

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

DIANE M. FAIR, et al.,
Plaintiffs,

-vs-

ROBERT C. ERICKSON, M.D., et al.,
Defendants.

JUDGE BOGGINS
CASE NO. 1997DV00363

- - - -

Deposition of ROBERT C. ERICKSON, M.D., taken
as if upon cross-examination before Juliana M.
Lawson, a Notary Public within and for the State
of Ohio, at the offices of Sindell, Young &
Guidubaldi, 610 Skylight Office Tower,
Cleveland, Ohio at 9:50 a.m. on Wednesday,
August 13, 1997, pursuant to notice and/or
stipulations of counsel, on behalf of the
Plaintiff in this cause.

- - - -

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6 On behalf of the Plaintiffs;
7 Leslie J. Esq.
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On behalf of the Defendant.

ALSO PRESENT:
ALSO PRESENT:

11 Pat Harrington
12 Diane Fair

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1 ROBERT C. ERICKSON M.D., of lawful age,
2 the plaintiff for the purpose of
3 cross-examination, as provided by the Rules of
4 Civil Procedure, being by me first duly sworn,
5 do hereby depose and say as

7 CROSS-EXAMINATION OF ROBERT C. ERICKSON, M
8 BY MR. YOUNG:

9 Q. Doctor, would you state your name and spell your
10 last name for the record, please.

11 Q. Doctor, you are a medical doctor?

12 A. Yes.

13 Your business address is what?

14 2037 Wales Avenue, Northwest, Massillon.

15 You received your undergraduate education where?

16 At Harding University in Searcy, Arkansas.

17 Q. Graduating in what year?

18 A. '68.

19 Q. You went on to medical school immediately
20 thereafter?
21

24 A. Vanderbilt.

25 Q. Finishing that in what year?

1 A. '72.

2 Q. Following graduation from medical school, what
3 did you do professionally?

4 A. Internship at Bardland Hospital in Dallas,
5 Texas.

6 Q. Would you spell that?

7 A. B-a-r-d-l-a-n-d.

8 Q. Is that a one-year internship?

9 A. Yes.

10 Q. Did you serve a residency after that?

11 A. After that I did a fellowship in orthopedic at
12 Rancho Los Amigos Hospital in Downey,
13 California.

14 Q. And that fellowship in orthopedics was for what
15 period of time?

16 A. One year.

17 Q. You successfully completed that?

18 A. Yes.

19 Q. Following completion of that internship, what
20 did you do professionally by way of education?

21 A. Three years of orthopedic residency at
22 Vanderbilt combined program in Nashville.

23 Q. By combined program, what does that mean?

24 A. It's at multiple hospitals.

25 Q. It was orthopedic residency, however?

1 A. Yes.

2 Q. Three-year residency, did you complete that
residency?

A. 1977.

Q. Following that, what did you do professionally?

A. Went into the United States Air Force for two
years.

E Where did you serve?

9 Montgomery, Alabama, Maxwell Air Force Base.

10 As an orthopedic surgeon?

11 Yes.

12 Attached to what hospital?

13 A. Maxwell Air Force Base.

14 Q. Served there for three years, the entire period
15 of your service?

16 Two years.

17 Following that, what did you do professionally?

18 Went to Mobile, Alabama as an orthopedic surgeon
19 for approximately a year.

20 Were you part of a group in Mobile, Alabama?

21 Yes.

22 What was the name of the group?

23 I was in with another person named Dr. Jack

24 Bender.

25 Q. Were you a principal in that group?

- 1 A. No.
- 2 Q. Was it Dr. Bender's practice?
- 3 A. Yes.
- 4 Q. You stayed with him for approximately one year?
- 5 A. That was probably about seven months. I
- 6 finished the service in the summer of '79, and I
- 7 started in Massillon in February of '80. So it
- 8 would be about seven months.
- 9 Q. When you came to Massillon in 1980, did you set
- 10 up your own practice there?
- 11 A. Yes.
- 12 Q. Have you been a sole practitioner since that
- 13 time?
- 14 A. I don't know what you mean.
- 15 Q. Have you been engaged with other orthopedic
- 16 surgeons in the practice of medicine in
- 17 Massillon?
- 18 A. Yes.
- 19 Q. What's the nature of your practice at this point
- 20 in time? Do you have partners?
- 21 A. Yes.
- 22 Q. What's the name of the practice?
- 23 A. Orthoclinic.
- 24 Q. And how many principals are involved in that
- 25 practice?

2

3

7 A

8 Q.

9 And you function as an employee of the corporation?

A. Yes.

11 Q. You have insurance in the name of the

12 corporation

15

16 rights or any problems with coverage?

17 A. Not that I know of.

19

20 negligence claims presented against you?

A. Yes.

23

files a suit or something settled or is claim where somebody

Have you had any

1 MR. SPISAK: Actual lawsuit is what
2 he's saying.

3 A. Yeah. The most recent, '88, '89.

4 Q. Was that filed in the local Common Pleas Court?

5 A. Yes.

6 Q. State court?

7 A. I think so.

8 Q. Has that been resolved?

9 A. Yes.

10 Q. Prior to that, what would be the most recent
11 claim?

12 A. 1982 maybe.

13 Q. Again, in the local state court?

14 A. I believe so.

15 Q. That, of course, has been resolved?

16 A. Yes.

17 Q. Have there been any others filed in court
18 against you?

19 A. I don't think so.

20 Q. In terms of complaints presented against you for
21 professional negligence that did not result in
22 suit, have there been any of those?

23 A. Like a cash settlement, is that what you mean?

24 Q. Claims presented. In other words, you were
25 placed on notice and you forwarded that to your

1 insurance carrier that a claim was being
2 presented?

3 A. Is that like one of those 180-day letters?

4 Q. Perhaps. It could be a 180-day letter. It can
5 be just a notice of representation asking that
6 it be forwarded to the carrier.

7 A. I mean, I've had some of those. I don't
8 remember how many.

9 Q. Let's put it this way: Have there been any
10 claims against you resolved by way of settlement
11 without filing suit?

12 A. Yes.

13 Q. Have there been more than one?

14 A. I don't think so.

15 Q. Tell me about that claim that was resolved
16 without suit. When would that have taken
17 place?

18 A. I think it was -- if I recall correctly, it was
19 the summer of '95.

20 Q. Was there an attorney involved for the claimant?

21 A. No.

22 Q. And what is the name of the claimant?

23 A. If we keep talking, I'll remember it.

24 Q. Let's do it this way: Without pressing on that,
25 I assume from what you're saying, that claim was

presented to your insurance carrier and they
resolved it in some manner without filing suit?

A. That's true.

Q. Did you have the same insurance carrier at that
point in time as you have today?

A. Yes.

Q. Doctor, before Diane Fair came under your care
for the treatment of the condition that we will
discuss here, you had some personal knowledge of
her, did you not? She was known to you in the
community?

A. Yes.

Q. Had you ever treated her before the treatment
for this condition?

A. I don't recall.

Q. We'll get your file here in just a minute and
get into that.

In terms of the treatment for this woman
which we're about to discuss, did you have any
knowledge concerning the condition before she
came to you professionally in your office?

A. I don't think so.

Q. You hadn't received any information from other
coaches or other doctors or anything like this
that would have given you any information from

1 which you would have drawn any conclusions; is
2 that fair?

3 A. I think so.

4 MR. YOUNG: Now I need the file and
5 she is copying it.

6 - - - -

7 (Thereupon, a recess was had.)

8 - - - -

9 Q. I've made a copy of your original chart that I
10 have before me. I'll take the entire matter and
11 I'll mark it Plaintiffs' Exhibit 1 later. I
12 want you to feel free to refer to the original
13 as we go through this.

14 Can you tell me when Diane Fair first came
15 under your care?

16 4. July 17th, 1995.

17 2. Now, do you have any independent recollection of
18 that day and her examination, separate and apart
19 from the record that you have before you?.

20 1. Probably.

21 a. A minute ago, to try to clarify this, I asked
22 whether you had any knowledge from which you
23 would have formed any conclusions that you, you
24 had obtained from, on that date, July 17th,
25 1995. As I understand it, you did not; is that

1 correct?

2 A. I don't recall any now.

3 Q. On July 17th, 1995, when she came to your
4 office, why did she come to your office?

5 A. To have her foot examined, I think.

6 2. Do you have a record of that?

