IN THE COURT OF COMMON PLEAS

Doc. 217

CUYAHOGA COUNTY, OHIO

CELIA GIGANTI,

Plaintiff,

-vs-

JUDGE FUERST
CASE NO. 260391

NANCY HOWE,

Defendant.

- - - -

Videotape deposition of RICHARD S. KAUFMAN, M.D., taken as if upon direct examination before Colleen M. Malone, a Notary Public within and for the State of Ohio, at the offices of Beachwood Orthopedic Associates, 23250 Mercantile Road, Beachwood, Ohio, at 1:30 p.m. on Friday, January 19, 1996, pursuant to notice and/or stipulations of counsel, on behalf of the Defendant in this cause.

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1750 Midland Building
Cleveland, Ohio 44115
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FAX 621.0050
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APPEARANCES:

Mitchell A. Weisman, Esq.
Weisman, Goldberg, Weisman
& Kaufman Co., L.P.A.
1600 Midland Building
Landmark Office Towers
Cleveland, Ohio 44115
(216) 781-1111,

On behalf of the Plaintff;

William E. Armstrong, Esq.
Buckley, King & Bluso
1400 Bank One Center
Cleveland, Ohio 44114-2652
(216) 363-1400

On behalf of the Defendant.

ALSO PRESENT:

Dan Williams, Video Operator

RICHARD S. KAUFMAN, M.D., of lawful age, called by the Defendant for the purpose of direct examination, as provided by the Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, deposed and said as follows:

DIRECT EXAMINATION OF RICHARD S. KAUFMAN, M.D.

BY MR. ARMSTRONG:

Q. Okay. Would you state your full name for the record, sir.

A. Richard S. Kaufman, M.D.

Q. Okay. And what is your profession?

A. I'm a physician and orthopedic surgeon.

Q. Would you explain to the jury, doctor, how, what your educational background was leading up to you becoming a physician?

A. I received my BA degree Summa Cum Laude, that means with highest honors, from Yale University in 1952, and my M.D. degree from Columbia University in 1956. I then had five years of postgraduate training, a year of internship at Mt. Sinai Hospital in Cleveland, a year of surgical residency at University Hospitals in Cleveland, two years of orthopedic surgery

residency at Mt. Sinai Hospital, and a year of orthopedic surgery residency at Indiana University Medical Center in Indianapolis.

Q. Okay. And did you become licensed to practice medicine in the State of Ohio?

A. I've been licensed to practice medicine in the State of Ohio since 1956, which is now 39 years, and I'm also licensed to practice in Indiana and California.

Q. Okay. And do you have a specialty, doctor?

A. I specialize in the field of orthopedic surgery.

Q. And are you board certified in orthopedic surgery?

A. Yes, by the American Board of Orthopedic Surgery.

Q. What is a diplomat of the American Board of Orthopedic Surgery?

A. That means that I've been certified by the American Board.

Q. Okay. And would you just explain briefly to the jury what was required for your certification?

A. I became board certified. I had to have, of course, four years of college and four years of medical school, five years of postgraduate training. Following this, I took a three day

series of written and oral examinations, which I passed the first time. I then had to be in practice for two-and-a-half years and take a second set of written and oral examinations, which I also passed the first time, and was certified by the American Board of Orthopedic Surgery as a fully trained and competent specialist.

Q. Okay. Do you have any hospital affiliations, doctor?

A. Yes. I'm on the active staff at Meridia South Pointe Hospital, which used to be called Suburban Hospital, where I've been the chief of orthopedic surgery for 29 years, Mt. Sinai Hospital, Hillcrest Hospital. I was the chief of orthopedics at Woman's General Hospital for 23 years until it closed, and I'm the orthopedic consultant to the Arthritis Clinic at Cleveland Metropolitan General Hospital.

Q. Okay. Would you explain to the jury, doctor, what the field of orthopedics entails?

A. Orthopedic surgery is the branch of medicine that deals with the diagnosis and treatment, both medically and surgically, of diseases and injuries to what we might call the local motor

system, that is the parts of the body that move you about, primarily the bones and joints, but also the muscles and tendons and ligaments and nerves of the spine and the arms and legs.

Q. Okay. So that someone with a back problem, would they come to you typically?

A. Yes.

Q. All right. And someone with a neck problem, would they also see you?

A. Yes.

Q. And someone with a, say, rotator cuff problem?

A. Yes.

Q. Okay.

A. Rotator cuff is in the shoulder.

Q. Okay. In the shoulder, right.

And you would also perform surgery in various areas of the spine?

A. Yes. I don't operate on the neck, actually. I take care of a lot of people with injured necks, but I don't actually operate. I operate on, do a lot of lower back surgery, as well as shoulder surgery.

Q. Okay. Do you have any teaching positions, doctor?

A. Yes, I'm a clinical instructor in orthopedic

surgery at Case Western Reserve University Medical School for the last 32 years, and I was a professor for 20 years at the Ohio College of Podiatry.

Q. That deals with the feet?

A. Yes.

Q. Okay. And have you been an orthopedic consultant to any Cleveland hospitals?

A. Yes, I'm the orthopedic consultant to the Arthritis Clinic at Cleveland Metropolitan General Hospital.

Q. Okay. Have you published any papers, doctor, dealing with orthopedics?

A. Yes, I published papers dealing primarily with fractures or broken bones, and I've given innumerable papers on various, at various, on various subjects. I was invited to present a paper at orthopedic grand rounds at Harvard University Medical School in Boston. I gave the Harold Cummins Lectureship at Tulane University in New Orleans. I was invited to participate in a symposium at the Mid-American Orthopedic meeting in Colorado Springs, and I gave the Dr. Russell Rizzo Memorial Lectureship here in Cleveland.

Q. Okay. And do you belong to any professional associations, if you could just highlight a few of them?

A. I'm a member of the Cleveland Orthopedic Society, the Ohio State Orthopedic Society, the Great Lakes Orthopedic Club, the Mid-America Orthopedic Society, the Clinical Orthopedic Society, the Bioelectric Repair and Growth Society. I'm a fellow of the American College of Surgeons. I'm a fellow of the American Academy of Orthopedic Surgeons, and a diplomat of the American Board of Orthopedic Surgery.

