DOC. 221

THE STATE OF OHIO,)
) SS:
COUNTY OF CUYAHOGA.)

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IN THE COURT OF COMMON PLEAS

Theodore Fowler, et al. Plaintiffs,	
vs	Case No. 260558
Mattie Jones, Defendant	Judge Burnside
Counter Claimant/Third Party Plaintiff	
vs.	
A & W Foods, Inc., Defendant.	

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DEPOSITION OF RICHARD S. KAUFMAN, M.D.

WEDNESDAY, MARCH 1, 1995

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Deposition of Richard S. Kaufman, M.D., a witness called for examination by the Defendant under the Ohio Rules of Civil Procedure, taken before me, Colleen A. Fox, a Registered Professional Reporter and Notary Public within and for the State of Ohio, pursuant to notice at the offices of Richard S. Kaufman, M.D., 23250 Mercantile Road, Beachwood, Ohio, commencing at 9:30 a.m., the day and date above set forth.

APPEARANCES:

On behalf of the Plaintiffs:
Frank G. Bolmeyer, Esq.
Sammon & Bofmeyer
1160 Rockefeller Building
614 Superior Ave., N.W.
Cleveland, Ohio 44113
and
John G. Salmon, Esq.
200 Public Square, #29-4500
Cleveland, Ohio 44114

On behalf of the Defendant, Mattie Jones:
Walter H. Krohngold, Esq.
Keller & Curtin
330 Hanna Building
Cleveland, Ohio 44115

Richard S. Kaufrnan, M.D.,
of lawful age, a Witness herein,
being first duly sworn,
as hereinafter certified, was examined
and testified as follows:

MR. KROHNGOLD: Let the record reflect that this is the deposition of Dr. Richard Kaufman, which is being taken pursuant to notice, and that it's my understanding that the statutory, procedural formalities of notice, service, and the filing of this deposition will be waived, counsel, is that correct?

MR. BOLMEYER: Correct.

MR. KROHNGOLD: This deposition- is being taken upon direct examination in order to preserve the Doctor's testimony for use at the time of the trial of this action, brought by Theodore Fowler against my client, Mattie Jones.

This action has Case No. 260558, before the Honorable Judge

Janet Burnside in the Cuyahoga County Court of Common Pleas.

My name is Walter Krohngold. And I am one of the attorneys for Defendant, Mattie Jones.

DIRECT EXAMINATION

BY MR. KROHNGOLD:

Q. Doctor, could you please state your full name for the record?

A. Dr. Richard S. Kaufman, M.D.

Q. Would you please state your current professional address and whether we are at that address today?

A. 23250 Mercantile Road, Beachwood, Ohio; and, yes, we are in my offices today.

Q. Doctor, what's your profession?

A. I'm a physician and surgeon.

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

A. 1956, which is about 38 years ago.

Q. Are you currently licensed in the State of Ohio?

A. Oh, yes,

Q. Doctor, it's my understanding your specialty

is in the field of Orthopedic Surgery?
A. That's correct.
Q. And could you explain to the Ladies and Gentlemen of the Jury what's involved with Orthopedic Surgery?
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 locomotive system, the parts of the body that move you about, that is the bones and joints, primarily, but, also, the muscles and ligaments and nerves and tendons of the spine and the arms and legs.
Q. Are you Board Certified in Orthopedic Surgery?
A. Yes, I am.
Q. And what's involved with that process?
A. When I became Board Certified, I had to have four years of college, four years of mkdical school, five years of post-graduate training,

I then took a three-day series of written and oral examinations, which I passed the first time.

I then had to be in practice 2 1/2 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 in Orthopedics.

Q. Is Orthopedic Surgery -- or rather Board Certification -- one of the highest, if not the highest, achievements in your field?

A. Yes.

Q. Doctor, could you please tell the Ladies and Gentlemen of the Jury a little bit about your background, including college, medical school, and your post medical school training?

A. I received my B.A. 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 post-graduate 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 at Mt. Sinai Hospital, and a year of Orthopedic Surgery residency at Indiana University Medical Center in Indianapolis.

Q. How long have you been in private practice?

A. Since July of 1961, which is now almost 34 years.

Q. Could you list some of the medical organizations and societies that you belong to?

A. I belong to 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, Fellow of the American Academy of Orthopedic Surgeons, and a Diplomat of the American Board of Orthopedic Surgery,

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

A. Yes, I'm on the active staff at Suburban Community Hospital, which is now called Meridia South Point, where I've been Chief of Orthopedic Surgery for the last 28 years.

I'm also on the staff at Mt. Sinai Hospital, Hillcrest Hospital.

I was the Chief of Orthopedic Surgery at Women'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. Are you or have you been involved in any teaching or publications in your field?

A. Yes, I've published papers dealing primarily with fractures, broken bones, which are the same thing; and I've given innumerable papers 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 Cummin's Lectureship at Tulane University in New Orleans, I was invited to participate in a symposium at the Mid-America Orthopedic Meeting at Colorado Springs; and I gave the Dr. Russell Rizzo Memorial Lectureship here in Cleveland.

Thank you, Doctor.

As part of your professional practice,

do you have occasion to see and examine individuals who are not your patients for purposes of consultations or second opinions or medical legal matters or Workers' Compensation matters?

A. Yes, about five percent of my practice includes -- is involved with doing consultations, that is examining a patient and sending a report to somebody, Plaintiff's attorney, a Defense attorney, Industrial Commission of Ohio, third party, second opinions, that sort of thing.

95 percent of my practice is taking care of sick and injured patients,

Q. Doctor, could you please tell the Ladies and Gentlemen of the Jury whether you had occasion to examine the Plaintiff in this matter, Theodore Fowler, at the request of the Defense?

