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CLERK
SUPREME COURT OF VIRGINIA

MAY 23 1995

Supreme Court of Virginia

RECORD NO. 942034

JAN 22 1995

**FRANCONIA ASSOCIATES and
THE FISCHER GROUP, INC.,**

Appellants,

v.

ALGERNON CLARK,

Appellee.

JOINT APPENDIX VOLUME I

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COPY

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VIRGINIA:

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IN THE CIRCUIT COURT FOR FAIRFAX COUNTY
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

ALGERNON (ALLEN) CLARK

Plaintiff

v.

AT LAW NO.

126947

**FRANCONIA ASSOCIATES,
A Virginia Limited Partnership**

**SERVE: Franconia Properties, Inc.,
A General Partner
Courtland Traver, Registered Agent
8280 Greensboro Drive, #900
McLean, VA 22102**

*Served
Oct 12 93
on GLI*

and

THE FISCHER GROUP, INC.

**SERVE: Courtland Traver, Registered Agent
8280 Greensboro Drive, #900
McLean, VA 22102**

Defendants

MOTION FOR JUDGMENT

NOW COMES Plaintiff ALGERNON (ALLEN) CLARK, by Counsel, and for cause of action states as follows:

JURISDICTION & VENUE

1. Plaintiff ALGERNON (ALLEN) CLARK ("CLARK") is a resident of the County of Fairfax, Virginia
2. Defendant FRANCONIA ASSOCIATES ("FRANCONIA") is a Virginia Limited Partnership, which owns, inter alia, the Springfield Mall, which is located within the

County of Fairfax, Virginia.

3. Defendant THE FISCHER GROUP, INC. ("FISCHER") is a Delaware Corporation, which provides professional management services in the County of Fairfax, Virginia. Venue is thus proper.
4. The amount in controversy exceeds Ten Thousand Dollars (\$10,000). Accordingly, this Court has jurisdiction to hear and decide this matter.

STATEMENT OF FACTS

5. On April 26, 1993, CLARK was an employee of Elegant Nails, a business which leases space in Springfield Mall from Defendants FISCHER and FRANCONIA, and operates its business within the Mall. CLARK was present at his place of employment, and thus was a business invitee of the Mall. On that date, the Mall was owned by FRANCONIA, and was operated by FISCHER.
6. At or about 3:00 pm, CLARK observed an individual being pursued by other Mall employees, and learned from them that the individual had stolen money from another business in the Mall. CLARK followed the individual toward a Mall exit, designated as Exit #3.
7. Exit #3 consists of a hallway, at the end of which are four doors, arranged in a single line as two separate sets of double doors, all of which open outward. CLARK pushed open the left door on the left set of double doors, attempting to exit from the Mall. However, as he passed through the door, it failed to operate properly, and rapidly sprang back toward its closed position with great force and speed, catching or "clipping" CLARK's right leg as it closed.

8. FISCHER and FRANCONIA were aware of, or in the exercise of reasonable care, should have been aware of, the defective and dangerous condition of the door.

COUNT I

9. Paragraphs 1 - 8 above are incorporated herein by reference.
10. As the owner and operator of the Mall, a place of business to which the general public and the employees of stores doing business within the Mall are invited, FRANCONIA, its agents and employees (including Defendant FISCHER), owed a duty to Plaintiff to use ordinary care to maintain the premises in a reasonably safe condition and to use ordinary care to warn him of any unsafe condition about which FRANCONIA knew, or by the use of ordinary care should have known.
11. Defendant FRANCONIA breached the duties they owed to Plaintiff in at least the following ways:
- A. Failing to design and construct the doors in Exit #3 in a manner consistent with recognized standards of construction, design, and safety;
 - B. Failing to inspect, maintain and repair the doors in Exit #3 to insure that they operated in a reasonably safe manner;
 - C. Failing to warn Plaintiff of the dangerous and unsafe condition of the doors at Exit #3.
12. As a direct and proximate result of FRANCONIA's breach of these duties, CLARK was caused to sustain serious and permanent injuries, has been prevented from transacting his business, has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability, deformity and loss of earning

capacity; has incurred and will incur in the future hospital, doctors' and related bills in an effort to be cured of said injuries.

COUNT II

13. Paragraphs 1 - 8 above are incorporated herein by reference.
14. As the operator of the Mall, Defendant FISCHER and its agents and employees owed Plaintiff a duty to use reasonable care to maintain the premises in a reasonably safe condition and to use ordinary care to warn him of any unsafe condition about which FISCHER knew, or by the use of ordinary care should have known.
15. Defendant FISCHER breached the duty they owed to Plaintiff in at least the following ways:
 - A. Failing to inspect, maintain and repair the doors in Exit #3 to insure that they operated in a safe manner;
 - B. Failing to warn Plaintiff of the dangerous and unsafe condition of the doors at Exit #3.
16. As a direct and proximate result of FISCHER's breach of these duties, CLARK was caused to sustain serious and permanent injuries, has been prevented from transacting his business, has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability, deformity and loss of earning capacity; has incurred and will incur in the future hospital, doctors' and related bills in an effort to be cured of said injuries.

WHEREFORE, Plaintiff ALGERNON (ALLEN) CLARK prays that he be granted

judgment, jointly and severally, against the Defendants in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), his costs incurred, and for such other and further relief as he may be entitled at law.

ALGERNON CLARK
By Counsel

DAVID R. AXELSON, P.C.