Q. Okay. I'm going to hand you what's been marked as Defendant's Exhibit H, and could you identify that, doctor?

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(Thereupon, Defendant's Exhibit H, a document entitled Curriculum Vitae - Richard S. Kaufman, M.D. was marked for purposes of identification.)

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A. This is what's called my curriculum vitae, which means my credentials, and this is up-to-date and accurate.

Q. Okay. Good. In addition to being an orthopedic

surgeon, do you from time to time see patients in your office?

A. Oh, we, orthopedic surgery entails the medical treatment of patients, as well as the surgical treatment, so we spend quite a bit of time seeing patients in the office, yes.

Q. Okay. And in addition to that, you from time to time act as a consultant for, for lawyers?

A. Yes, about five percent of the patients that I see are in consultation. That is, I always see them for examination and a report to somebody, a Plaintiff's attorney, a defense attorney, a third party, Industrial Commission of Ohio, second opinion, that sort of thing. Altogether, that represents about five percent of my practice. 95 percent of the people that I see are sick and injured patients that I treat.

Q. Okay. At my request, Dr. Kaufman, did you see a lady by the name of Celia Giganti?

A. Yes.

Q. Okay. And could you explain to the jury when you saw her?

A. I examined Mrs. Giganti July 21, 1994.

Q. Feel free to consult your notes, doctor, from time to time if you need to do so.

Okay. And when you saw her, did you take a history from her?

A. Yes.

Q. And what did that history reveal, doctor?

A. Mrs. Giganti said she was injured April 8th, 1993 when the car she was driving, going about 10 miles an hour, was involved in a collision from the rear with another car. She said she was wearing a seatbelt. She said her left shoulder hit the door and her chest hit the steering wheel. She was not unconscious.

Following the accident she said she developed pain in her low back and her left leg, as well as in her throat, her left shoulder and her left arm. She also developed pain in her chest.

She saw Dr. Jack Berman the following day, Dr. Berman is an internist, and was examined and x-rays taken. She was treated with Darvocet, which is a pain pill; Percodan, which is a pain pill; a heating pad and an antiinflammatory medication she said with a little relief.

She was then referred to Dr. Devereaux, who is a neurologist, someone who specializes in treatment of problems with the nerves, because

of her low back pain, with the pain going down her left leg, and because of her hoarseness.

She had an MRI. MRI is, stands for magnetic resonance imaging. The patient is placed in a large magnetic field. The field is flipped 90 degrees, it's then flipped back again, the patient's atoms and molecules disturb the magnetic field and the disturbance is measured and feed into a computer and the whole thing comes up with a picture, not only of the bones, but of the nerves, the soft tissues and nerves and discs between the bones, the cartilage discs between the bones in the back, and these can all be seen on an MRI.

And she had an MRI of her lower back, as well as an EMG. That stands for electromyogram. Electro means electricity, myo is muscle, and gram is a picture. So it's a picture of the electrical activity of the muscles and of the nerves of her low back and left leg. And the report was said to show a herniated disc, that is a bulging disc of cartilage coming out and pressing on a nerve root.

She had pain pills and a different

antiinflammatory medication without relief.

She was then referred to Dr. Colombi. He performed surgery. Dr. Colombi is a neurosurgeon. She performed -- he performed surgery on her lower back, taking out the herniated disc in her lower back on June 15th, 1993.

Following this, she started physical therapy in September of 1993, which she received twice a week, and massotherapy, which is just massage, once a week, which she called, quote, limited relief, unquote.

She said she was still getting therapy the last time June 6th, which would be six weeks prior to when I saw here.

Q. If I could stop you there, doctor. You mention that she indicated that her car was traveling about 10 miles an hour when it was rear-ended by another car?

A. That's what she said.

Q. Okay. So her car was in motion?

A. It was in motion. And when a car is in motion, it tends to absorb some of the impact.

Q. Okay. Did she mention some complaints that she had regarding her injuries?

A. At the present time she said that the pain in her left arm or upper extremity had persisted unchanged. She said it involved the entire left upper extremity, all the way to the fingertips. She said it would come and go and was moderate to severe in degree. She said she was having no pain at the time of this examination, and she had last had pain, quote, probably last evening, unquote.

She said the pain was made worse by the end of the day and was relieved by rest. She said there was intermittent numbness and weakness of her entire left upper extremity, and the last time the night before this examination. She had not had any MRI of her neck, nor an EMG of her upper extremities. She hadn't had those tests for her upper -- her arms, she only had it for her legs.

Q. Okay.

A. She said that since her low back surgery, the low back pain had improved at times. She said it was located on the left side and it went all the way from the lower part of the mid back, where the ribs are attached, down to the buttocks. She said it was constant and moderate

in degree, at times severe. She said that it was moderate at the time of this examination. She said the pain was made worse by activities of daily living, that is just things, doing anything around the house, and it got worse as the day went on.

She said it was relieved by nothing that she knew of, although she said it was helped by exercise. She tried, she said that she tries to swim daily.

She said there was a constant spread of the pain to the left, the outer side of the left thigh and to the front of the leg and foot and toes. She said she had constant numbness in the same area, and she said she had weakness of the entire leg.

Q. Was there anything significant about, excuse me, was there anything significant about those complaints, doctor?

A. Well, the -- you don't get weakness of the entire leg. I mean, that requires several different nerves to be involved, and she said that she had weakness in the entire leg, which is sort of, we call it nonanatomical complaint, it doesn't, it doesn't fit the normal anatomy,

and that would be somewhat bizarre.
Q. Okay. And did any of her symptoms subside?
A. She said the hoarseness and her chest pain had subsided.
Q. Okay. What did she tell you about her background, doctor?
A. She said that she was a substitute administrator for schools. She said she had not worked since the accident. She said she'd had no previous or subsequent injuries or symptoms in her arm or neck or her low back in the past. She said that she had been in good health, she'd had no serious illnesses or operations. She had taken no medication which would affect her symptoms on any of this examination.
Q. Okay. And did you perform a physical examination on Mrs. Giganti, doctor?
A. Yes. On physical examination she appeared to be in no discomfort. She said that she was in moderate low back pain at the time. She certainly did not appear to be when you looked at her and watched her move about, get up, get down, walk around. She was instructed to let me know if anything caused her pain during the examination. Her gait, the way she walked, was

normal, and she moved about quite easily. She could walk on her heels and toes easily, indicating that she had good muscle strength in her legs.