A. Yes.

Q. And when and where did that examination take place?

A. It took place April 26, 1994 here at my office,

Q. And, as part of that examination, you have a

copy of a report prepared April 26th detailing the results of that examination, Doctor?

A. Yes.

Q. Please feel to refer to that report throughout the questions being put to you today.

A. Thank you,

Q. Upon your first meeting with Mr. Fowler, did you obtain a history from him?

A. Yes.

Q. And what was that history?

A. Mr. Fowler said that he was injured October 23, 1992 when the truck he was driving was involved in a collision from the left side with a car.

He said he was wearing a seat belt. He said his head hit the left side door.

He said he was unconscious for five to ten minutes.

Following the accident, he said he developed pain in his neck and low back that day, He went to St. Vincent's Charity Hospital the day of the accident, and was released after examination and x-rays.

Since the accident, the patient has been under the care of Dr. Ochoa, who treated him with heat, traction and electrical stimulation, twice a week, with some relief at times-

The last time be received a treatment was the day before this examination; and he said he got relief from that treatment for two hours only, So that it had no affect on this examination-

In addition, he said he takes some Motrin, Ibuprofen, The last time, two days before this exam-

He said he had an MRI, that's a Magnetic Resonance Imagining. It's a test in which the patient is placed in a large magnetic field and the magnetic field is spun one way, and then it's spun back, and it disturbs the atoms and molecules and they disturb the magnetic field and the whole thing is recorded and run through a computer, and that's about all I understand about it. And it comes out with a picture of the bones and of the soft tissues, primarily the cartilaginous disks between

the bones and the nerves. And you can see these in the MRI.

This was done of his lower back, which was said to show a disk herniation at L4-5 and protrusion, which is the same thing. A disk herniation and disk protrusion are the same thing,

So there was a protrusion at L4-5 and L5, S1, which are the lowest two levels in the lower back.

The L stands for lumbar, and that's the lower back; and there are five bones, and we speak of the disk spaces with the name of the bone above and the bone below.

So this would be the space between the fourth lumbar and fifth lumbar and between the fifth lumbar and the sacrum, which is the part of the spine that attaches the pelvis.

And the MRI showed it did not involve any of the nerve roots, that is the bulging out -- it bulged out, but it didn't press on any nerve roots,

Q. What does that mean?

A. Well, it was just bulging out, that it

didn't -- the disks when they bulge out don't produce any symptoms unless they are actually pressing on a nerve root and causing nerve root irritation.

And the MRI showed that it was not.

At the time of this examination, Mr. Fowler said that his neck pain had become worse.

He said it was located in the midline, right in the middle. He said it was constant and moderate in degree.

He said it was made worse by turning his head sharply, and was relieved by nothing that he knew of.

He said there was spread of the neck pain to the right side of his head around the ear and also to the right shoulder.

He said there was some pins and needle feelings in the tips of the -- all the fingers of his right hand.

He said that the low back pain had become worse, He said it was located on the right side of the lower back,

He said it was constant and varied in degree, being severe most of the time.

He said it was made worse by excess activity and by bending, as well as by walking more than ten minutes, and was relieved by heat a'nd Motrin.

He said that there was constant spread of the low back pain down his right leg, down the back of the leg to the toes.

He said this would increase with walking even two or three steps.

He said that he had constant numbness of the entirety of the right lower extremity, that is the entire right leg all the way down, including the foot,

Q. Doctor, before you continue on, as to the actual complaints of Mr. Fowler, did any of those complaints give you any concern or were they in anyway suspicious to you, at least as far as the general complaints went?

A. Well, the pins and needle feelings in the fingertips of the right hand is -- we call non- anatomical-

The nerves of the hand -- actually, there are three different nerves that go to the fingers in the hands, and, if you get tingling because of neck problems,

irritation of a nerve root, you get it in certain fingers, You don't get it in all the finger tips; and, if you get it in the fingers, you don't get it in just in the tips, you get it in the distribution of the nerve, which involves part of the forearm, and arm, part of the hand and the fingers, as well as just the tips-

So pins and needles feeling in the fingertips of the right hand is bizarre; and the numbness of the entirety of the right lower extremity, that is an entire right leg, is also what we call non-anatomical.

There are -- well, I can show you, There is a picture.

In the arm there are the nerves that go to separate places in the hand. And you can see there are three nerves that go to fingers in the hand.

Q. At the top, you're showing us a diagram?

A. It's a diagram of the nerve distribution of each nerve that comes out of the neck, the 5th nerve, the 6th, the 7th and the 8th nerve.

Q. That's what you mean by C?

A. C stands for cervical, which means neck.
Q. Those are the nerves that come out of the neck area and go to various parts of the arm?
A. That's right, These are the ones that go to various parts of the arms.

And the same thing in the leg, The L stands for lumbar, and you have L4, L5 and S1, which is the first sacral; and they go, as you can see, they go to strips down the legs.

Q. Would those --
A. Each one.
Q. Would that be a certain area which would be affected by that particular nerve?
A. That's correct. That's what we call a dermatome. Derm meaning skin.

And it's the skin area that is supplied by that particular nerve, It's really-quite constant.

So that it's impossible to have numbness of the entire leg because they're several nerves, Actually, the L3 nerve goes up to the upper thigh and other nerves go to the leg besides 4-5 and S1.

And so you can't get numbness of the entire leg, That's what we call non-anatomical or a bizarre symptom.

Q. You would expect nbne of this to be consistent with those shaded areas?

A. One of those patterns, that's right, one of the shaded patterns representing the nerve root that was being irritated, if a nerve was actually being irritated.

Q. Did Mr. Fowler tell you anything about his employment?

A. Yes, his occupation, he said was as a truck driver, He said he returned to regular work for one day only in December of 1992. And he said he had not worked otherwise.