7 A. Uh-huh.

8 2. What does the record indicate?

9 A. You mean you want me to read what's on here

10 B. Well, I would like you to find the records that
11 pertain to it. And you can read it if you like,
12 if that's what it takes to determine why she
13 came to see you.

14 It was because her right foot was bothering her.
15 You are referring to what page at this point in
16 time?

17 July 17th, 1995.

18 Is that a handwritten office note?

19 Yes.

20 Under the heading of Orthoclinic?

21 Yes.

22 I see what appears to be a stamped dated July 17th
23 1995. And I see a circled S. The circled S
24 stands for what?

25 4. Subjective.

1 Q And you have written --

2

3 A. The first paragraph isn't.

4 Q. And by that, we're talking about "review right
5 foot"?

6 A. Yes.

7 Q. Who actually recorded that?

8 A. One of the office staff.

9 Q Can you tell me from the handwriting who that
10

11 A I think it was the K. Hammond that's a couple
12

13 Q. Now, you're reading something that indicates
14

15 A Six lines down on the right-hand side

16 Q. Hammond being H-a-m-m-o-n-d?

17 A. Yes.

18 Q. Is it your practice to have a member of your
19 office staff with you during examination and to,
20 in fact, record the notes that are made during
21 your examination?

22 A. Someone usually brings the patient back before I
23 see them and records the notes. And sometimes
24 there's somebody in the room, and sometimes
25 there's not somebody in the room. Just varies

1 on the day, who the patient is and what's going
2 on.

3 Q. Here we have a handwritten note, the first
4 paragraph, which you believe is the handwriting
5 of K. Hammond.

6 Do you have any opinion as to when she
7 would have written that information?

8 A. Whenever she brought Diane back to the room.

9 Q. Before she was examined, during the examination
10 or in what manner?

11 A. Probably before.

12 Q. And this would have been the complaint you
13 believe as it was related to Ms. Hammond?

14 A. Correct.

15 Q. You believe that you would not have been in the
16 room at that time?

17 A. Yes.

18 Q. Now, do *you* have any independent recollection
19 about walking into the room that morning and
20 taking a history separate and apart from this
21 record?

22 A. What does "independent recollection" mean?

23 Q. Separate and apart from the record, do you have
24 any knowledge of what Diane Fair said to *you*
25 that morning, other than what is contained in

1 writing in this record?

2 A. Yes.

3 Q. What do you recall other than what's written
4 here?

5 A. Well, her foot was bothering her.

6 Q. How was her foot bothering her?

7 A. She had a swollen portion on it that seemed to
8 swell sometimes, and sometimes it wasn't very
9 swollen. And she had some trouble with her foot
10 and she wanted it looked at.

11 Q. And when you say she had some trouble with her
12 foot, are we talking about what you later
13 determined was a lipoma on the top of the foot?

14 A. I actually never determined that.

15 Q. Describe for me then what she was complaining
16 about in terms of her foot bothering her, what
17 your understanding was concerning her complaint
18 that morning or that day.

19 A. That she noticed swelling on her foot, that
20 sometimes she thought was black-and-blue, but it
21 wasn't black and blue that day. And that her
22 shoes may or may not have been tight or fit
23 right or something, you know, something with her
24 gait.

25 Q. Did you obtain any history, other than that

1 which is recorded here in your handwritten note
2 or the handwritten note of your record?

3 A. Not that I recall.

4 Q. Did you perform an examination?

5 A. Yes.

6 Q. What are your findings?

7 A. That she had a swollen area on the top of the
8 foot. She also had some soreness in the outer
9 portion of the foot where that diagram is.

10 Q. Where that diagram is meaning what, the mass?

11 A. Yeah. There's a diagram on the chart that's a
12 rough configuration of her right foot, and there
13 was an area that seemed a little larger on the
14 inner and upper aspect of the foot. That's
15 where it says "mass." And on the outer aspect,
16 couple calluses on her BIP joint. That's the
17 joint that's the first joint out into the toe on
18 the third and fourth toes. And some discomfort
19 over that area.

20 Q. Now, doctor, after the first paragraph here we
21 have meds, estrogen. Is that in your
22 handwriting?

23 A. Wait a minute. Hang on a second.

24 Q. After the first paragraph.

25 A. Oh, yes.

1 Q. So that as you enter the room, you're taking a
2 history and you are recording some notes on this
3 page as well?

4 A. I think that's Kristi's handwriting.

5 Q. Meds, estrogen?

6 A. Uh-huh.

7 Q. You believe that is K. Hammond's handwriting?

8 A. Yes.

9 Q. When we get down on the next -- right foot
10 x-ray, whose handwriting is that?

11 A. That's the x-ray technician, Denise Abbott.

12 Q. Explain to me this Orthoclinic sheet on which
13 these handwritten notes are made. How is this
14 sheet used within your office?

15 It's kept as a permanent record in the chart.

16 Now, K. Hammond holds what position, or did at
17 this time, in your office?

18 She is an assistant in the back office.

19 Is she still employed by you?

20 Yes.

21 Still holds that position?

22 Uh-huh.

23 Q. She brings the patient back to an examination
24 room?

25 A. Yes, uh-huh.

Q. And she begins to write on the Orthoclinic
2 sheet. What do we call this?

3 A. Progress note.

4 Q. She begins to write on the progress note the
5 history that she takes?

6 A. Uh-huh.

7 Q. When you walk in and you see the patient, do you
8 confirm that history?

9 A. Yes.

10 Q. And if it's inadequate, that is, if K. Hammond
11 has taken an inadequate history, do you
12 supplement it?

13 A. Sometimes.

14 Q. Well, if there are relevant findings, do you
15 include those in your notes?

16 A. Not always.

17 Q. There are times when you exclude relevant
18 findings by way of history from your progress
19 notes?

20 A. I don't exclude them. Sometimes I don't record
21 them.

22 Q. Under what circumstances would you not record
23 them?

24 A. I can't think of an example right now.

25 Q. Is it an intentional act that you fail to record

relevant findings on -- are you saying sometimes there is an oversight and you may not put it down?

4 A. I don't know that either of those apply.

5 Q. Well, I'm trying to understand what's involved.

6 You have an office assistant who is, in
7 part, taking a history and recording that
8 history in the progress note. As I understand
9 it, you walk into the examination room and you
10 take the history as well; is that correct?

11 A. Yes.

12 Q. You don't trust the history that's been taken
13 simply by the office assistant, you determine
14 whether it is adequate for this patient's
15 complaints, I assume; is that correct?

16 A. I don't think I said that.

17 Q. I'm asking.

18 A. No. I trust my office assistants.

19 Q. So that if she takes a history, you do not
20 necessarily check to determine that it is an
21 adequate history?

22 A. I check what's on the page and talk to the
23 patient.

24 Q. I understand. And would you take a history?

25 A. Yes.

1 Q. And under some circumstances, you may supplement
2 what's been written there, and you may not, and
3 I'm trying to determine when you do which.

4 A. I don't know that I have an exact answer for
5 that right now.

6 Q. There is no common or general practice for you
7 to which you can testify this morning?

8 A. Not right now, no.

9 Q. Does the office assistant remain with you during
10 the examination as a general practice?

11 A. Depends. Sometimes yes, sometimes no.

12 Q. Do you recall what occurred in this situation?

13 A. Somewhat.

14 Q. What do you recall concerning what occurred this
15 day?

16 A. I remember picking the chart up and Diane was in
17 the room and I walked in and started talking to
18 her.

19 Q. Was there anyone else in the room?

20 A. Right now, I don't recall.

21 Q. Now, on this page, is there anything that is in
22 your handwriting?

23 A. Starting where it says O for objective, and then
24 that drawing. And then after that --

25 Q. I assume that this x-ray by D. Abbott was

1 performed in your office?

2 A. Yes.

3 Q. In another room other than the initial
4 examination room?

5 A. Yes.

6 Q. You would have ordered the x-rays, she would
7 have gone down the hallway where it would have
8 been performed?

9 A. Yes.

10 Q. This sheet would have gone with her at that
11 time?

12 4. Yes.

13 2. And the x-ray technician has written "right foot
14 x-ray done today"?

15 1. Yes.

16 Q. That indicates that she has completed that work?

17 A. Yes.

18 Q. This page comes back to you with Diane Fair, and
19 then you re-examine her in light of the x-ray?

20 1. I think the x-ray was probably done befdrre I saw
21 her.