Q. Okay.

A. Examination of her neck showed her to hold her head straight. The neck motion was normal in rang without pain. There was no restriction, it could go down and back and side to side and turning it from side to side without any pain. There was no spasm in the muscles. Spasm is the involuntary contracture of a muscle when there is underlying pain and the muscle will go into spasm to prevent motion, and the examiner can feel the spasm through the skin. There was no spasm. There was no tenderness in the muscles and ligaments about her neck.

The neurological examination of her arms was normal. The reflexes, just as when you tap the knee, the leg kicks, there are other tendons that you can tap and the muscles will twitch, there are three in the arms, and these are all normal. There was no numbness and there was no weakness in the arms. So the examination of the neck was totally normal.

Q. Okay.

A. Examination of her left shoulder showed the contours of the shoulder to be normal. It looked perfectly normal. There was no swelling. There was no fluid in the joint. There was no instability of the ligaments about the joint. The shoulder was quite stable. There was no redness or heat or any evidence that the shoulder was inflamed. There was no skin discoloration, such as black and blue or redness.

Range of motion in the shoulder was normal. She could bring it all the way up and bring it all the way back and turn it in and turn it out and bring it across. All these motions were perfectly normal and they were all pain free. There was no crepitus felt in the joint. Crepitus is a sandpapery feeling that you feel when the joint surface is rough, particularly if they have arthritis, that sort of thing in the joint. You can feel the sort of rough, one rough surface moving on another, you get this sandpapery effect, and she did not have that, that, it was not present. There was no tenderness anywhere about the shoulders, so that

the examination of her left shoulder was totally normal.

Q. Okay.

A. Examination of her lower back showed her to stand straight. There was a well healed surgical incision from her surgery. There was some restriction of motion in all directions, due to pain, going down and back and --

Q. Is that due to complaints of pain or --

A. Yes, due to complaints of pain. She said it hurt. So and going down and back and side to side was restricted because she said it hurt.

There was no muscle spasm in the muscles of the lower back at that involuntary contracture, and I can't feel when there's underlying pain, but there was no spasm.

Moderate tenderness was said to be present over the left side of the lower back and also over the surgical incision area.

The Lasegue sign -- I'll say this first and explain what I'm saying. The Lasegue sign was negative on both sides when sitting, but was positive at 80 degrees on the right and 45 degrees on the left when she was lying down. Now, the Lasegue sign is a test that we do. It

can be done two different ways The patient can be lying flat and, with knee straight, the leg is brought up in the air like a pterisco pe This puts a stretch on the sciatic nerve as it goes down the back of the leg, and if that nerve is irritated, it will produce pain in the back and down the leg And you can also test it when they're lying flat this way You can also test it with a patient sitting on the edge of the bed, like on the edge of the examining table and then straighten the leg out Now the leg is in exactly the same position as if she were lying flat in bed, except she's sitting up And in this case, she can put her leg out perfectly easily when she was sitting up, straightening up perfect. But when she's lying flat, she, one she says gives her pain at 80 degrees and this one at only 45 degrees You just get it up this high and she said it hurt This is an example of exaggeration of symptoms, because, obviously, the two test should produce the same result

On addition, although the Patrick's sign, the Patrick's sign is a test that we do with the patient lying on her back and she put the heel of one foot on t opposite knee and then this

leg, like you're going to tie your shoelaces, except you're lying flat. And then this leg is brought down in a sort of figure four position and this puts a stretch on the muscles and ligaments of the lower back and will produce pain if they are inflamed. It did not in her. But she said that just moving the hip up 45 degrees when she was flat produced pain, 40 degrees on the left and 80 degrees on the right, although she could sit on the edge of the bed with the hip flexed 90 degrees without any complaints. When she was lying flat, she said when her hip was bent up only 45 degrees, it gave her pain. This is another example of exaggeration of her symptoms.

Measurement of her legs showed the length to be equal. The circumference of the thighs were equal, which you would expect. The circumference of the left calf was one quarter inch smaller than the right. The examination of the nerves of her lower extremities of her legs revealed the knee jerks to be brisk and equal and the ankle jerks to be equal. There was said to be decreased sensation, that is some numbness in the outer side of the left leg and foot.

Q. Is this what she told you, doctor?

MR. WEISMAN: This, excuse me. I just wanted to object. Move to strike portions of the last answer.

Q. Okay.

A. She said that there was decrease sensation -- yes, this is what she told me. When I examined her for numbness, she said that she had decrease sensation in the outer portion of her leg and foot.

Q. Okay.

A. There was apparent weakness of the extensors of the left foot, but that is the toe extensors, the muscles that pull the toes upwards appeared to be weaker on the left than on the right.

Q. Okay. Thank you, doctor. Would there be any explanation anatomically of her complaints of pain in the two positions, one being flat and one sitting up on the examination table?

A. No, there's no anatomical explanation for that. Actually, the leg is in the same position at the two times, except the patient doesn't realize it, and that's what we call a, that is called evidence of exaggeration of symptoms when the test is not consistent between the positions.