He said, at the time he returned to work, he apparently siipped on the floor-and fell, injuring his back again-

Previous injuries consisted of an, accident in 1977, in which he injured his neck, his low back, and left shoulder with pain for one and a half months.

He said he had no other symptoms except that -- since then until the present accident.

He said he had been in good health with no serious illnesses or operations.

Q. Doctor, did you conduct a physical examination on Mr. Fowler?

A. Yes. On physical examination, Mr. Fowler appeared to be in no discomfort, that is in spite of the fact he said he was in constant, severe pain, He certainly didn't look like it when he was sitting there talking to me.

However, his gate was somewhat slow and deliberate, He got up and moved around slowly, as if moving about produced pain.

He said he could not walk on his heels or toes, because he said it would give a "quivering" in his back, whatever that meant. I don't have any idea what that -- that's not a normal symptom walking on your heels and toes. I can't imagine what he meant by quivering.

He said -- he was told to let me know if anything caused him pain during the examination.

Examination of his neck showed it to be held in the midline position, that is he

wasn't tipped to one side or the other or down.

However, there was severe restriction of all motion in his neck due to complaints of pain. He just absolutely would hardly move his neck at all, really not at all because he said it hurt.

There was no spasm in the muscle. Spasm is an involuntary contraction of the muscle when there is underlying pain; and you can feel the spasm through the skin, if it's present, It was not present.

Q. would you expect -- if someone indicated they had severe restriction of motion due to pain, would you expect to find generally some indication of spasm in that area?

A. Yes. If they're in that much pain and that much restriction of motion, you would expect to find some spasm, which there was not.

Q. And, again, that's something the patient does not have any control over?

A. That's right, That's what we call an objective finding. The objective findings are those which the patient does not have to tell us is present, such things as muscle

spasm, swelling, skin discoloration, redness or black and blue, warmth over an area, that sort of thing-

These are objective findings.

Subject findings are those things the patient tells me are present, and I have no way of knowing, such things as pain on motion or tenderness.

And spasm is an objective finding, that's correct.

He said there was moderate tenderness over the right trapezius muscle, which is this big muscle on the side of the neck.

The neurological examination of the arms show the reflexes to be normal. Just as when you tap the knee and the leg kicks, there are other tendons that you can tap and the muscles will twitch. Actually there are three of them in the arms, and these were all normal.

However, he said that tapping on the tendons, just barely tapping on the tendon to get the muscle to contract, he said caused neck pain, which is -- I don't know why.

Q. Does that make sense from a neurological standpoint?

A. No, there is no connection at all. I mean one of the times you tap is at the wrist, and why that would cause neck pain, I can't imagine it. That's what he said, so I put it down.

There was no muscle weakness. However, he said that there was numbness present over the entire right upper extremity, that is all the way from the shoulder down he said was numb; and, again, as I pointed out before, there are four or five different nerves that go to the arm; and you don't get numbness of the entire arm from the shoulder down, That's what we call non-anatomical.

Q. Did you also examine his low back?

A. Examination of his lower back showed him to stand without a list. He wasn't leaning to the side or leaning forward or backwards, again, there was severe restriction of all motion due to complaints of pain.

The Lasegue Sign, was negative bilaterally when sitting. Now, let me explain that, the Lasegue Sign is a test

that we do with the -- generally with the patient lying flat on his back, and with the knee straight, the leg is brought up in the air, like that, like a periscope,

This puts a stretch on the sciatic nerve that runs down the back of the leg. And, if that nerve is being irritated, as you lift the leg up, it will produce pain in the back and down the leg. The test can be done with him lying either on his back, like that, or it can be done sitting on the edge of the bed, edge of the table, and with the knees bent.

And, then, as you straighten out the leg, you now have the same position you would have if he were lying on the back with his leg up in the air,

When he was sitting on the edge -- sitting on the edge of the table, the test was perfectly normal. He had absolutely no pain at all.

However, lying flat in bed and I began to do this, he said it hurt at ten degrees, barely off the bed -- just -- let's get the arm out of the way here, just ten degrees

off the bed, and he said it produced pain.

Q. Is that -- does that make sense to you?

A. No, that's an obvious exaggeration of symptoms, You can't have it positive at ten degrees lying flat and perfectly normal sitting up on the edge of bed. That doesn't make any sense at all.

Also, be said that even with the knee bent, bending the hip up, only 20 degrees, just a little bit, was said to produce pain in the back where he could sit on the edge of the bed with his hips bent up 90 degrees without any difficulty at all; but, down on his back, now when I'm testing him, just 20 degrees, and he *says* it hurts.

Q. Does that make sense to you?

A. No, this -- obviously is an exaggeration of symptoms- Even when he was lying prone, on his abdomen, lying flat on his stomach, bringing the knee up like this was said to produce pain at about this level, which, again, doesn't make any sense at all because it doesn't affect the nerve. It relaxes the nerves that go down the leg. It doesn't cause any -- it shouldn't cause any

difficulty at all. And even at 40 degrees, he said that produced pain, again, these are bizarre symptoms-

Measurements ,of his legs show the lengths to be equal. The circumference of the thighs and the calves were equal, which indicates there was no muscle wasting.

Sometimes, when there is pressure on a nerve root, the muscles will get smaller even before they can test them as being weaker, but they were normal. You would expect them to be the same-

The neurological examination of his legs showed the knee jerks to be equal. There is a similar reflex, where you tap the knee and the leg kicks are -- there's similar reflex to that where you tap the heel cord and the foot kicks, and that's called the ankle reflex; and these were normal.

There was no weakness in the legs.