22 2. An x-ray would have been done before you
23 initially saw her?

24 1. May have been. I don't know that day. I mean,
25 I don't recall.

1 Q. Who would have ordered the x-ray before you saw
2 her?

3 A. I would have.

4 Q. As a result of the complaints by the office
5 assistant, or under what circumstances would you
6 order an x-ray before you see the patient?

7 A. It varies.

8 Q. Well, in this case?

9 A. If they came out -- I don't recall, I really
10 don't, which way it happened.

11 Q. Do you believe that the x-ray was done before
12 you saw the patient, or do you just have no
13 opinion?

14 A. I have no opinion.

15 Q. Do you know that you saw Diane Fair and examined
16 her after the x-ray was performed?

17 A. Yes.

18 Q. How do you know that?

19 A. Because I completed the chart.

20 Q. After the x-ray is being noted as being
21 performed?

22 A. She wouldn't have been x-rayed on her way out
23 the door.

24 Q. Now, the diagram of the foot that is immediately
25 adjacent to the O, is that something that you

- 1 have written?
- 2 A. Yes.
- 3 Q. Do you recall when you placed that in the chart?
- 4 A. When she was there.
- 5 Q. And while she was still there in the room with
- 6 you?
- 7 A. Yes.
- 8 Q. Can you explain that diagram to me? You've
- 9 written three words and I don't understand those
- 10 three words. I can understand "mass." At the
- 11 top of the diagram you have written what?
- 12 A. "Callus."
- 13 Q. And beneath that?
- 14 A. "Pain."
- 15 Q. Can you tell me how you determined -- well, what
- 16 does pain with an arrow to that circle mean on
- 17 the foot?
- 18 A. The area was tender when I examined her foot.
- 19 Q. That was something that you would have learned
- 20 then on examination and not by way of history?
- 21 A. True.
- 22 Q. Can you describe the pain that was present that
- 23 day?
- 24 A. No. I didn't have the pain. Diane did.
- 25 Q. Did you learn anything about the pain other than

the fact that it was uncomfortable?

A. Location.

Q. Did you inquire in any way as to when that pain was present?

A. No.

Q. Did you learn anything about the nature of the pain that day?

A. No.

Q. By that I mean any description of the pain.

A. Just the spot was tender.

Q. Did you learn whether she ever had pain other than during your examination at that point?

A. I don't recall.

Q. To your knowledge, that day as you sat there, had she ever had pain in her foot at that location other than during your examination?

A. I don't recall.

Q. Would that have been a relevant finding during that examination?

A. Concerning the rest of her foot?

Q. Concerning the nature of the pain, the presence of the pain, the period of time that she had experienced it, whether it was only there during this examination?

A. It could have been.

1 Q. Was that relevant history that you would have
2 obtained on that day, if you have, have no
3 knowledge or you just don't remember?

4 A. Yeah. Right now I don't recall.

5 Q. Would it have been your common practice to
6 inquire as to such periods of time she
7 experienced the pain, for instance?

8 A. I don't really understand that question.

9 Q. Well, I see a diagram here in your notes, and
10 you've indicated a circle and you have written
11 pain. And I've asked you what that meant and
12 you told me that that meant it was tender when,
13 you examined her.

14 Are you able to conclude, as you sit here
15 today, that you knew anything else about that
16 pain on July 17th, 1995, other than that it was
17 tender during your examination?

18 A. I'm still not sure I'm with you. I mean, I
19 examined her foot. It was tender there, and I
20 made a note of it.

21 Q. How did you perform the examination?

22 A. With my fingers.

23 Q. What did you do?

24 A. Squeezed the spot.

25 Q. And you found a spot that was tender when you

1 squeezed it, correct?

2 A. Uh-huh.

3 Q. Did you have any other knowledge, other than the
fact that it was tender when you squeezed it on
July 17th, 1995?

4 A. Not that I recall.

5 Q. Beneath the diagram we have a capital A. Can
you tell me what's written there?

6 A. It says, "Assessment, mass and neuroma."

7 2. "Mass and neuroma"?

8 A. Uh-huh.

9 Q. Is that a P that is beneath the A?

10 A. Yes.

11 Q. And what is written beside the P?

12 .. Number 1 is "aspirate."

13 And by that you mean aspirate what?

14 The area on the top of the foot.

15 That is labeled "mass"?

16 Yes.

17 Did you aspirate it on July 17, 1995?

18 Yes.

19 And you drew no fluid; is that what that
20 indicates?

21 Yes.

22 Q. Under Number 2, that is what, "check in office"?

1 A. Yes.

2 Q. What does that mean?

3 A. At the time, you know, I don't think she was
4 sure which way she wanted to go on excising it,
5 so we could either check it back in the office
6 or excise it.

7 Q. Under Number 3 you have written what?

8 A. MAC with local.

9 Q. What does L MAC mean?

10 A. That's an anesthetic with abbreviation for
11 managed anesthesia care. It's essentially
12 sedation.

13 Q. Hyphen local Thursday.

14 A. Uh-huh.

15 Q. What does that mean?

16 A. The local is the other part of the anesthetic,
17 and the Thursday was probably the day we were
18 going to do it.

19 Q. Now, I understand that you aspirated the mass
20 and that you found no fluid. Number 2 means
21 check in office. Number 3 seems to indicate you
22 were planning on excising this mass under a
23 local.

24 A. No.

25 Q. What does it mean?

1 A. She had two separate problems with her foot and
2 we discussed this lump area on the top of it.
3 And she was worried about the length of it. And
4 I told her if we took all that out, that there
5 might be -- the skin there is very thin and
6 there's a good chance she would lose some nerves
7 and sensation on the top of the foot. I wasn't
8 sure once we aspirated it whether it was a tumor
9 or whether it was a swollen area from stress on
10 her foot or her toes. She said her shoe rubbed
11 it. So the way I left it, we could do either
12 one.

13 Q. Do either one meaning?

14 A. Take the neuroma out or take the mass out.

15 Q. Let me back up. We have written beside the
16 diagram "excisional lipoma of the foot." When
17 was that written there?

18 A. I don't know.

19 Q Is that in your handwriting?

20 A. No.

21 Q. Can you tell me whose handwriting it is?

22 A. I think it's the office secretary.

23 Q. Does that indicate that a decision was made to
24 excise the lipoma of the right foot before she
25 left the office on July 17, 1995?

1 A. I don't know what that indicates. I didn't
2 write it.

3 Q. When she left your office on July 17th, 1995,
4 did you have any plan for treatment of her
5 condition?

6 A. I think she talked to the secretary about
7 operating on it.

8 Q. Did you have any plan for the treatment of her
9 condition on July 17th, 1995 before she left?

10 A. With whichever she decided, if she wanted to
11 decide on any or all of her foot, we could. If
12 she wanted to operate on one or two things, we
13 could. It was up to her.

14 Q. Let me understand. Is it your testimony that
15 she had two conditions present in her right foot
16 on July 17th, 1995?

17 A. She may have had more than two. There were two
18 in that drawing.

19 Q. Two indicating what, the pain and the mass?

20 A. *Yes.*

21 Q. These were separate and unrelated conditions?

22 A. They could have been separate and related. They
23 could have been separate and unrelated. They
24 could have been unrelated.

25 Q. On July 17th, 1995, you examined her for this

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comes to mind.

Q. Did you draw any conclusions concerning what it was, what your diagnosis was at that time?

A. Yes.

Q. And what was your conclusion?

A. It was a mass.

Q. Did you conclude that it was a lipoma?

A. No.

Q. Can you tell me why the secretary in your office would have written excisional lipoma of the foot?

1 A. No.

2 Q. Can you tell me where she got the word lipoma?

3 A. Again, I don't know. I didn't write that.

4 Q. Do you believe that you did not write this, it
5 was written by a secretary in your office?

6 A. I know I didn't write it. It's not my
7 handwriting.

8 Q. And you believe it was a secretary that wrote
9 it?

10 A. Uh-huh.

11 Q. But you have no idea where she got the word
12 "lipoma" or why that term was used; is that
13 correct?

14 A. No.

15 Q. Are you able to state today as you sit here
16 offering this testimony that it did not come
17 from you?

18 A. What's that?

19 Q. That you did not use the word "lipoma," or did
20 not conclude this was a lipoma?

21 MR. SPISAK: I think he already
22 testified to that. But go ahead, doctor.

23 A. I said it was mass.

24 Q. I understand. You have identified it as a mass
25 and you said that your secretary wrote down

1

2

3 A. I don't know.

4 Q. Do you know that you did not use that word?

5 A. On that day, yes, I know that.

6 Q. Do you know that you did not use that word

7

"

"

8

9

10 A. I don't know.

11 Q. Do you have any opinion concerning that?

12 A. No.

13 Q. And you don't know why it was written there?

14 A. No, I don't.

15 Q. Do you have an opinion concerning why it was
16 written there?

17 A. No.

18 Q. You do recall that you made two alternatives
19 available to Diane Fair on July 17th, 1995; is
20 that correct?

21 A. Yes.

22 Q. And that is you could treat one condition or the
23 other?

24 A. Or neither.

25 Q. And did you talk with her about how those

1 conditions could be treated?