Q. Okay. Did you have any x-rays taken, doctor?
A. Yes. X-rays were taken at this office of the lower back and pelvis, and she showed degenerative disc disease with some slipping of the one vertebra on the other at, between the third and fourth lumbar vertebra. And there are five lumbar spine -- lumbar bones, we'll call vertebrae, and you number them from the L1 down to L5, and then L5 -- after that it becomes the sacrum, which is part of the pelvis, and between L3 and L4 there was disc degeneration and some sliding back of L3 on L4. There was also a narrowing of the interspace between L4 and L5 and a mild lumbar scoliosis, that is a curvature of the spine, which she's had since she was a young girl. This is something which occurs as a teenager and it doesn't change.
Q. Okay. And by disc degeneration, doctor, what do you mean by that?
A. Well, the, between each one of the bones in the back there's a disc of cartilage and this acts like a shock absorber and with time they begin to wear out and they loose their water content and they get smaller. Now, you can't actually see the discs on plain x-ray, but you can see

the space between the bone above and the bone below. And when this space gets smaller, then it's evidence that the disc has degenerated and gotten smaller. It's something that occurs in the lower portion of the neck and also occurs in the lower portion of the low back, with time, with wear and tear, and it's consistent with this patient's age.

Q. Okay. And by low back, you mean the areas of like L4-L5?

A. L4-5 and L5 and is first sacral vertebra. Those are the bottom two discs and those are the ones that tend to degenerate the fastest.

Q. Okay. Would there, can you show the jury what you mean by the degenerative changes in Mrs. Giganti's spine by use of the x-rays?

A. Yes.

Q. Okay.

VIDEO OPERATOR: We're off the record.

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

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(Thereupon, Defendant's Exhibits I, J and K, x-rays were marked for purposes of identification.)

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MR. ARMSTRONG: I want to go back on the record.

Q. Doctor --

VIDEO OPERATOR: Hold on. I'm sorry. We're on the record.

Q. Doctor, I've marked for purposes of identification three x-rays marked Defendant's Exhibits I, J, and K.

A. Yes.

Q. And I just want to ask you, are those the x-rays of Mrs. Giganti that you took?

A. Yes, on July 21, 1994.

Q. Okay.

A. This is, Exhibit I is an x-ray from the side of the lower back and these are the vertebrae, the bones that make up the back. This space here is the disc spaces where the cartilage is. You can't see it, but you can see the space between the bone above and the bone below. This out here are just gas in the abdomen and this is her back, the back of her back there. These are the

ribs coming down here. This is the 12th rib coming off here. So this is the first lumbar, second, third, fourth and, let's see, this would be one, two, three, four, five and -- no, this, this is one, two, three, four, five is down here. That's right. And what you see is this -- they should line up. You see the back of all the vertebrae should line up and the fronts line up. Here, this one, has slid back slightly on this bone here. It's backward. That's a degenerative change. That's an L3-4. And the disc space is narrowed here. You can see it's narrowed here, as well. Down here is the pelvis. That's what's obscuring the bones down here. That's on I.

J is a close-up view of just the lower back. Here's the pelvis. The hip joints are down here. Again, this is just gas in the abdomen. This is the L4 vertebra here. This is the disc space that's narrowed here. It's also a little here, but primarily it's the L3-4 and this is particularly narrowed at L4-5.

And this is the view, this is K. This is a view from the front. This is in her clothing and clips and things of metal in her clothing.

Again, the gas in her abdomen. Pelvis down here. Ribs up here. This is the last thoracic vertebra, the ones the rib attached to. So this would be L1, 2, 3, 4, 5, and you can see there's a very slight curvature to her back, which she has had since she was a young girl. And the degenerative change particularly to L4-5 down here.

Q. Okay. That's where she had her operation?

A. Yes, uh-huh.

Q. Okay. Doctor, did you have an opportunity to review some of Mrs. Giganti's records?

A. Yes.

Q. Both before her accident, as well as afterwards?

A. Yes.

Q. Okay. And did you find any indication in any of those records as to whether or not Mrs. Giganti had suffered any kind of neck problem prior to her accident of April 8th, 1993?

A. Oh, yes. In her industrial -- in her records from the Industrial Commission of Ohio she had had a previous neck injury in April of 1978, and there's been other ones, I think, since then as well. She also had fallen once -- I don't know if she was a gym instructor, gym teacher, and

she had fallen in at one time in gymnastics doing something and injured her lower back as well.

Q. Okay. And did you have any opportunity to look at the records of Dr. Fromson, Froimson?

A. Yes, Dr. Froimson.

Q. Okay. And particularly a record involved back in 1987?

A. Yes. At that time he saw her for a knee problem and noted that she had some weakness of bringing her foot up, of the muscles in her left foot, her extensors of her left foot.

Q. Okay. And from the records that you reviewed, what type of problem would she have there, doctor?

A. In her knee or -- well, she had some weakness, this weakness in her leg, and it was apparently in the muscles itself.

Q. Okay. There was an indication of a lack of a left foot reflex?

A. Yes. And she also had an absent ankle jerk, which goes along with an injured nerve going into her leg.

Q. Okay. And from the absent ankle jerk, what nerve would be involved?

A. Well, it could be either L5 or S1. Primarily S1.
Q. Okay.
A. But occasionally we see an L5 nerve root injury as well, but primarily it's S1. That is the first sacral nerve root.
Q. Okay. Did she bring that problem to your attention or the fact that she had suffered from prior neck or low back problems in the past to your attention, doctor?
A. No. I asked her specifically if she had any problems with these areas, and she said she had not.
Q. Okay. Doctor, based upon your knowledge, experience, and training, the history that Mrs. Giganti gave you, the review of her records and your examination of her, did you have an opinion within reasonable medical certainty as to whether Mrs. Giganti had suffered a neck and left shoulder injury in her accident of April 8th, 1993?
A. Yes, it would be --
Q. And what was your opinion, doctor?
A. It would be my opinion, based upon reasonable medical certainty, that I found no evidence that

she injured her neck or left shoulder.
Q. Okay. Taking the same considerations into consideration, do you have an opinion within reasonable medical certainty as to whether she sustained an injury to her low back in the auto accident of April 8th, 1993?
A. Well, apparently she had a herniated disc in her lower back when Dr. Colombi operated on her after the accident. There's some indication she may have had it before the accident. She certainly had it after the accident. And there is evidence that she had some residual radiculopathy, which radiculo means nerve root and pathy means something wrong with it. So there is some evidence she had some residual radiculopathy, because she has this weakness in her toes and some atrophy of the calf. She said she has some numbness on the side of her leg.
Q. Okay. And did she have numbness in her toes prior to this accident on examination by Dr. Froimson?
A. I believe she did, yes.
Q. Okay. Based upon your knowledge, experience, and training, your examination of Mrs. Giganti and the history that you took, as well as your

review of her records, did you find any need for future medical treatment for Mrs. Giganti?