Again, he said that there was numbness of the entirety of both of the legs, the right more than the left-

Again, this is a non-anatomical

distribution, as I said before, there are several nerves that go down the leg and there is just no way in which you can get numbness in the entirety of both lower extremities.

Q. Doctor, did you take x-rays of Mr. Fowler?

A. Yes, X-rays were taken of his neck and of his lower back,

Q. What did they reveal; and, if it will help, perhaps you could put them up on the shadow box.

A. Okay. The x-rays of the neck --

Q. By the way, were these taken in your office?

A. They were taken in my office by my technician at my direction and read by me.

Let's see. I lost them- Just a minute,

This is an x-ray of the neck taken from the side. Here's the jaw and the skull, the shoulders down here, and this was with his head bent forward, You can see that this is 2 fairly normal vertebrae. These are bones here, these are the disks, the cartilage between it, you can't see it because the x-rays go right through it.

These bones should be fairly square, You can see they're beaked, and they've got these spurs on the bones, the disk spaces are quite narrowed,.

This is all due to degenerative arthritis, wear and tear type of arthritis in his neck. That's one view of his neck with his head bent down.

This is a view with his head bent back; and you can see there is pretty good motion in that neck, in spite of the fact that when I tested him, or tried to test him, he wouldn't move his neck at all,

Here you can see it goes back, and here it goes forward; and you can see the severity of degenerative arthritis of most of the lower segments of the neck-

Q. Would this have been a condition that was going on for quite sometime with Mr. Fowler?

A. Oh, yes, this is something that's going on for many years. It's gradually getting worse. It's the wear and tear that we all start to get when we get over 40; and he's in his early 60's.

So, it's obviously his, although it's

even somewhat more you expect at this age, it's something which has been going on for a long period of time.

Q. It would not have been caused by the auto accident?

A. No, it's my opinion, based on reasonable medical certainty, that this was not caused by the automobile accident, nor was it exaggerated or accelerated by the automobile accident.

Q. Were there also x-rays taken of his low back?

A. Yes, this is an x-ray of the lower back taken from the side. These are the ribs up here, The pelvis down here- These are the bones that make up the lower back. 'And, again, you can see this should be nice and square like I showed in the neck, and they should be -- have a nice disk space between each of them.

You can barely see the one down here. I've got a close up of that. And you can see that at the lowest level on the lower back, where the last lumbar joints -- the sacrum, this is the sacrum here, here's the

hip joint down here, this space is almost gone. It's big osteophytes, which are bone spurs from the degenerative arthritis.

Again, this is not caused by injury. It's something that's wear and tear that's been going on for a long period of time,

Q. Doctor, in addition, you also had a chance to review some of the MRT films that were run of Mr. Fowler?

A. I didn't at that time, I have since then.

Q. Are those MRT findings from your review of the films consistent with the x-ray findings in terms of degenerative changes?

A. Yes.

Q. Is there any arthritis that's shown on any of the films?

A. It's called degenerative osteoarthritis. It is a type of arthritis. Arthritis is a general term that means something wrong with the joint; and this is degenerative osteoarthritis, the wear and tear kind that we all get, it's something that has gone on for many years. gradually increasing as we get older.

Now, your report in the beginning indicates

that you were told that the MRI showed some type of protrusions in the low back, which did not involve any nerve roots.

From your review of the MRI films, did you see any nerve root involvement?

A. No, there was not.

Q. And, again, could you try to detail a little bit what that means when you say nerve root involvement?

A. This is the model. of the back.

Q. And why it's significant or insignificant?

A. This is a model of the back and here are bones stacked one on the another, and here are the disks between the bones; and, at each level, a pair of nerves are given off that go to the arms or legs or wherever they're supposed to go, down the back around the nerves in a sac; and then, up here is given off at each level,

And, if one of these disks bulges out, it can press on the nerve root, and then it will cause pain or numbness or weakness or nerve root injury to wherever that nerve root is supposed to be going, In this case, presumably, the leg.

And if this protrusion, which is on the MRI, pressed on a nerve root, it could cause some injury, but it doesn't- It just bulges out, and doesn't press on anything.

So that it really has no symptoms whatsoever. The bulging disk has really -- is without any symptoms until it presses on a nerve root. We see bulging disks in people as they get older in a very high percentage of the population that are totally without any symptoms at all.

Q. And, again, in Mr. Fowler were these findings on the MRI films caused by this degenerative arthritis that you've described earlier?

A. Yes, I think it's related to the degenerative changes and not the injury.

Q. Okay, Was there any finding that you saw caused by trauma or accident, or anything like that?

A. No.

Q. Doctor, have the tests which you've performed, have they been approved and accepted within your field of Orthopedic Surgery?

Yes.

Q. And did you have a sufficient amount of time to conduct the examination and review all of the films and records for this particular patient?

Yes.

Q. Did the information that you reviewed, including films, give you a more detailed accounting of Mr. Fowler and his other problems -- and his various problems?

Yes.

From your examination of the Plaintiff and your review of records and films, Doctor, do you have an opinion with a reasonable degree of medical certainty as to your diagnosis at the time that you examined him?

Yes.

Q. And what is that opinion, please?

It's my opinion, based on reasonable medical certainty, that Mr. Fowler has cervical -- and I'll say it first in medical terms -- lumbosacral spondylosis. Cervical means neck, lumbosacral means low back, spondylosis is the degenerative arthritis that he has which is unrelated to this

accident.

And based on the above history and examination, I found no objective evidence of injury. That is, all the evidence was something he told me was present. I could find no objective evidence at all.

The diagnosis is based entirely on what he told me. Again, I'll say it in medical terms possible cervical and lumbosacral myofascitis. Cervical means neck, lumbosacral means low back, myofascitis, myo means muscle, fascia means ligament, and itis is an inflammation, So that means an inflammation of the muscles and ligaments of his neck and back.