2 A. Yes.

3 Q. Let's talk about that circle which you've
4 labeled as pain.

5 Did you conclude on July 17th, 1995 that
6 she was suffering from a neuroma in that area?

7 A. That's the most common thing that causes pain in
8 that area.

9 Q. My question is did you conclude on July 17th,
10 1995 that she was suffering from a neuroma?

11 A. Yes.

12 Q. And are we talking about a Morton's neuroma,
13 that's the phrase that we use for that?

14 A. Uh-huh.

15 Can you tell me the basis for your conclusion on
16 July 17th, 1995 that she was suffering from
17 Morton's neuroma?

18 Her physical exam.

19 And she had pain in the forefoot on physical
20 examination?

21 Uh-huh.

22 Did you perform a differential diagnosis at that
23 time on that pain?

24 MR. SPISAK: I'm going to object.

25 You've used that phrase a couple times now,

1 "perform a differential diagnosis," and I
2 don't know if the doctor understands that,
3 but I don't understand that.

4 I don't think you perform
5 differential diagnosis, but I could be
6 mistaken. Can you answer the question as
7 it's asked?

8 THE WITNESS: Well, I've been
9 trying to guess what that meant. Maybe I
10 shouldn't guess.

11 MR. SPISAK: Don't do that. If you
12 don't understand, tell him you don't.

13 2. Let's define terms, what "differential
14 diagnosis" means to you.

15 A. It's a list of possibilities in a -- it's a list
16 of possibilities in arriving at a diagnosis.

17 2. That could be causing the symptom?

18 A. Yes.

19 2. Did you consider other conditions that could be
20 causing the pain in the forefoot on July 17th,
21 1995?

22 A. Yes.

23 Q. What other conditions did you consider?

24 A. Metatarsal ganglion.

25 Any others?

1 A. Subluxation of the MP joint.

2 Q. Any others?

3 A. Not that I recall.

4 Q. Are there any others with which you are aware as
5 you sit here today that could cause such pain?

6 A. There possibly are, but they don't immediately
7 come to mind.

8 Q. Were you able to eliminate metatarsal ganglion
9 as a cause of this pain on July 17th, 1995?

10 A. Yes.

11 Q. How?

12 A. Metatarsals were sore.

13 Q. Were you able to eliminate the subluxation of
14 the joint?

15 A. Yes.

16 Q. How? Physical examination, clinical
17 examination?

18 A. Physical examination.

19 Q. Did you consider any other inflammatory process
20 that might have been present and causing the
21 pain?

22 A. I don't understand the question.

23 Q. Did you consider anything else, other than
24 Morton's neuroma, metatarsal ganglion and
25 subluxation of the joint, to your knowledge, as

you sit here today?

2 A. I may have. I don't remember.

Q. But you were able to conclude adequately for
4 your own purposes that she was suffering from
5 Morton's neuroma?

6 A. Yes.

7 Q. What treatment did you consider for the Morton's
8 neuroma?

9 A. You could do nothing or excise it.

10 Q. Those are the two alternatives?

11 A. Inject it.

12 Q. Did you discuss the Morton's neuroma with Diane
13 Fair as she was present in your office on
14 July 17th, 1995?

15 A. Yes.

16 Q. Do you have a recollection of that as you sit
17 here today?

18 A. Yes.

19 Q. What did you tell her?

20 A. That her foot was sore there and she probably
21 had a neuroma.

22 And you had no history concerning the prior
23 claim -- excuse me, prior pain, correct? Did
24 you determine, you determined on clinical
25 examination that she had a neuroma, correct?

1 A. Yes.

2 Q. Did you determine whether it interfered with her
3 life in any way?

4 A. Well, she was in there because her foot bothered
5 her.

6 Q. Because of pain between the toes?

7 A. I think she was in there because her foot
8 bothered her.

9 Q. And the foot bothering her was the mass on the
10 top of the foot, wasn't it?

11 A. The swollen area that was black-and-blue.

12 Q. Right. Which has been labeled a "mass" on your
13 diagram. She wasn't in there because of the
14 pain between the toes, was she?

15 A. I thought she was.

16 Q. Well, if we look at the history that was taken
17 by your office assistant, there is no indication
18 of pain between the toes or any painful
19 condition, is there?

20 A. No, there's not.

21 Q. But you found pain on examination?

22 A. Yes.

23 Q. And you diagnosed Morton's neuroma?

24 A. Yes.

25 Q. In determining whether to excise it or leave it

1 alone, did you determine whether it had been
2 present before July 17th, 1995?

3 A. Her foot bothered her. Part of the history of
4 this was the strap of her shoe was rubbing, and
5 oftentimes people will get subtle problems with
6 their feet. If they have swollen areas, they
7 will develop calluses, lumps, bumps. So I
8 looked the foot over and that was there, also.

9 Q. You found that there, also, and you told her
10 that you could either surgically take it out or
11 leave it alone, is that fair, that's what you
12 believe you told her?

13 A. Yes.

14 Q. Do you remember telling her that?

15 A. Yes.

16 Q. Did you talk with her about the risks and
17 benefits of one procedure versus another?

18 A. Yes.

19 Q. What did you tell her?

20 A. That the mass on the medial side of the foot, to
21 explore that could leave a long scar, a numb
22 area. The other thing could leave a numb area.

23 Q. The other thing meaning what?

24 A. The neuroma could leave a numb area. Either one
25 could have numb spots or scars.

Q. Do you remember talking with her about excising the lipoma and her talking about where the scar would be and whether you could limit the scarring? Do you recall that?

A. Maybe not in your exact words, but the spot is a real difficult spot to get a decent scar.

Q. And you recall discussing that with her?

A. Yes.

Q. And as you sit here today, you have a recollection of discussing a separate surgical procedure that could be done, she could do either the mass or the other area that you've discussed as pain, labeled as pain, which you diagnosed as neuroma. You made those two options available to her, you did that on July 17th, 1995?

A. Yes.

Q. Did you discuss conservative treatment of what you diagnosed as the neuroma and how that might be managed?

A. Other than shoes, I don't believe so. Other than just shoe change and watching the type of shoes she was wearing.

Q. Did you discuss that with her, however?

A. Yes.

1 Q. Now, in an attempt to fully understand and be
2 fair here, it's your testimony that you made the
3 diagnosis of Morton's neuroma on the clinical
4 examination alone, correct?

5 A. Yes.

6 Q. It's your testimony that you have no
7 recollection of inquiring concerning whether
8 this neuroma had interfered with her life in any
9 way; is that fair?

10 A. Today it is.

11 Q. To your knowledge, you did not obtain a history
12 as to whether this was constant pain or
13 intermittent pain, correct?

14 A. I don't recall.

15 Q. You did not determine, to your knowledge,
16 whether it was a burning pain or a paresthesia
17 or an ache; is that correct?

18 A. I don't recall.

19 Q. You did not determine whether she had difficulty
20 walking or whether it had interfered with her
21 normal activities, correct?

22 A. I thought she had difficulty walking and that it
23 interfered with her normal activities.

24 Q. You thought that the pain produced that?

25 A. Something with her foot did.

1 Q. Why? How did you conclude that?

2 A. Pardon?

3 Q. How did draw that conclusion?

4 A. I thought that's what she said.

5 Q. As you sit here today, you believe that you

6

7 A. Uh-huh.

8 Q. There's no notation here on your chart

9

10 A. I understand that.

11 Q. Correct?

12

13

14 that you believed was present on July 17th,
15 1995?