A. No.

Q. Or do you have an opinion as to whether she needed or needs future medical treatment, doctor?

A. Yes. It's my opinion that based upon reasonable medical certainty that she did not need any further medical treatment for anything that may have occurred in this accident.

Q. Okay. And taking into consideration your knowledge, experience, and training, your examination of Mrs. Giganti on, let's see here, July 21, 1994, the history that she gave you and your review of her records and your examination of her, do you have an opinion within reasonable medical certainty as to whether she could carry on her occupation as a substitute school administrator in the future, doctor?

A. Yes.

Q. And what is your opinion?

A. It is my opinion, based upon reasonable medical certainty, that she should be able to continue doing, working as a substitute school

administrator, a desk job type of job.
Q. Okay. Is there anything about being a school administrator which would in any way cause her problems with her back?
A. No.
Q. Her low back?
A. Not, no. I think that based on my examination of her, I found no reasons why she could not continue doing that.
Q. Okay. Again, the same considerations, doctor. Do you have an opinion within reasonable medical certainty as to whether Mrs. Giganti will need surgery of any kind in the future?
A. No, she will not.
Q. Okay.

MR. ARMSTRONG: Thank you. That's all the questions I have.

MR. WEISMAN: If we can go off the record for a minute.

VIDEO OPERATOR: We're off the record.

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

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CROSS EXAMINATION OF RICHARD S. KAUFMAN, M.D.

BY MR. WEISMAN:

Q. Dr. Kaufman, when Mr. Armstrong was questioning you, he made mention of Dr. Froimson's findings. Based on your memory of reviewing Dr. Froimson's records regarding the left foot problem, wasn't that finding back in 1987?

A. Yes.

Q. Okay. And of what significance would that be to you medically, that it was six years before the collision, in terms of relating it to problems that were found after the collision?

A. Well, it would indicate that she had some sort of radiculopathy or weakness in her foot even at that point.

Q. Okay. But if assuming Mrs. Giganti didn't see anybody, treat with anybody between 1987 and 1993, would you conclude that it certainly was not a major medical problem or disability for her?

A. It certainly would, that would make it appear that way, yes.

Q. Okay. Mr. Armstrong, at the end of his questioning, asked you about her employment. Just in general terms, isn't it true that

somebody with low back problems, not necessarily talking about Mrs. Giganti, but just in general terms, wouldn't prolonged sitting be a hardship for somebody or could be for somebody with severe low back problems?

A. It could be a hardship for anybody.

Q. Yes.

A. Any of us who sit for long periods of time, get up and walk around and stretch a little bit.

Q. Sure. But even especially for somebody who has low back problems?

A. It can be.

Q. Okay. Doctor, would you agree with me that most people over 40 years of age have some degenerative disc disease and arthritis of the spine?

A. Yes.

Q. Okay. And the fact that a person has degenerative disc disease that may or may not mean that they have pain associated with that disease; is that generally correct?

A. Yes.

Q. Okay. And the fact that you took an x-ray in July of 1994 of Mrs. Giganti showing an x-ray of the low back, which showed degenerative disc

disease, isn't it true that that does not necessarily mean that she had any low back pain before the collision in April of 1993?

A. That's also true.

Q. And, in fact, do you have any information or medical evidence that would indicate that she had any significant low back pain or disability before the collision of April 8th, 1993?

A. Just the one incident where she hurt her back. Other than that, no.

Q. And what, do you remember what year that was?

A. It was quite awhile ago. It may have even been '78 or something like that.

Q. Okay. Okay. Do you have any information or medical evidence that Mrs. Giganti was restricted from her normal daily functioning before the collision of April 8th of 1993?

A. No.

Q. Okay. Do you have any information that she was not physically able to do her work before April 8th of 1993?

A. No. Well, I mean, she did retire as from being a gym teacher and --

Q. Right.

A. -- becoming an administrator, so I don't know if

she can continue being a gym teacher anymore, but as administrator she seemed, at least on a part-time basis, seemed to be able to do that.

Q. Okay. And there was certainly no evidence you know of medically that she was disabled in any way before the collision?

A. As a hospital administrator?

Q. Or a school administrator?

MR. ARMSTRONG: School.

A. School. It's not hospital, school administrator.

Q. Right.

A. School administrator, yes, that's correct.

Q. Okay. In general terms again, it's certainly possible to sustain severe low back injury in a rear end automobile collision?

A. In general terms?

Q. Yes.

A. Everybody that gets hit from the rear end doesn't sustain low back injuries.

Q. Right.

A. Most of them probably don't.

Q. Okay.

A. But it's possible.

Q. Okay. In fact, you've treated many people with

low back injuries, correct?
A. Oh, yes.
Q. And haven't you heard stories from people where they had minor types of situations where they bend over in a maybe awkward way and they say, gee, I heard something pop or some type of description like that and they come in with severe low back complaints?
A. You can get it from bending over, that's correct.
Q. Or sometimes bending over and lifting something without bending your knees?
A. Sure.
Q. Okay. Do you have any particular familiarity with the specifics of the collision as to how the automobile accident happened?
A. Just what I related already. I don't know anything else.
Q. Okay. And as far as the severity of the property damage to the vehicles, you're not familiar with that, correct?
A. No.
Q. Okay. Now, let me, if you would look at your report please of July 21st of 1994, and looking at the first page you'd indicated that Mrs.

Giganti mentioned to you that the car was going about 10 miles per hour, correct?