However, I really could not tell the extent of this possibility, because there was such a large degree -- obvious exaggeration of symptoms and the bizarre findings.

So that there is no way of telling just how much he has of that, *if* he has it at all.

Q. Do you have an opinion with a reasonable degree of medical certainty as to whether

Mr. Fowler showed any signs of a herniated disk due to the automobile accident?

A. Yes, it's my opinion that he did not. A herniated disk is, just like a bulging disk. It's -- the bulging that he has I think is due to degeneration.

Q. Doctor, do you have any opinion with a reasonable degree of medical certainty as to any kind of prognosis for Mr. Fowler?

A. Yes.

Q. And what would that be, please?

A. Well, I think that any injury which he might have sustained in this accident has probably healed- I think that he has symptoms relative to his arthritis, and he'll continue to have probably some problems.

If he has any problems, he has problems with his arthritis, but I don't think he has any problems from this accident.

Q. From your review of the films and your discussions with him, do you believe that he at some time after the accident, he was capable of employment, of becoming employed? As you indicated, he did not work after the accident except for one day?

A. Well, that's hard to say. I think that he probably could go back to work, Whether he would go back to work is another question, but I think he probably could.

Q. Doctor, as part of your records that you reviewed, you were given a copy of a bill from Dr. Ochoa regarding his treatment of Mr. Fowler, correct?

A. Yes.

Q. I believe that bill showed approximately 120 office visits for a total of almost $19,000 worth of treatment.

Doctor, do you have any opinion from -- based on your knowledge of charges in the community -- as to whether 120 treatments for what appears to be a soft tissue injury is a reasonable number of treatments?

A. That seems like it's quite excessive, yes, certainly, probably, ten times the number of treatments that I would normally give a patient.

Q. And the way I averaged it out it was approximately $160 per office visit?

A. That's what it looked like to me,

Q. Would you say that was reasonable, those

charges?

A. No, that seems to be almost twice what normally would be charged.

Q. Okay. Doctor, have the opinions -- have all the opinions that you've given today been to a reasonable degree of medical certainty?

A. Yes.

MR. KROHNGOLD: Okay, Let's go off the record for a minute,

(Short recess taken)

MR. KROHNGOLD: Doctor, I don't have anything further at this time- Thank you.

THE WITNESS: Certainly.

CROSS-EXAMINATION

BY MR. BOLMEYER:

Q. Doctor, my name is Frank Bolmeyer. I, along with Jack Salmon, represent Theodore Fowler in this case, I have a few questions for

You saw Mr. Fowler back in April of '94, about ten months ago, is that right?

A. Yes.

Q. That was on one occasion you saw him?

A. That's correct.
Q. You have not seen him since?
A. No.
Q. And you were not aware of what his condition was at or around the time of his accident in October of '92?
A. Not firsthand, no.
Q. Nor were you aware of what his condition was like until the day you saw him when you made that examination at that time?
A. Just based on the records and what he told me.
Q. Now, as far as the records you reviewed, Doctor, what records did you review in preparation for your exam and/or your report?
A. I don't know, Normally, we have stored these records in the past. It got -- we had to enlarge certain facilities in our office, and we had to get rid of the storage and we returned the records. It says records stored and then they were returned in July; and, because they were stored, I didn't make a fist of what they were. We've got returned. We did not list what was

returned. So I don't know,

Q. I looked, the kind of situation that you're in here when you're examining a patient that is not your patient, it's set up by the attorney, they call you and say would you examine this patient?

A. They call my appointment secretary, yes-

Q. All right. Then they write you a letter and kind of outline what they want or what they're requesting that you do?

A. Well, I don't pay any attention to that. I take the history from the patient. They write a letter, but I don't depend on that at all.

Q. And I was looking in your file, and there is a letter from your lawyer in there. And, in the letter, there is no reference to him enclosing any records or documents.

Do you know if you got records elsewhere other than with the letter that was that sent to you?

A. Yes, I have a note in the chart that says records stored. So I've got some records, I don't know what they were-

So you don't know if you saw his physical

therapy records or his treatment records from Dr. Ochoa, or whether you saw the MRI report or whether you saw the emergency room records, you just ,don't recall?

A. I probably saw the MRI report because I have notations of what it said it showed, but I don't have a note about the other records that you mentioned.

Q. Doctor, were you aware that this accident was a significant impact, and the car that actually struck the truck that Mr. Fowler was riding in was a total loss as a result of the accident, were you aware of that?

A. No, I was only examining Mr. Fowler and not his truck or the other car, so, I'm not concerned about what happened to the other car.

Q. You do treat people that are injured in auto accidents, do you not?

A. Oh, yes, a lot of them, of course.

Q. And you treat people that have bad backs and bad necks as a result of auto accidents?

A. Yes.

Q. So it would be fair to say you can hurt your back or your neck in an auto accident?

A. Wall, yes, obviously, the people I see are people who are hurt. The people that aren't hurt in auto accidents, I don't see,
Q. Okay. Were you aware he was taken by ambulance to St. Vincent's?
A. No.
Q. Do you know Dr. Ochoa. by the way?
A. Yes, I know Dr. Ochoa very well-
Q. He's on the staff at Suburban Hospital where you're Head of Orthopedics?
A. Yes, I've known Dr. Ochoa for many years.
Q. And you've known him to be a good physician?
A. Well, I really don't have much contact with him in terms of exchanging patients- So I really -- I don't know. I certainly have newer heard anything bad about him, but I never really had anyway of critiquing his care of patients.
Q. Now, certainly, him being on the staff at Suburban where you're the Head of Orthopedics, you would expect that people on the staff at Suburban would be good, well qualified physicians, would you not?
A. Yes.
Q. Now, in your practice, you treat patients

that have what we've talked about in this case as soft tissue injuries, do you not?