16 MR. SPISAK: I'm going to object.

17 I think he did indicate there was some
18 discussion about shoes or some such thing
19 as opposed to nothing. But go ahead,

20 A. I already went through the differential. The
21 first choice I gave her was to do nothing.
22 Check it back in the office.

23 Q. That was a choice that you gave her. Did you
24 make a recommendation to her as to what she
25 should do?

1 A. No. I said you can do either thing you want.
2 You can take this out. You can take that out.
3 You can wait. It's up to you.

4 Q. And you didn't give her any advice concerning
5 what would be the risk/benefit analysis of
6 taking this out?

7 A. Except that there was going to be nerve problems
8 involved, anything she did. I mean, it wasn't a
9 real straightforward issue.

10 2. Did you discuss with her the fact that she might
11 have nerve problems as a result of the surgery?

12 A. Yes.

13 2. You told her that?

14 A. Yes.

15 2. Did you tell her what might occur as a result of
16 this surgery, what the complications might be

17 A. Yes.

18 A. What did you tell her?

19 A. That, you know, the usual. Wound can break
20 down, there can be nerve problems. It can have
21 an unsightly scar, limp, be worse.

22 2. On examination, did you notice any spreading of
23 the toes?

24 A. No.

25 2. Did you determine whether the condition was

1 aggravated by activity?

2 A. She was pretty nonspecific on that. It seemed
3 like some days her foot swelled and bothered her
 and some days it didn't.

Q. By the swelling, you're talking about the mass?

A. Well, it wasn't -- it was a diffuse thing. It
 was kind of certain shoes aggravated her foot.

2. So July 17th, 1995, did you believe that the
 pain that's indicated on this diagram was
 related to the mass that's indicated on the
13 diagram?

12 A. I thought it could have been.

13 Q. Did you have an opinion as to whether it was?

14 A. I said I thought it could have been.

15 Q. And what was your opinion as to how the two
16 could be related?

17 The one spot, if you limp, and the other spot,
18 it rubs, the rubbing could cause swelling. If a
19 person limps from a neuroma, or has any kind of
20 problem from a neuroma, that causes them to
21 posture their foot differently. Or if they wear
22 their shoe differently, you can get swelling in
23 another spot of the foot.

24 Q. I suppose I don't mean mechanically as to what
25 could have caused the two separate, but

1 medically were they related in any way? Was the
2 pain causing the mass or the mass causing the
3 pain, as you have indicated on the diagram?

4 A. I think I just answered that.

5 Q. Well, you talked about mechanically they could
6 be, both be caused by a shoe rub. That's not
7 medically.

8 A. No.

9 Q. I'm talking about whether this was something
10 that linked the two in terms of causation. One
11 related to the other. I'm not talking about
12 mechanical causation, medical causation.

13 A. In orthopedics I cannot separate that. I have
14 no idea what you mean.

15 Q. I'm talking about whether a lipoma is related
16 to, to a neuroma.

17 A. That's a different question that you just asked
18 me.

19 Q. In your opinion, on July 17th, 1995, was the
20 lipoma related to neuroma?

21 A. Where did you get a lipoma on July 17th, 1995?

22 Q. You mean how do I draw the conclusion it was
23 there?

24 A. Uh-huh.

25 Q. From your chart which says lipoma.

MR. SPISAK: Wait a minute. He has already testified he didn't draw that conclusion.

MR. YOUNG: He's asking me where I got it. That's where I got it.

Q. My question is on that date, did you believe at that time one was related to the other?

A. What was one? That is a pronoun.

Q. The neuroma related to the mass?

A. The neuroma could be related to the mass. Yes, I said that.

Q. In what way?

A. I previously answered this.

2. I heard that and I would like to clarify it, if I may.

A. If the neuroma is causing any type of symptom or any shoewear change, anything else, the rest of the foot can have swelling.

3. As a result of rubbing and irritation there?

A. That's a possibility.

4. Are there other possibilities?

A. Shift in the foot, joint swelling, stress on the bone.

Q. With the excision of the -- would the excision of the mass have had any effect on the neuroma

1

2 A. No.

3 Q. Was it your opinion that the excision of the

4

5 A. It could.

6 Q. Was your opinion -

7 would?

8 A. It depended on the cause of the mass, but it

9 could.

10 O. You said that it would have been possible to

11

12

13 A. Yes.

14 Q. Did you discuss the possibility of injecting the

15 site?

16 A. Of the -- I don't recall.

17 Q. Is it possible to treat a Morton's neuroma

18 conservatively?

19 A. In certain circumstances.

20 Q. Under what circumstances?

21 A. Just change the footwear and see what happens.

22 Q. Is it a possibility to treat Morton's neuroma

23 with the injection of steroids?

24 A. Yes.

25 Q. What is the reason for doing that, what's the

1

2 A. The theory is it decreases irritation, sometimes
3 swelling.

4 Q. Did you consider that in this case?

5 A. As I recall, she didn't want to do any
6

6

7 Q. Do you recall discussing it with her?

8 A. Well. I already had a needle out that day and
9

9

10

11

12 O. Well, you aspirated the mass. Do you have any
13

13

14

15 A. Not right now I don't.

16 Q. Do you have any recollection of discussing
17 injecting Lidocaine?

18 A. No, I don't.

19 Q. Is that a possible therapy for Morton's
20 neuroma?

21 You have to indicate verbally.

22 A. I don't know. When you say "a possible
23 therapy" --

24 Q. Right.

25 A. People have cut off feet for things like that,

1 so I don't understand the word "possible
2 therapy."

3 Q. Do you know it to be an accepted therapy for the
4 treatment of Morton's neuroma?

5 A. It may be. I don't know.

6 Q. In terms of dealing with Morton's neuroma, this
7 is a condition which is common for you to
8 encounter in your practice?

9 A. What does "common" mean?

10 Q. Well, do you see it often in your practice?

11 A. Yes.

12 Q. Can you approximate for me the number of times
13 you would have performed this surgery in 1995?

14 A. I don't recall.

15 Q. Can you approximate it for me?

16 A. Not really. I mean, I'd be guessing. I don't
17 recall.

18 Q. In July and August, would you have performed
19 this surgery as many as five to ten times, July
20 and August of 1995?

21 A. Well, I know I did ten, I'm sure of that. But
22 otherwise, I don't recall.

23 Q. Well, let's -- to perform this surgery, excision
24 of Morton's neuroma, would you generally do this
25 in a hospital as opposed to in your office?

1 A. Yes.

2 Q. Are there occasions when it would be performed
3 in your office?

4 A. The Morton's neuroma?

5 Q. Yes.

6 A. No. It's a little retractor I use in the
7 hospital.

8 Q. In 1995 you were on the staff of what hospitals?

9 A. Let's see. Massillon Community, Aultman,
10 Columbia University and Dunlap Hospital.

11 Q. Did you have more than one office in the summer
12 of 1995?

13 A. Yes.

14 Q. Where were your offices at?

15 A. The other office was in Orville.

16 Q. If you were going to perform excision of
17 Morton's neuroma out of your main office, where
18 would that surgery have generally been
19 performed?

20 A. Whereever the people's insurance directed it.

21 Q. Was it common for you to perform surgery at
22 Dunlap Hospital in the summer of '95?

23 A. I don't recall how many cases I did there in the
24 summer.

25 Q. Is there a hospital where most of your work was

1 done?

2 A. Most of it was at Massillon Community.

3 Q. Can you approximate the percentage that was done
4 at Massillon Community versus the others?

5 A. I don't know.

6 Q. In your office, is there a record kept what
7 surgery you performed on what date and what
8 patient?

9 A. You mean a surgery log?

10 Q. Yes.

11 A. You'd have to ask my office manager how she does
12 that.

13 Q. Who is that?

14 A. Vickie Horton.

15 Q. Would she have the most knowledge concerning the
16 paperwork within your office?

17 A. She is responsible for it.

18 Q. Doctor, just for the record, can you describe
19 what Morton's neuroma is?

20 A. It's a tumor of the interdigital nerve. It's
21 usually in the third inner space of the foot.

22 Q. A tumor of the nerve?

23 A. Yes.

24 Q. What causes it?

25 A. Generally pressure.

Q. What are the symptoms that result from Morton's neuroma?

A. They vary from a change in the foot position and posture to numbness and burning.

Q. Is it a --

A. They have a very wide spectrum of symptoms.

Q. Is it a disabling condition?

4. What does "disabling" mean?

2. Does it interfere with activities of a person's daily life?

A. It can.

Q. Can it result in severe pain?

A. It can.

Q. What is the success rate, cure rate when performing an excision of the Morton's neuroma for the pain?

A. It's probably over 90 percent. That's off the top of my head.

2. What are the complications that can arise from it? You said that there is some nerve problem that can arise. Can you describe that for me?