A. That's what she said.

Q. Now, isn't it true while you're asking a lot of questions and she's giving you a lot of answers there can be, at times, miscommunication and confusion, that's possible among people that are ta1king?

A. Well, I don't know. Just starting out --

Q. Yeah.

A. I, first of all, I don't interrupt her, I ask her --

Q. No, I --

A. -- a question.

Q. Sure.

A. And when she answers it, I write down whatever she said.

Q. Right and --

A. And if I'm not answering -- asking a lot of questions and answering a lot of questions, I think the questions are pretty straightforward.

Q. Right.

A. I asked her what happened and this is what she told me.

Q. Right. And when you've talked to people over

the many years you've been on this earth sometimes people can have miscommunication or misinterpretation when they are talking. I mean, just in general?

A. We try to be very careful to avoid that.

Q. Right. The only point I'm trying to make is it's possible that Mrs. Giganti said to you she was going about 10 miles per hour, but maybe she meant just prior to the collision, as opposed to the exact time of impact; is that possible?

MR. ARMSTRONG: Objection.

Q. Is that possible, that she misunderstood?

A. Well, she can say -- it's possible she can say anything she wants.

Q. Yeah. Right.

A. But that's what she told me.

Q. Okay.

A. That she was traveling 10 miles an hour.

Q. Yeah. And she was going 10 miles an hour, but whether it was at the exact time of impact?

A. Well, that's what I asked her, of course.

Q. Okay. And on your statement, though, in the report it doesn't say at the time of impact, does it?

A. She said her car was going about 10 miles an

hour when she was hit from the rear by another car. That's what she told me.

Q. Okay.

A. That's what I put down.

Q. Very good. Now, speaking of possible mistakes, about three sentences down she indicated to you she saw Dr. Jack Berman the following day.

A. That's what she told me.

Q. Okay. And again, you probably wrote down what she said, correct?

A. Oh, yes.

Q. Okay. And, in fact, if the records end up showing -- well, let me -- let's do this. Did you review Dr. Berman's records?

A. I don't remember seeing -- did she -- I reviewed some of --

Q. Yeah.

A. -- but I don't remember, I don't -- yes, I did review his records, but I don't remember what date though.

Q. Okay. And whether or not she actually saw Dr. Berman or his partner the following day?

A. No.

Q. Do you happen to recall that?

A. No, I don't know. I don't know whether -- he

has a partner, Dr. Rosenbaum. I don't know whether it was Berman or Rosenbaum that she saw.

Q. And if Dr. Berman testified the other day that, in fact, she saw his partner the next day, you would have no basis to disagree with that, would you?

A. No.

Q. Okay. ***So*** again, she might have been mistaken in telling you it was Dr. Berman?

A. Well, she went to his office apparently.

Q. Right. Okay. Now, looking at page two, you mentioned that you asked her about prior illnesses and injuries, correct?

A. Yes.

Q. We're going down to about the I think third full paragraph. And she indicated to you that she had no previous or subsequent injuries or symptoms in the above areas; is that correct?

A. That's correct.

Q. Okay. And do you think that there was anything in her past medical history with respect to specifically her low back, that was of any particular significance that she should have recalled to tell you?

A. Other than the one injury that she had, I don't

think there was, no.
Q. Okay. That was the one you estimated in '78?
A. I think -- it's been awhile. I don't know. I don't know exactly.
Q. Okay.
A. But it certainly was awhile ago.
Q. Okay. *So* in fairness to her, I mean, something that happened 15 years earlier, it's possible somebody could overlook that?
A. Yes.
Q. Okay. Now, looking at the last page of your report, would it be your experience as a doctor -- and first *of* all, you've done spine surgery, correct?
A. Yes.
Q. Okay.
A. I certainly have.
Q. You're right.
A. On your brother.
MR. WEISMAN: Objection. Move to strike.
Q. And in doing surgery on people's spine, would you agree with me that, generally, somebody is not going to subject themselves to that serious of a surgery unless they have major symptoms?

MR. ARMSTRONG: Objection. Move to strike the hypothetical question.

Q. Did you understand my question?

A. In general that would be true.

Q. Yeah. Okay.

A. There are people who have, who want to have surgery, but generally that's true.

Q. Yeah. In other words, for Mrs. Giganti to subject herself to surgery at Dr. Colombi's hands, would it be reasonable to presume from the complaints and the records you reviewed that she was having significant problems after the collision?

A. Yes.

Q. Okay. And do you agree with this general statement, in low back spine surgeries that about 10 percent of the time they're not going to be successful or would you use another statistic? What would we be your approximation?

A. Well, again, it depends what you mean by successful. I think that if you are -- it depends what you're trying to cure.

Q. Okay. By successful, I guess I'm talking about relieving symptoms.

A. Well, if on a herniated disc --

Q. Uh-huh.
A. When you take out the herniated disc, it relieves the symptoms in better than 90 percent of the time. Certainly because it's a purely mechanical thing. The disc material is pressing on a nerve root and you take the disc material out and it no longer presses on the never root and that's the end of the problem. So that certainly in, in most cases, at least 90 percent of the cases they will have very good results, yes.
Q. Okay. Is there anything in Mrs. Giganti's medical history that would account for her herniated disc, any incident or trauma that you can think of?
A. Not that I know of.
Q. Okay.
A. That would be before this accident.
Q. Before the collision?
A. Not that I'm aware of.
Q. Okay. Now, you had the opportunity to examine Mrs. Giganti in July 21st of 1994; is that correct?
A. Yes.
Q. Okay. And that would be about one year and

three months after her collision, correct?

A Yes.

Q Okay And that's about one-and-a-half years ago today; is that a fair estimate?

A Yes. Uh-huh.

Q Okay And that was your only opportunity to meet with her and examine her?

A. That's correct.

Q And you noted in your first sentence there that a representation of my office was present during the examination; is that right?

A. Yes.

Q Okay And that person took some notes and kind of kept track as to how the examination went?

A I don't know what, if she was writing things down.

Q Yeah.