A. Yes.

Q. And do you agree that sometimes soft tissue injuries can be severe and debilitating?

A. We're not talking about this man, we're talking about people generally, you mean?

Q. Right.

A. Yes.

Q. So that you treat patients that are in automobile accidents that have severe injuries that can last for a long period of time and it still not be a broken bone or a herniated disk?

A. That's correct.

Q. Doctor, you're quite familiar with arthritis because I understand that you're involved at Metro Hospital in their Arthritis Program there?

A. Yes.

Q. Now, what exactly is degenerative arthritis?

A. It's a wear and tear type of arthritis in which the bones, because of repeated motion over our lifetime, gradually wear out,

Q. Now, would someone that has degenerative

arthritis in their neck and their back, would their -- in simple terms, would their back be weaker than a normal, healthy back?

A. No, actually, they're generally stiffer. They don't move as much.

Q. Does arthritis cause symptoms?

A. Yes.

Q. And what would those symptoms be, generally?

A. Pain, pain on motion, stiffness.

Q. Does it also cause radiating pain at times?

A. Only if the arthritis gets the bony spurs -- irritate a nerve root, then it can cause radicular pain, or radiate. We call it a pain which radiates, which spreads out from the neck.

Q. Now, arthritis can be aggravated by traumatic injury, such as an auto accident, can it not?

A. No, it cannot. In my experience of over 34 years of following patients in auto accidents, I have never seen a case of this type of degenerative arthritis which is either aggravated or accelerated by an automobile accident.

Q. Is it your opinion that the symptoms from

arthritis are not ever worsened by a significant traumatic impact?

A. That's correct.

Q. So that the symptoms are not even worsened?

A. We're talking about this type of soft tissue injury. We're not talking about a fracture, which he, obviously, he didn't have, you mean this type of injury-

That's right, the symptoms are not made any worse.

Q So that when your neck and back is whipped around in an accident, it doesn't cause any increase in the symptoms from the arthritis, in your opinion?

A That's correct, absolutely correct.

Q Okay..

A. That's based on 34 years of following these people.

Do you agree, Doctor, that someone with significant spinal arthritis in their neck or their back would be more susceptible to injury in an automobile accident than someone with a normal, healthy back?

MR. KROHNGOLD: Objection.

What sort of injury?

a. An injury to his spine or his back?
A. I think that somebody who has arthritis in their tissues are -- the soft tissues are probably less elastic, and therefore, they would tend to be more easily injured. It doesn't mean that they were injured, but are probably more easily injured, yes-
Q. Did you ewer review any x-rays of Mr. Fowler's neck or back that were taken prior to your examination on him?
A. No.
€?- So you wouldn't know if there was any change in his arthritis since the accident?
A- Well, it may get a little worse because this is a progressive diseases. As everyone knows, arthritis is somethins that gets gradually worse as we grow older, and he's grown older since between the time of his accident and when I saw it.

But, certainly, I don't think it would be any more than we normally expect with the passage of time.

a. But the only way that you could conclusively state that would be by examining x-rays, both before and after, is that a fair

statement?

A. No, I think I can conclusively state it because I've never seen it happen.

Q. What causes radiation of pain from a low back into a leg, Doctor?

A. Two things. There are two types of radiating pain.

One is what we call referred pain, in which the tissues of the lower back are injured themselves, and the brain thinks, feels the pain is coming from some place else rather than the injured tissue.

A more common example of this that many people are aware of is that pain down the left arm can come from a heart attack.

It's got nothing to do with the left arm, or with nerve roots, or anything. It's just the brain gets mixed up and doesn't know quite where the pain is coming from. And you can feel some pain going into the buttocks and thighs, particularly from the lower back, just being felt from the soft tissue, from the muscles and ligaments.

Pain going all the way down the leg is due to a nerve being irritated in the lower

back and going into a certain distribution of the leg, depending on which nerve roots were injured.

Q. Now, the nerves that we talked about earlier, the nerves, I assume, they pretty much cover the entire leg. One nerve or another would cover a particular part of the leg, is that right?

A. I'm not sure which nerves we we're talking about earlier, but the second part of your statement, that the entire leg is supplied by nerves of various -- from various places is correct, yes.

Q. So, if there was pressure or irritation on nerves from various places, it would be possible that an entire leg could feel numb or tingling at times from pressure on those various nerves?

A. No, because you would have to have pressure at five different levels in the back and that would be bizarre, and then have those on both sides, which would even be more bizarre.

Q. Well, I appreciate that you feel it's bizarre.

A. No, what I'm telling you is it would not be possible to have the nerve root irritation at five different levels on both sides.

Q. With someone with significant marked degenerative arthritis, they could not have irritations on five different nerves?

A. I've never seen it in 34 years. I mean everything is possible under the sun, I suppose, but I've never seen it.

Q. When *you* wrote this report back in April of '94, you had not reviewed the MRI film, is that right?

A. That's correct.

Q. Doctor, you had told us about a herniated disk before. Is it -- as a general rule, a normal, healthy disk does not herniate in an automobile accident?

MR. KROHNGOLD: Objection.

A. I've see herniated disks after an automobile accident.

Q. Well, let me ask it this way, Doctor, do you generally, when you find *a* herniated disk also find the presence of some degenerative disk disease or some degenerative condition involving the disk?

A. No, you can have a normal disk which herniates because of injury,
Q. All right. What causes a herniated disk, Doctor?
A. Enough pressure on the disk to cause it to rupture through the ligament which surrounds the disk and holds it in place.
Q. And that certainly can be trauma from an auto accident that can cause a herniated disk?
A. We're not talking about this accident now, we're talking about just generafly you mean?
Q. Yes.
A. Yes, that's possible.
Q. And is it easier for a disk to herniate when it's degenerated prior to the herniation?
A. No, it's much less common because the disk is not degenerated, not dried up, not shrunk up.