A. Can have a recurrent neuroma, which is a little bump on the end of the nerve, a wound infection, continuing pain, swelling. I think it's called reflex sympathetic dystrophy. That's the common

1

2 Q. Is a second excision of a neuroma more difficult

3

4

5 A. Really depends.

6 Q. You can't say in general it is more difficult?

7 A. No. Because I've done both. And sometimes it

8

9

10 Q. Depends on what?

11 A. Scarring, location on the foot.

12 Q. Is it your testimony that when Diane Fair left

13

14

15 elected for the treatment of her conditions?

16 A. She had a couple options. I mean, it was down
17 to a few options.18 Q. As I understand your testimony, you discussed
19 her conditions with her and you made options
20 available to her.21 When she left your presence that day, had a
22 decision been made on how the treatment would
23 progress?

24 A. No. I told her to decide what she wanted to do.

25 Q. And did she decide what she wanted to do?

2 Q. How do you determine that from the record? What
3 is the next notation following this page that
4 would indicate that?

5 A. Well, I think she scheduled surgery that day.

6 Q. Would she schedule the surgery or would your
7 office schedule the surgery?

8 A. Well, the office schedules it. She has to say
9 she wants it done.

10 Q. And is it your testimony that she contacted your
11 office and said she wanted to have the neuroma
12 excised?

13 A. The surgery work sheet, I think it was filled
14 out on the 17th, although I don't know because I
15 don't fill this sheet out.

16 Q. Surgery work sheet is what, can you identify
17 that for me? Where is that found? On the right
18 side of your chart?

19 A. It would have been on the right-hand side.
20 Yeah.

21 MR. SPISAK: I think it was right
22 underneath the first date of the
23 treatment.

24 - - - -

25 (Thereupon, a discussion was had off

the record.)

- - - -

Q. We have a page here from your chart that is labeled surgery work sheet. You believe this was prepared in your office on July 17th, 1995, as indicated by the date in the upper left-hand corner?

A. Yes.

3. And this was prepared by who in your office?

A. Different people. Couple different things. Most of the writing on it is the scheduling person:

2. Would the date on this indicate to you that arrangements were made before she left your office that day?

A. I think so, because it says 7-17.

3. In the upper left-hand corner we have a section of this form that says "Schedule with Jackie." Is that a person in your office?

A. That's a person at the hospital that schedules the operating time.

Q. All of the writing on this form, however, was prepared by someone in your office, maybe different people, but they are your office staff?

1 A. Yes.

2 Q. Under the second section we have instructions,
3 folder to patient. There is standard
4 instructions or folder that goes out to the
5 patient?

6 A. Yes.

7 Q. And there's the handwritten notation, "Mailed
8 new instruction sheet, 8-1." Do you know what
9 would have been contained in that instruction
10 sheet?

11 A. It's a standard packet we have at the office.

12 Q. Containing what?

13 A. Just instructions of going to the hospital and
14 follow-up visit and --

15 Q. There would have been nothing there pertaining
16 to the actual procedure to have been performed?

17 A. Whether there was a copy of the, copy of the
18 consent form, I don't know.

19 Q. Is there a consent form that's used in your
20 office?

21 A. Yes.

22 Q. Separate and apart from any consent of paying by
23 the hospital?

24 A. Yes.

25 Q. Can you identify that form for me?

□ □ □ □

(Thereupon, a discussion was had off
the record.)

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Q. And the consent form that you just identified is one under the label patient?

A. Well, there's four of them. They have different labels on top.

Q. The fourth one indicates that surgery that was being performed was for Morton's neuroma of the right foot?

A. Uh-huh.

Q. Now, the surgery was actually performed where and when?

A. I'm sorry. I couldn't hear you.

Q. The surgery was actually performed where and when?

A. At Massillon Community Hospital on the 22nd of August.

Q. Does the operative record appear to be complete and accurate to you?

A. I believe so. I haven't looked at it recently.

Q. Take a look at that, if you would. The --

MR. SPISAK: You say the operative record. You mean the operative report.

1 MR. YOUNG: Operative report.

2 MR. SPISAK: Because we don't have
3 the whole operative record here, I don't
4 believe.

5 A. Yes.

6 Q. Just a couple of points from parts I've taken
7 from your record, doctor.

8 Can you find the hospital record that's
9 contained within your chart?

10 A. Yes.

11 Q. Take a look at that, if you would. This is what
12 I had pulled from your chart. I hope that's
13 complete.

14 A. Yes. That's actually okay.

15 Q. That's actually what -- this is part of the
16 hospital record that is retained within your
17 file. You appear to have the complete hospital
18 record?

19 A. No. But that thing you had in your hand a
20 moment ago is actually a progress note. I mean,
21 it's probably in the hospital record, too.

22 Q. Yes. It's attached to -- take a look at the
23 discharge summary from the hospital, if you
24 would.

25 A. Okay.

MR. SPISAK: Hang on just a second.

- - - -

(Thereupon, a discussion was had off the record.)

- - - -

Q. The discharge diagnosis was Morton's neuroma of the right foot, correct?

A. Yes.

Q. Under the history is the statement -- and I assume you dictated this report?

A. Yes.

a. History, "Patient had pain and discomfort in her foot, burning. I tried alterations, had not worked."

Can you describe for me what that sentence means, doctor, two sentences?

A. It's just part of her history, that she had discomfort and pain in her foot and that, you know, she had the option to change her footwear.

Q. When you state "I tried alterations, had not worked," what does that mean?

A. That she had options to change her footwear.

Q. But she elected not to choose that option and she elected surgery?

A. Yes.

Q. It doesn't mean there were any conservative options that were actually taken, when it says "I tried alterations"?

A. That's not a conservative option.

Q. I'm not talking about options. It says "I tried alterations."

A. That's what I meant.

Q. That does not mean that you, in fact, did anything conservatively for her treatment, other than make that option available, correct?

A. Right.

Q. Would you follow on your progress notes for me when she next appeared and how she progressed?

MR. SPISAK: You're talking office notes now?

MR. YOUNG: Yes.

A. August 25th.

Q. She next appeared in your office August 25th?

A. Yes.

Q. Written under, or written adjacent to the letter S, can you tell me whose handwriting that is?

A. Denise Abbott.

Q. Under -- can you tell me whose handwriting that is?

1 A. It's probably Becky Hose.

2 Q. H-o-s-e?

3 A. Uh-huh.

4 Q. Do you have anything in handwriting here which
5 is yours?

6 A. No.

7 Q. Nothing. On August 25th, does she appear to be
8 progressing well?

9 A. As far as her incision went, she was.

10 2. There are no complications that appear obvious
11 at that point in time?

12 A. Except she wondered why the incision was where
13 it was.

14 2. Is that your personal recollection, or is there
15 something here in writing that indicates that?

16 A. That's my personal. recollection.

17 B. It's your personal recollection on that, on
18 August 25th, 1995 she wanted to know why the
19 incision was where it was?

20 .. Yes.

21 How did she indicate that to you? What did she
22 say?

23 She was very puzzled. She looked at her foot
24 and said, "why is the incision there?"

25 What was the response?

1 A. I looked at her foot and said, "I thought that's
2 where you wanted it."

3 Q. Do you have any further discussion concerning
4 that?

5 A. Well, yeah. I mean, obviously she was concerned
6 and so was I. I thought the neuroma was
7 bothering her and the other mass was a secondary
8 reactive thing and would go away with time. And
9 so I hadn't dealt with it. I mean, as far as
10 surgically taken out. The impression I was
11 under at the time --

12 2. Did she indicate to you during that visit on
13 August 25th, 1995 that she thought you were
14 going to surgically address what you have
15 indicated as a mass on the foot?

16 A. Yes.

17 Q. Do you recall anything further concerning your
18 discussions with her about that?

19 A. I told her that given where the mass was and the
20 neuroma, that the other options that I thought
21 on the mass was if it was active, cortisone may
22 make it go away.

