, I guess I do disagree with that opinion. I would not worry about the surgery at this point in time but what's -- and if the surgery was necessary, I would probably have to remove the same tissue he is describing as well as some other tissue.

Q. Okay. So you two are not in sharp disagreement about what needs to be done in order to --

A. I -- I don't think we're in much disagreement at all, although he probably has a little bit better defined opinion than I do because he has, you know, he saw what it looked

like before.

Q. Okay. And the only disagreement is that he thinks physical therapy will not work and you think physical therapy will work?

A. Oh, I know physical therapy will definitely improve him. I don't know if it will cure it, but it will definitely significantly improve it.

Q. So as it relates to Mr. Schertz's condition today, even with the physical therapy he will have some permanent limitation in that shoulder?

A. It would not be unusual to have an extraordinarily minor limitation but certainly better functional movement than he has now, and he could do the sports activities at a higher level than he can attempt to do it now. But in all likelihood he will not about 100 percent.

Q. Okay. And even if that were to be successful, it is also your opinion that he's still going to have to do maintenance exercises --

A. Absolutely.

Q. -- that if he doesn't do them he is going to slip back into where he was?

A. Well, I don't know if he's going to slip back where he was, but we think certainly if he didn't it would be a lot of waste of time to go through a lot of additional theory and the time and the effort and what's necessary to get better, I think that, you know, you don't want to go through that again. It's not pleasant.

Q. So if he doesn't do that for the rest much his life, he is going to continue to have limitation he has today?

A. I'm sorry. I don't understand what you mean.

Q. If he does not *go* the through the maintenance exercises and the physical therapy that you discussed, if he does not do that every day he will --

A. I'm not saying every day. I'm saying maybe two to three days a week, two to three times a week once he gets the movement.

Q. All right. If he does not do that, he will slide back into where he is today?

A. I'm not sure exactly where he will be, but it will definitely not stay at the maximum improved level.

Q. And all this is conjecture and -- and

you really don't know for sure whether or not even what you suggest will work will work?

A. That's correct. I mean, this is what a reasonable orthopedic surgeon that deals with these problems -- I don't know nothing works 100 percent of time.

Q. Okay.

A. This would be my best orthopedic prognosis, and if Mr. Schertz, who was a very nice fellow, if he had come under my care at that point in time, that's what I would do with him.

Q. But he didn't, did he?

A. No, that was not purpose.

Q. And, in fact, when this case is over if Mr. Schertz came back to you there wouldn't even be a record of his visit, would there?

MR. KURI: Object, move to strike.

THE WITNESS: I would keep a record of it, yes.

BY MR. WYATT:

Q. Wait, wait, wait, wait, wait, wait. Let's go back here. Doctor, you testified when these cases are over, these records are no longer in your office?

A. Correct.

Q. All right. So when this case is over if Mr. Schertz came back to you there wouldn't even be a record of this visit, would there?

A. Well, I'm under court order to keep everything at this point in time so for this case I --

MR. KURI: Object, move to strike as irrelevant in discussing matters which is highly inflammatory to the jury.

MR. WYATT: Mr. Kuri, he opened the door.

MR. KURI: You opened the door.

MR. WYATT: No, no, no, no, no. This doctor testified that he's under a court order to maintain this record. He just said it. I didn't ask him. I didn't lead him. I didn't --

MR. KURI: My objection is on the record.

BY MR. WYATT:

Q. All right. Well, Doctor, prior to that court order you referred to, after this case was over, you would destroy these records, wouldn't you?

A. I would probably give them back to Mr. Kuri.

Q. You would no longer have them in your office?

A. Correct.

MR. KURI: Continue line of objection, move to strike on this whole issue.

BY MR. WYATT:

Q. Okay. So if he came back to you, you would have this record but the only reason why you have the record is because the courts ordered you to keep that record?

MR. KURI: Objection.

THE WITNESS: Or if I get it from your office or Mr. Kuri's office, then I would have it, yes.

BY MR. WYATT:

Q. Okay. Now --

A. I think I would remember him well enough, though, that I know where to go from this point on.

Q. Now, your opinion he needs more physical therapy, did you tell Mr. Schertz that?

A. I may have.

Q. May have. If he was to testify that you didn't tell him that, would you --

A. It would have been -- it would have been

inappropriate for me to -- to discuss medical care with him, although what I would do as a physician, I would suggest that he would discuss physical therapy with his doctor. But it's not my obligation nor is it my responsibility to give him any recommendations.

Q. So even though you thought you knew something that might help him, you didn't tell him and you didn't tell doctor -- Dr. Acus, did you?

A. It wasn't beyond the scope, and it's beyond the limitations of the examination, that I should not get involved in the patient care.

Q. It's not what you were being paid for?

A. That's not what I was hired to do.

MR. WYATT: Okay. Thank you. No further questions.

MR. KURI: I don't have any further questions.

VIDEO TECHNICIAN: We are off the record.

(Off the video record:)

VIDEO TECHNICIAN: Doctor, you have a right to review this videotape to prove its accuracy or you may waive that right.

THE WITNESS: I will waive my right.

VIDEO TECHNICIAN: Will all counsel agree to waive any filing of the videotape?

MR. KURI: Yes.

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(Deposition concluded at 10:10 o'clock a.m.)

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