The juicier the disk, the more likely it is to actually bulge out, whereas the dried up, degenerated, narrowed disk is -- there's very little disk material left, so that it's less likely to bulge up.

Q. You did not review an MRI film of Mr.

Fowler's back before the automobile accident, did you?

A. I'm not aware he had one, maybe he did, I don't know.

Q. So the only MRI that you reviewed was an MRI was that was taken sometime after the accident?

A. That's right.

Q. Now, do you use these tests in your practice?

A. Oh, yes-

Q. Now, when would you refer a patient for an MRI of his lumbar spine or low back?

A. If I felt he had significant nerve root irritation symptoms.

Q. So that would be something based on your examination and what the patient told you?

A. And what I found-

Q. Right?

A. Mmm-hmm.

Q. And it would be somethins that you would not do unless you felt that there were some significant symptoms or findings to warrant it in your practice?

A. That's correct.

Q. Now, you are aware that he was a truck driver, prior to, or during this accident and in his career prior to the accident?

A. That's what he said.

Q. Were you aware that he worked for a company and delivered meats?

A. No.

Q. Were you aware that he did heavy lifting on a daily basis?

A. No.

Q. Were you aware that he was able to do his job and didn't miss any work prior to this automobile accident?

A. No.

Q. Do you know a --

A. Except I think he had another accident earlier, but, yes, years ago -- go ahead.

Q. Have you ever met or heard of a Dr. Gustafson?

A. I've heard the name, I don't know him at all.

Q. Are you aware that Dr. Gustafson had examined Mr. Fowler on behalf of his employer, A & W Foods, and be was of the opinion that he could not continue to work

as a truck driver as a result of this accident?

MR. KROHNGOLD: Objection.

A. No, I'm not aware of that at all. I don't know when it was, so.

Q. Doctor, in this case, you were asked to examine Mr. Fowler and write a report and testify, if need be, is that about the size of it?

A. I'm sorry -- the first part was -- yes.

Q. To examine him, write a report, and testify, if need be.

A. What, if anything, was wrong with him, and with the understanding that, if I needed to testify, I would, that's correct.

Q. Now, Doctor, certainly, your time is worth money, as I hope everyone's is. How much do you charge for writing the report that you did?

A. The examination and the report is $350.

MR. KROHNGOLD: Objection.

Q. And how about for the time of your testimony here today?

MR. KROHNGOLD: Objection.

A. The deposition, we allow the entire morning,

is $850.

Q. Now is that $850 if we're done in 15 minutes?

A. Makes no difference.

Q. Or three hours?

A. That's right. Sometimes it takes longer than that.

Q. Okay. Now, Doctor, how many times -- let's say in 1994, were you asked to testify such as you're doing here this morning?

A. I don't know. I don't keep track of it.

MR. KROHNGOLD: Objection.

Q. Could you give me an estimate?

A. No, what I've testified to this morning, I'm sure of. I have no idea how many times that was.

Q. Do you schedule these only on certain days of the week?

A. No, I don't schedule them on certain days of the week. I try to avoid scheduling them on Wednesday in the summer time, and that-sort of thing, but other than that, I do it when I can fit them in, if I can fit them in.

Q. How about the examinations of patients, such as Mr. Fowler, who are not your patients?

A. They're done during regular office hours.
Q. Are they done on a specific day of the week?
A. No.
Q. How many patients did you treat in 1994, would you estimate that for me?
A. No. I see about -- well, maybe 30 patients a day, and four days a week, 120 patients a week, and we're in the office about 45 weeks, more or less, so, that would be, 5,000, 5,500, something like that.
Q. Of those 5,500, five percent of them are patients that are not your patients?
A. That are seen for examination and a report. Actually that's probably high, five percent is probably high, I probably see about -- let's see. That's about right, about four to six a week, that's about right,
Q. Four to six per week where you provide the report?
A. Yeah, that's altogether. That's not necessarily just for Defense attorneys, for Plaintiffs' attorneys, and for the Industrial Commission of Ohio, and for second opinions, and people who need a second opinion before surgery, that sort of

thing.

Q. Have you worked with Mr. Krohngold before?

A. Yes, he has asked me before-

Q. And with other lawyers in his office?

A. I'm not sure what office he's in. If you tell me what office, I'll tell you.

MR. KROHNGOLD: Keller and Curtin.

THE WITNESS: Yes.

Q. Now, Doctor, I was looking in your file, can I take a look at it, if I could?

A. Certainly.

Q. And in the file is a -- why don't. you tell me what this is, it begins Page 1 and it's written in red?

A. This is an examination form that I use on all of my patients, all of my new patients, actually, whether they're for examination report, or ones that I am treating, I use the same form-

Q. Now, is that your handwriting on that?

A. Yes, my handwriting.

Q. And then there is --

A. It's done in red so I can read it better.

Q. Okay. Then when you -- what are the little

numbers that are on the front of the various entries?

A. At one point when we first made up this form, we thought we could somehow computerize the things so we could say a number instead of the whole sentence. It doesn't work. The patients' variations are so great, that it just doesn't work out, so we don't do that.

Q. So do you actually dictate a report?

A. Yes, dictate the report.

Q. Okay. Now, Doctor, when you are acting as a treating physician rather than an expert consultant, as you are in this case, and you're treating a patient, do you have an opportunity to observe that patient over a number of different visits?

A. Well, it depends, I would say that some patients that's true. Other patients I only see once or twice, and they're well, and they go home-

But patients that have a chronic problem that are going to require extensive treatment, you would have an opportunity to observe them and treat them over a number of

different occasions?