23 Q. Did you administer cortisone at any point in
24 time?

25 A. I think maybe the next visit.

1 Q. You didn't inject the mass during the surgery
2 that was performed at Massillon Hospital, did
3 you?

4 A. I don't think so.

5 Q. And if it's not contained in the operative
6 record or report, you would not have?

7 A. Probably not. I mean, I remember looking at the
8 area and I don't think, because it wasn't -- it
9 wasn't very puffy. I don't think we did
10 anything but take the neuroma out.

11 Q. But if you had done something, it would be
12 indicated on the operative report?

13 A. Right.

14 Q. Her next appearance in your office was when?

15 A. September 8.

16 Q. And that's the point at which you injected what
17 you have labeled "the mass on the foot"?

18 A. Yes.

19 Q. Were there any complications that were obvious
20 at that point in time arising from the surgery?

21 A. No.

22 The next visit was when?

23 September the 26th.

24 Q. She had an appointment on the 21st with a
25 failure to show?

1 A. Yes.

2 Q. She appeared on the 26th. Is that the first
3 complaint of nerve pain?

4 A. Yes, I think so.

5 Q. And I'm reading beside the S, "right foot, five
6 weeks, SP Morton's normal." CO for complaints
7 of --

8 A. Yes.

9 a. -- quote, nerve pain.

10 And that was her word for it?

11 A. It's in quotes. I assume it was.

12 Q. Do you have anything here that is in your
13 handwriting?

14 A. No.

15 Q. Did you examine her on that date?

16 1. Yes.

17 2. What were your findings?

18 1. That the wound was healed and her foot was
19 tender and somewhat swollen. It wasn't as
20 swollen as it had been. It was still swollen
21 and sore. The surgical site is what I mean by
22 it.

23 2. And Diane Fair had her husband with her on this
24 visit?

25 .. Yes.

1 Q. Do you recall why?

2 A. Yes.

3 Q. Why?

4 A. This is the same thing I mentioned before,
5 because they were under the impression that the
6 other part of her foot, the area we talked about
7 as mass, was going to be operated on. So her
8 husband wanted to know where she was and why she
9 was still having trouble and he was concerned.

10 Q. And did you explain the situation to him?

11 A. I think so.

12 Q. What was your opinion concerning what was
13 causing the pain at that point in time?

14 A. The surgical site was sore.

15 Q. And what was --

16 A. Post surgical pain.

17 Q. Post surgical pain?

18 A. Right.

19 Q. Were you concerned that there might have been
20 some complication or nerve pain arising as a
21 result of the surgery?

22 A. Well, those are synonymous in a way. I mean,
23 the things you just said together. There is
24 postoperative pain and -- I don't quite
25 understand what you said. Those sort of mean

1 the same thing.

2 Q. You felt that it was normal postoperative pain
3 arising from the surgical site?

4 A. It's within normal limits.

5 Q. And did you explain to Diane Fair and to her
6 husband that you felt that the surgical site,
7 the neuroma, was related to the mass on the top
8 of the foot on September 26th, 1995?

9 A. Yes.

10 Q. When did she next appear in your office?

11 A. October the 11th.

12 Q. Let me back up, doctor, to September 26th,
13 1995. Because I have a typed progress note and
14 for many of your office notes I note that there
15 is a handwritten note and there is a typewritten
16 note.

17 A. Yes.

18 Q. Can you tell me how the typewritten note is
19 created?

20 A. It's usually generated the same day of the
21 dictation.

22 Q. And do you dictate that note?

23 A. The second one, yes, the typed one.

24 So the handwriting is done by your office staff
25 generally?

A. Right.

Q. Although you may make some notes on that?

A. Right.

Q. But any typewritten progress note that we have has been dictated by you, I assume, following the visit?

A. Usually.

Q. On the September 26, 1995 typewritten progress note in the last paragraph is the statement "patient in today for evaluation. Complains of burning and discomfort in her foot. Continues with some swelling on the medial aspect. Seems to be resolved, also. However, she has a lipoma in this area that may need further treatment."

Was it your conclusion on September 26, 1995 that the condition on the top of the foot was a lipoma?

A. Probably.

Q. Can you tell me when you arrived at that conclusion?

A. When it didn't go away.

Q. And the first note I find on that is September 26. Would that have been at about that time? And that would have been approximately the first time that you would have

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4 A. Well, it wasn't in terms of billing and

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6 O. Well, I'm looking at that notation back in July

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14 Q. Do you have an opinion as to how it occurred?

15 A. No, I don't know.

16 Q. And I'm sure I asked you before, but as you sit
17 here, do you know whose handwriting that is, can
18 you indicate for me, on the excision, lipoma of
19 the foot?

20 A. That person that schedules, Laura Defiore.

21 Q. That's the secretary, Laura Defiore. Is she
22 still with you?

23 A. No.

24 Q. And is she still living in the Massillon area,
25 to your knowledge?

A. Yes.

Q. Where does she work, if you know?

A. I'm not sure. I think she works at one of the
country clubs.

Q. I'm sorry. We're just beyond September 26th of
'95. What was the next visit?

A. October the 11th.

Q. Doctor, Diane Fair has continued to experience
that pain in the right foot since the date of
this surgery, has she not?

A. I don't know. I haven't seen her in a long
time.

Q. When did you last see her?

A. Whatever the last note is.

Q. What is that?

A. July 15th of '96.

Q. She still had that pain at that time, did she
not?

A. Yes.

Q. By the time of the July '96 last visit, had you
diagnosed the cause of that pain?

A. I 'thought along the way that she had a thing
that's called reflex sympathetic dystrophy.
It's hard to separate that from other things,
that's called a recurrent neuroma. But I

1

2 Q. When you last saw her, you believed that it

3

4 A. Yes.

5 Q. If she is suffering, or if she was suffering at

6

7

8 A. Reflex sympathetic dystrophy?

9 Q. Uh-huh.

10 A. It's a complication of surgery can be.

11 Q. I'm sorry?

12 A. Can be.

13 Q. And a recurrent neuroma, what causes that?

14 A. Oh, that's a complication of surgery.

15 Q. Is it an inadequate excision that causes a
16 recurrent neuroma?17 A. No. There's always a neuroma that forms when
18 the nerve is excised. It's a little bump on the
19 end of the nerve when it's excised.20 Q. But recurrent neuroma, that being continuing
21 pain, what causes one that produces pain and one
22 that does not?23 A. The location, sometimes they will scar in an
24 area that they still get a bump.

25 Q. And when you talked about the 90 percent, give

1 or take, sum, probability of recurrence from
2 excision of a neuroma, is it a recurrent neuroma
3 that causes those procedures that are not
4 successful?

5 A. Of the 10 percent?

6 Q. Yes.

7 A. That's a possibility.

8 Q. What percentage would be caused by a recurrent
9 neuroma in your opinion?

10 A. I don't know offhand.

11 Q. Look through these notes, if I may. See if
12 there are any that we want to raise at this
13 time.

14 Did you find Diane Fair to be a cooperative
15 patient?

16 A. Yes.

17 Q. Did she follow your advice?

18 A. Yes.

19 Q. Did she do anything which in your opinion
20 contributed to her continuing pain and problem?

21 A. I don't know.

22 Q. To your knowledge?

23 A. I don't know.

24 Q. You have no opinion concerning that, you just
25 don't know?

1 A. I don't know.

2 Q. Doctor, in the fall of 1995, for instance, on
3 November 29th, 1995, I find under status, "doing
4 horrible"?

5 A. Yes.

6 Q. That means that she was experiencing a great
7 deal of pain?

8 A. That's a quote from her.

9 Q. You ordered a bone scan?

10 A. Yes.

11 Q. Why?

12 A. To see -- sometimes reflex sympathetic dystrophy
13 shows up on a bone scan.

14 Q. Did it? Were there any relevant findings in
15 that bone scan?

16 A. Yes.

17 Q. What?

18 A. There was increased uptake in her foot. I mean,
19 the bone scan showed change in her foot.

20 Q. I see under assessment a reference to status
21 post excision Morton's neuroma, metatarsal
22 ganglion?

23 A. Yes.

24 Q. Is that term metatarsal ganglion at that point
25 in time diagnostic in any way in terms of what

1 was causing the pain?

2 A. Yes. I mean, it's a diagnostic term that means
3 pain in the forefoot.

4 Q. Right. There is, at the bottom of that
5 handwritten notation, "Advised patient she needs
6 to follow up with family physician for check
7 on" -- excuse me, above that. There's something
8 before the word "surgery," Number 3. What is
9 that word? "Consider"?