A But I don't know what she was doing, no. I don't pay any attention to her.

Q Okay If it's estimated by that person that the physical examination, meaning after the history was taken, when you put your hands on the patient, had the patient do the various movements, if it went from about 10:05 to 10:13 a.m., approximately eight minutes, give or take,

does that seem approximately correct to you?

MR. ARMSTRONG: Objection. Move that the question be stricken.

A. What I do is I go in the office, I go in the room, I do a history and a physical examination. The examination actually begins when I'm taking the history and I'm observing the patient, of course, getting up and getting down and moving about, but I don't keep track of the time, and I go in, I do a complete and thorough job, and I leave, I don't keep track of the time.

Q. Okay. Based on your custom, though, and maybe your review of your report as to what was involved here, does eight or so minutes sound approximately right for the physical exam?

A. What I mean, what I've testified to this afternoon I'm sure of and I don't know how long it took.

Q. Okay. Okay.

A. We allow 45 minutes, but I don't have any idea how long it took.

Q. Okay. Now, let me get back to this idea of degenerative arthritis for a moment. Would you agree with me, Dr. Kaufman, that degenerative

arthritis -- first of all, it occurs in all of us as we age?

A. Now, of which joints?

Q. I guess we'll talk about the spine.

A. Well, with the degenerative -- yes, degenerative arthritis or osteoarthritis of the spine. *Go* ahead.

Q. Okay. As we all age and let's say we'll get -- let's talk about getting into our 50s, like Mrs. Giganti, most of us do have some degenerative changes?

A. Yes.

Q. Okay. And degenerative arthritis, again talking in general, will make a person more susceptible to injury, in other words, it's a weakening of the part of the body, so you might be more susceptible to injury?

A. No, degenerative arthritis is a wearing out of the joint and does not make it more susceptible, no.

Q. Okay. Just one moment. Okay. If I could, do you recall that I took your deposition in November in a case or I cross-examined you in a case named Patricia Morris versus Allstate?

A. No.

Q. Okay.
A. November of which year?
Q. Okay. Of '95.
A. No.
Q. Just a couple months ago. L t me bring your attention to a question that I asked you and I want to ask you if this was your answer.
A. Well, let me just see.
Q. Sure. This would be at line 13.
A. Okay.
Q. Line 13, the bottom left portion. If you would, could you read --
A. Okay.
Q. Could you read the question and answer, and my question to you is whether -- do you remember that question being put to you and giving that answer?
A. Yes.
Q. Could you read the question and answer?
A. Yes. It says, the question was if somebody has arthritis of their spine, as a general statement, would you agree that it may make them more susceptible to injury? In other words, when they are involved in something like an automobile collision, if the spine is already

started to degenerate to some extent with arthritis, can that make the person more vulnerable to being hurt?

And my answer was yes. And the reason for that is it's not the arthritis that it's the general degeneration of the spine, but not the arthritis.

Q. Okay. And that -- I thought I just asked you that.

A. Oh, I'm sorry. No, but the arthritis per se is not, does not make them more.

Q. Okay.

A. More susceptible.

Q. Soft tissues of the body, is that what we refer to as the nonbony materials like ligaments and muscles and tendons?

A. That's correct.

Q. Okay. And soft tissues can be permanently injured by trauma, such as an automobile collision; is that a fairly general statement?

A. Yes.

Q. Okay.

A. Possible.

Q. Okay. You did review some records from Dr. Berman, the family doctor?

surgeon?
A. Yes. Uh-huh.
Q. Do you know Dr. Jennifer Kregler who just --
A. I know the name, I don't know her.
Q. Okay. Do you know anything about her reputation --
A. No.
Q. -- in particular?
A. No.
Q. Now, Dr. Kaufman, you have examined Mrs. Giganti on behalf of the defense in this case?
A. No, at their request, not on their behalf.
Q. At their request.
A. Thank you.
Q. And these types of examinations, where lawyers ask you to see a patient and write a report, you've been involved in that type of review for some 30 years?
A. Well, I've been in practice for 35 years. I think for most of that it's not uncommon as an orthopedic surgeon to be asked to give consultation --
Q. Sure.
A. -- about a patient and write a report to

somebody.

Q. Okay. And with respect to -- so we can get some idea as to the frequency of your review of patients for attorneys and, you know, the legal world, workers' comp or whatever is involved, do you do, you set up approximately six to eight examinations per week of that nature?

A. I think about six is more, more the likely, four to six, something like that.

Q. Okay. Again referring you back to this particular deposition, I think I asked you at that time in terms of these examinations we're talking about, based on other cases we've had, would you say six to eight per week is a ballpark, fair estimate. I was asking you about the exams. You said, yes, I think about six probably, but like that?

A. Yeah. Yeah.

Q. So somewhere in that?

A. Yeah, about six is what I just finished saying.

Q. Okay. Okay.

A. I'll stick by that answer.

Q. Okay.

A. It's -- I was just thinking this week it's now Friday and I think I've seen maybe four this

week, so.
Q. It could be less it could be more?
A. It's generally about six.
Q. Okay. And the charge for your exam and report is $350?
A. That's right.
Q. And as far as giving a deposition like we're doing here today, about two per week is a fair estimate?
A. One or two.
Q. Okay. And again at that deposition, if you said two was a fair estimate --
A. That's what I said, one to two.
Q. Okay.
A. Uh-huh.
Q. And the charge for the deposition is $850?
A. That's right, for a half a day, regardless of how long it takes.
Q. Okay. And this particular deposition you reviewed with Mr. Armstrong for a half an hour, right?
A. Ahead of time?
Q. Right.
A. Yes.
Q. Okay.