A. Well, you've already qualified it by saying people who are sick for a long period of time, would I see them for a long period of time, and I would say yes.

Q. And when you're able to do that, you get to know the patient to an extent on a personal level?

A. Yes.

Q. And you have an opportunity over a number of different occasions to analyze their particular problems?

A. As they are at those times, yes.

Q. And, in this particular case, would you know Mr. Fowler if he walked in this room?

A. No.

MR. EOLMEYER: I don't have any other questions for you, Thanks, Doctor.

RE-DIRECT EXAMINATION

BY MR. KROHNGOLD:

Q. Doctor, just a couple of questions, and hopefully, we can let you get out of here.

A. That's okay.

Q. Under the rules of Court, you're not allowed to treat Mr. Fowler. You're only permitted to see him on one occasion, examine him, and render your opinion, is that correct?

MR. BOLMEYER: I object- I'm not sure that's the rule, but I'll object.

Q. Well, you can't treat him. You conduct a legal examination, a medical legal examination, you can't render any treatment to him, can you?

A. No, I would not treat him.

Q. Mr. Bolmeyer had asked you about some records for review. Could you look at the letter you received from Mr. Sincermous, who was the other lawyer who had sent Mr. Fowler to you?

A. Yes.

Q. Could you look at the second page of your letter. Is there a reference to medical records in that letter?

A. Yes, it says please review the attached records. So I'm sure there are records, As I say, I know at least that I saw the MRI report because I referenced that in my

report, but I don't know what other ones there were.

Q. In that letter to you, is there also a reference as secretaries put in their letters to enclosures that would be contained with the letter?

A. Yes, there were enclosures.

Q. Now, Mr. Bolmeyer had asked you about arthritis and whether it's possible someone could be more easily injured if they had arthritis. Notwithstanding that statement, would you expect if this occurred to see symptoms that were consistent in your examination with the complaints of the patient, would you still expect to see some consistency between what would be an aggravation of arthritis and what you found in your examination with this patient?

MR. BOLMEYER: Objection, that's leading.

A. The arthritis wouldn't be aggravated to begin with. I mean the fact is that people with arthritis have tissues which are older, and which are more easily injured if they're going to be injured.

If they are injured, I would expect to find some consistent and anatomical findings in regards to that injury.

I think that in spite of the fact that they have arthritis, you still would expect them to have a certain picture of symptoms and -- that were consistent and with the soft tissue injury, if that's what their problem is, regardless of whether or not they have arthritis.

. Did you find that to be the case with Mr. Fowler?

. No, I did not. As I say, it was several bizarre findings, totally indicating a large degree of exaggeration of his symptoms, and even, as T showed on the x-rays, when he wouldn't move his neck at all, when I examined him, he bent his head back and forth when he had the x-rays taken.

So it's quite obvious that there is objective signs of exaggeration of his symptoms.

Mr. Bolmeyer bad asked you about taking an MRI if there was some suggestion that it would be warranted. If a patient complained

to you of numbness or tingling, would that be reason for an MRI, or to consider an MRI?

A. Yes, if he said it were present, I think that I might take an MRI.

Q. You're not takins issue with the decision to administer the MRI, are you?

A. No, oh, no.

Q. In your review of the actual film, did any of the findings support his complaints or otherwise indicate that there was anything trauma related?

A. No, it did not. The MRI did not show any nerve root involvement. The nerves were not being pressed upon by these two bulging disks.

Therefore, his complaints of numbness, bizarre as they are, had nothing to do with the bulging disk or with the nerve roots in his back.

Q. Mr. Bolmeyer bad asked you about a Dr. Gustafson and what he found, Were you aware that there was a Dr. Bray that also examined Mr. Fowler and indicated he could return to light duty approximately six weeks after the accident?

MR. BOLMEYER: Objection.

I'm not sure if I had those records originally or not, but I think I'd have to see his report.

Were you aware that when he saw Mr. Fowler about four days after the accident, be found Mr. Fowler had a full range of motion of his neck with no pain in his neck, and be could move all of his arms and his legs and that he had some tenderness, but rood range of motion of his low back?

Would that surprise you if those were his findings?

MR. BOLMEYER: Objection.

A. Well, it's certainly not what Mr. Fowler told me was the case, but, it certainly is quite often the case after automobile accidents.

Q. Okay. Were you aware that Mr. Fowler was offered a job as a night watchman by A & W Foods early in 1993; and he apparently turned it down because he didn't think he could hold the phone for more than a few seconds to make a phone call?

MR. BOLMEYER: Objection, this

is way beyond the scope of redirect.

A. No, but I think, no -- to answer your question, I would say no.

MR. KROHNGOLD: I don't think I have anything further, Doctor, at this point.

RECROSS-EXAMINATION

BY MR. BOLMEYER:

Q. Doctor, when Mr. Folwer's neck was x-rayed, were you in the room?

A. No.

Q. Do you know if it hurt him to move his neck?

A. No.

MR. BOLMEYER: Okay. I don't have any further questions for you, Doctor.

MR. KROHNGOLD: That's all, Doctor.

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

(Deposition concluded; signature waived)

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CERTIFICATE

- - -

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

I, Colleen A. Fox, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named witness, Richard S. Kaufman, M.D., was by me first duly swcrn to testify the truth, the whole truth snd nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to stenotypy in the presence of said witness, afterwards transcribed, and that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid-

I do further certify that this deposition was taken at the time and place in the foregoing caption specified, and was completed without adjournment.

I do further certify that I am not a relative, employee or attorney of either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 3rd day of March, 1995.

Colleen A. Fox, RPR, Notary Public, in and for the State of Ohio.

My commission expires May 9, 1998.

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