10 A. Wait. I'm not where you are.

11 Q. November 29, 1995.

12 A. Yes, I think the word's "consider."

13 Q. "Consider surgery to remove bump at base of
14 great toe"?

15 A. Yes.

16 Q. What does that mean? Are we talking about the
17 area that has been identified as mass on your
18 diagram in July of '95?

19 A. I'm not sure. In all probability, that's what
20 it is.

21 Q. To your knowledge, there were never any other
22 conditions, other than the callus, the pain and
23 the mass that you identified in July of '95 in
24 her foot?

25 A. In July of '95?

1 Q. At any time after. I see that -- I see a
2 reference to bump and I wonder if there is
3 anything else that appeared in the interim.

4 A. There's not another bump. That's not a very
5 specific word. But it mentions great toe, so I
6 think that's probably it.

7 Q. During the period of time that you treated Diane
8 Fair, did the area that you labeled as "mass"
9 change in any way?

10 A. It seemed like it got smaller. If you follow
11 the note, it seemed like it was smaller. It's
12 hard to say because her foot was swollen. I
13 don't think it got dramatically bigger.

14 Q. Would you agree it didn't get dramatically
15 smaller in terms of disappearing?

16 A. Well, it was kind of strange because sometimes
17 it wasn't very obvious, so I wouldn't agree with
18 what you said.

19 Q. There were times when it was not very obvious?

20 A. Yes.

21 Q. When you last saw Diane Fair, had you concluded
22 that the mass was a lipoma?

23 A. That's a pathological diagnosis and you
24 really -- that --

25 Q. Was that your working diagnosis at that time?

1 A. Sometimes we get lost in terms, and especially

2

3 Q. Had that tumor caused any problem for her during

4

5 A. The swollen area?

6 Q. Yes.

7 A. I don't understand your question.

8 Q. Had it caused her any problems, the swollen

9

10

11 A. Considering we're sitting here today, I think

12

13 Q. Physically, did that swollen area, the mass,

14

15 A. I don't know what she did about her shoes. She
16 said sometimes it was more swollen than others,
17 so I don't know.

18 Q. If we go through this chart, after July of '95
19 through the last time that you saw her, we see
20 repeated references to significant pain, do we
21 not? I mean, we can go through each visit, but
22 she keeps complaining of being horrible, having
23 significant pain?

24 A. Yes.

25 Q. That pain was coming from the area between the

1 toes, the area where the neuroma had been
2 excised as opposed to from the area which was a
3 lipoma or mass, was it not?

4 A. I think it would be more accurate to say the
5 pain was coming from her foot, maybe more other
6 parts of her foot than the area where the mass
7 was. I think that's a more accurate --

8 Q. When we talk about other areas of the foot, what
9 other areas of the foot was she complaining of?

10 4. The arch, side of her foot, top of the foot,
11 heel.

12 Q. Was it generalized pain that she was complaining
13 of?

14 A. In the foot, more specifically in some places
15 than the other, right after surgery, it was more
16 in the front of her foot than her arch was sore
17 and she had trouble walking. So to specifically
18 tell you which one on a given day was a sore
19 spot, I don't know.

20 2. But it was the trauma of the neuroma or the
21 excision of the neuroma that was causing the
22 pain as opposed to the mass area, would you
23 agree?

24 MR. SPISAK: I'll note my objection
25 to that. You can go ahead and answer that,

1 if you can.

2 A. I don't really understand that.

3 Q. You've testified that in your opinion the pain
4 that she experienced was either caused by a
5 reflex sympathetic dystrophy or a recurrent
6 neuroma?

7 A. Or metatarsal ganglion.

8 Q. Those conditions are related to the area of the
9 excision as opposed to related to the area of
10 the mass, would you agree?

11 A. Probably.

12 Let me back up one second because
13 "probably" has some legal terms that medically
14 aren't the same. I think possibly is better for
15 me to use. Because I'm not sure how different
16 things apply legally instead of medically.

17 Q. Sitting here today, do you have any idea whether
18 you deviated, opinion as to whether you deviated
19 from the set standards of care in the treatment
20 of Diane Fair?

21 A. Yes, I do.

22 Q. What is that opinion?

23 A. I didn't.

24 Q. You conclude that she had a Morton's neuroma in
25 July of 1995. And that excision was a proper

1 treatment for that condition at that point in
2 time?

3 A. Yes.

4 Q. And it's your position that the standard of care
5 does not require conservative treatment before
6 excision; is that correct?

7 A. It depends on the case. But that's a
8 possibility.

9 Q. By "that's a possibility," does that mean that
10 the standard of care does require conservative
11 treatment before excision of a Morton's
12 neuroma? I'm trying to understand what you
13 said.

14 A. I'm trying to understand what you said. What
15 was that again?

16 Q. In your opinion, does accepted standard of
17 medical care require conservative treatment of a
18 Morton's neuroma before surgery?

19 A. Depends on the case, but, no, it doesn't .
20 require.

21 Q. What circumstances -- when you say it depends on
22 the case, what circumstances warrant surgery
23 without conservative care?

24 A. A lot of that depends on the patient. There's a
25 number of issues. I can't really think

1 specifically of one right now, but the patient
2 comes in and says they want something done and
3 it's not out of the ordinary, such as a bump on
4 the finger, and take my toe off or something
5 that's totally crazy.

6 Q. We're talking about Morton's neuroma, and my
7 question is whether the standard of care
8 requires conservative treatment before surgery.
9 And your testimony is not under all
10 circumstances?

11 A. That's true.

12 a. Under what circumstances is surgery without
13 conservative treatment warranted?

14 MR. SPISAK: And I'll object and
15 advise you, you can go ahead and answer it,
16 if you can answer it in a vacuum or in a
17 very general way, which is, I think, the
18 way it's being asked.

19 .. Medicine is so broad and there are so many
20 different factors that come into something to
21 just pull one out of my hair and say this is one
22 for sure. You know, we've been sitting here --
23 Let's ask it this way: As I understand your
24 testimony, Diane Fair came to your office in
25 July of 1995 complaining of a foot problem?

1 A. Yes.

2 Q. You examined her, and on examination you found
3 pain between the toes?

4 A. Correct.

5 Q. You have no recollection as to the nature of the
6 pain, you have no recollection as to whether it
7 was there before she came into your office, you
8 have no recollection as to whether it was
9 intermittent, constant.

10 What circumstances on July 17th, 1995
11 warrant performing surgery for a Morton's
12 neuroma without more information?

13 A. I left it up to her.

14 Q. Okay. And it was her decision, she had a right
15 to make that decision?

16 A. Sure.

17 Q. You made no recommendation?

18 A. I told her I thought there were a couple things
19 going on. We talked about that.

20 Q. You did not make a recommendation, you simply
21 made the options available to her; is that fair?

22 A. Yes.

23 Q. Do you have an opinion as to whether her
24 condition, the condition of the right foot, was
25 aggravated in any way by the surgery?

A. Do I have an opinion?

2 Q. Yes.

3 A. Am I doing opinions today or am I doing facts?

4 MR. SPISAK: If you're not prepared
5 to give an opinion or you don't have an
6 opinion, you just tell him that.

7 A. I don't have an opinion.

8 Q. Do you need more information to form an opinion?

9 A. Well, I don't know. You're back to legal
10 things. I don't know what you mean.

11 Q. My question is did the surgery aggravate her
12 condition in your opinion? That's pretty
13 straightforward.

14 MR. SPISAK: Note my objection.

15 A. It's not very straightforward. Did her foot
16 feel bad after surgery?

17 Q. Did it feel worse than it had before the
18 surgery?

19 A. Yes.

20 MR. YOUNG: Let me take a couple of
21 minutes.

22 - - - -

23 (Thereupon, a recess was had.)

24 - - - -

25 MR. YOUNG: Thank you. I have

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C E R T I F I C A T E

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

I, Juliana M. Lawson, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named ROBERT C. ERICKSON, M.D., was by me, before the giving of his deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness, and was subscribed by said witness in my presence; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulations of counsel; that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this ____ day of _____, A.D. 19 ____.

Juliana M. Lawson, Notary Public, State of Ohio
1750 Midland Building, Cleveland, Ohio 44115
My commission expires March 10, 2000

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