A. There's no charge for that.
Q. Okay. So our deposition would be an hour and a half to two hours, approximately?
A. Well, I block out the whole afternoon, so I can't do anything else anyway.
Q. Okay.
A. I don't know how long, I have no idea how long you're going to take so.
Q. Right. Now, when you issue a report, as you did for Mr. Armstrong, obviously when he has you testify, there can be things in there that are not good for the patient, that happens from time to time?
MR. ARMSTRONG: Objection.
A. I'm not sure what you mean by that.
Q. Okay. Well, for example, you said she was an exaggerator. That's not good for Mrs. Giganti's case, correct?
A. Well, I don't know, I'm not a lawyer, I'm just putting down what I find.
Q. Uh-huh. Well, you would agree with me that's not something that's helpful to her?
A. Well, I don't know. As I said, you're the attorney, I'm not. I'm just, I'm a medical doctor.

Q. Uh-huh.
A. I don't pass on what's helpful or not helpful for the, a person's legal case.
Q. Okay. And you concluded that you found no evidence of injury, I guess, to her neck or left shoulder?
A. That's correct, there was none.
Q. Okay. You did indicate there was some low back problems that you found?
A. I indicated that she was status. That means she, her present status was that she had had a previous surgery on her lower back for the lumbar disc.
Q. Uh-huh.
A. And that she had some residual radiculopathy. I said peripheral neuropathy. What I really meant was radiculopathy.
Q. Okay.
A. And there was obvious exaggeration of symptoms.
Q. Okay. Well, in any event, Mr. Armstrong has called upon you today to testify as a witness for the defense, correct?
A. Well, he's --
Q. He's calling you?
A. He's called me for his, yeah.

Q. Right.
A. For the defense to testify.
Q. Sure.
A. I don't testify for the defense.
Q. Right. And my question to you is this. With all of the examinations that you do, let's talk about for the defense. I know you do for both sides and so forth, but for the defense, are there reports that you write from time to time that are totally favorable to the patient?
A. Well, there are reports I've written from time to time in which I found things wrong with the patient that nobody knew was wrong with the patient, and there are times in the past where I've been asked by the plaintiff's attorney to testify and examine the patient at the request of the defense because I found things wrong with -- other doctors hadn't.
Q. Okay. Do you think that your secretary could locate a report that is helpful to the plaintiff, the person make making a claim, when you examined the plaintiff on behalf of the defense?
A. No, because it's not cataloged that way.
Q. Okay.

A. We have, we don't cross catalog them.
Q. No?
A. By -- we don't care who they're helpful for, I just write a report. So that it's not a matter of any kind of filing system which you could possibly locate that sort of thing.
Q. Okay. Was Mrs. Giganti essentially cooperative when she was in the office, in other words, did she do what you asked her to do?
A. Yes.
Q. Okay. Do you have any familiarity with her personally?
A. No.
Q. So as to her family history or reputation or anything like that, you would have no familiarity?
A. No.
Q. Just a few last questions and I'll wind up. Do you have any medical evidence or information from before the collision to indicate that she needed low back surgery?
A. No, except for the weakness that was found by Dr. Froimson.
Q. In 1987?
A. '87.

Q. Okay.
A. That would be the only indication.
Q. Okay. He did not refer her for surgery as far as you know?
A. No.
Q. Okay.

MR. WEISMAN: Thanks. I have nothing further.

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FURTHER DIRECT EXAMINATION OF RICHARD S. KAUFMAN, M.D.

BY MR. ARMSTRONG:

Q. Doctor, just a few questions.
A. Sure.
Q. Is it possible for someone to actually have a herniated disc at L4-5 without the intervention of an auto accident or a trauma?
A. Oh, yes. You can, a real major trauma you meant, a single incident you can get -- generally there's -- you can point to something that they've done, as was mentioned earlier, they can bend over, they can sneeze, they can try to lift something which they think is light and suddenly they find it's very heavy and they can herniate a disc. I've had patients

who had all of this incidences. There are lots of other causes, of course. Playing basketball is one. That sort of thing.

Q. Okay. Well, the doctors that testified in this case have testified regarding the accident and the relationship of Mrs. Giganti's injuries. Based upon the history that she gave them of the accident and I think to some extent you're testifying in accordance with that history, too?

A. That's correct.

Q. That's something that the patient tells you and, actually, the doctor giving an opinion of that nature has no personal knowledge of those things?

A. That's correct. And if she had trouble prior to the accident, I'd have no way of knowing it, of course.

Q. Okay. Unless she told you?

A. Unless she told me.

Q. Okay. Also, Mr. Weisman has mentioned that you charge for your services, both for writing a report and for the testifying here today. Is that money that you actually receive yourself?

A. Oh, no. Actually, it goes in the office. And of that money, 60 percent of it is overhead and

the 40 percent remaining, there are five of us in the office so it's divided five ways, so I end up with about eight percent of it and that's before taxes.

Q. Okay. And you have employees to pay?

A. Oh, yes. We have a very large office and a very large overhead.

Q. Approximately how many employees do you have here who are nonmedical doctors?

MR. WEISMAN: Objection.

A. Thirty five.

Q. Okay. Also in reviewing Mrs. Giganti's records, is there any indication as to why she retired in 1990 as a school administrator?

A. She had other injuries, I think to her knees and that sort of thing, that caused her to -- not school administrator, she retired as a gym teacher and became a school administrator I think at that time.

MR. WEISMAN: Objection.

A. Is that right? I'm sorry.

Q. I think -- if you want to take a look at that. I think she was an administrator.

A. Oh, then.

Q. At the time that she retired?

A. Oh, yes. The claimant states that she took early retirement because of her injuries, and that was in 1992.

Q. Okay.

MR. ARMSTRONG: Thank you, doctor. I have no further questions.

MR. WEISMAN: Nothing further.

THE WITNESS: I'll waive viewing and I'll waive signing. Thank you.

MR. VIDEO OPERATOR: We're off the record.

(Signature waived.)

C E R T I F I C A T E

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

I, Colleen M. Malone, 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 RICHARD S. KAUFMAN, 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 the reading and signing of the deposition was expressly waived by the witness and by stipulation of counsel; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulation of counsel; and 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 22nd day of January A.D. 19 96.

Colleen M. Malone, Notary Public, State of Ohio
1750 Midland Building, Cleveland, Ohio 44115
My commission expires August 3, 1997

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