By:



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J. S. GIBSON, CLERK
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ALGERNON CLARK

Plaintiff,

v.

FRANCONIA ASSOCIATES, et al.,

Defendants.

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Law No. 126947

**ANSWER AND
GROUNDS OF DEFENSE**

Defendants Franconia Associates and the Fischer Group, Inc., by counsel, for their answer to the below-numbered allegations of the plaintiff's motion for judgment, state as follows:

1. These defendants are without sufficient knowledge to admit or deny the allegations of paragraph 1. To the extent a response is required, the allegations are denied.
2. Denied.
3. Denied.
4. No response is required. This Court has jurisdiction of all matters in controversy exceeding \$1,000.
5. These defendants are without sufficient knowledge to admit or deny the allegations of paragraph 5. To the extent a response is required, the allegations are denied.
6. These defendants are without sufficient knowledge to admit or deny the allegations of paragraph 6. To the extent a response is required, the allegations are denied.
7. These defendants are without sufficient knowledge to admit or deny the allegations of paragraph 7. To the extent a response is required, the allegations are denied.

8. Denied.
9. Defendants incorporate their previous responses.
10. States a legal conclusion, no response is required.
11. Denied.
12. Denied.
13. Defendants incorporate their previous responses.
14. States a legal conclusion, no response is required.
15. Denied.
16. Denied.

Grounds of Defense

1. Plaintiff's claim is barred by his own contributory negligence.

2. The plaintiff's alleged injuries were caused, if at all, by persons other than the defendants.

WHEREFORE, these defendants respectfully request that the plaintiff's motion for judgment be dismissed with prejudice as against them and that they be awarded their costs and attorneys fees incurred herein.

FRANCONIA ASSOCIATES
THE FISCHER GROUP, INC.

By Counsel

Murphy, McGettigan & West, P.C.
225 Reinekers Lane
Suite 700
Alexandria, Virginia 22314
(703) 549-5353

By: _____

David C. Schroeder
Va. Bar #27496

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer was sent via first class mail, postage prepaid this 27th day of October, 1992 to the following:

David R. Axelson, Esq.
10617 Jones Street
Suite 301A
Fairfax, VA 22030



David C. Schroeder

1 V I R G I N I A

2 IN THE CIRCUIT COURT FOR

3 THE COUNTY OF FAIRFAX

4 - - - - - x

5 ALGERNON CLARK, :

6 Plaintiff : Law No. 126947

7 vs. :

8 FRANCONIA ASSOCIATES, :

9 et al., :

10 Defendants : Pages 1 - 288

11 - - - - - x

12 Fairfax County, Virginia

13 Tuesday, August 16, 1994

14

15 J U R Y T R I A L

16

17 BEFORE: Honorable Jane Roush

18

19 COURT REPORTER: Joan V. Cain, CSR

20

21

22

BLOCK COURT REPORTING SERVICES, INC. (202) 638-1313

COPY

1 A P P E A R A N C E S O F C O U N S E L:

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BLOCK COURT REPORTING SERVICES, INC. (202) 638-1313

1 C O N T E N T S

2 D-X C-X RD-X C-X

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BLOCK COURT REPORTING SERVICES, INC. (202) 638-1313

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1 start. Mr. Axelson, call your first witness.

2 MR. AXELSON: Call Allan Clark.

3 ALGERNON CLARK,

4 having been first duly sworn by

5 The Clerk, a Notary Public

6 within and for the Commonwealth of

7 Virginia, was examined and

8 testified as follows:

9

10 DIRECT EXAMINATION

11 BY MR. AXELSON:

12 Q. Would you state your full name, please,
13 sir?

14 A. Algernon Clark.

15 Q. And you go by Allan Clark?

16 A. Yes, I do.

17 Q. Mr. Clark, how old are you?

18 A. I'm 35.

19 Q. And where do you live?

20 A. 3431 Kipper Road, Arlington, Virginia.

21 Q. Where were you working in April of 1993?

22 A. Elegant Hair & Nail.

1 Q. And what is it that you were doing at
2 Elegant Hair & Nails?

3 A. I was a hairdresser.

4 Q. Where is Elegant Hair & Nails located?

5 A. Springfield Mall, bottom floor by
6 entrance three.

7 MR. AXELSON: May I see Exhibit Number
8 27, please. Your Honor, may I approach the clerk
9 to get witnesses (sic) and the witness to --

10 THE COURT: Yes, you may. Feel free
11 to.

12 MR. AXELSON: Thank you.

13 BY MR. AXELSON:

14 Q. I have here a diagram which has been
15 marked as Plaintiff's Exhibit Number 27. Does this
16 diagram fairly and accurately represent the layout
17 of the stores near Elegant Hair & Nails in April of
18 1993?

19 A. Yes, it does.

20 Q. I have a blowup of the exhibit. I
21 wonder if you would hold that up, please?

22 MR. AXELSON: Your Honor, first of all,

BLOCK COURT REPORTING SERVICES, INC. (202) 638-1313

1 I move the introduction of Exhibit 27 in evidence
2 at this time.

3 THE COURT: Any objection?

4 MR. SCHROEDER: No objection.

5 THE COURT: Plaintiff's Exhibit 27 is
6 admitted into evidence without objection.

7 MR. AXELSON: Thank you.

8 - - -

9 (Plaintiff's Exhibit Number 27 received
10 into evidence)

11 - - -

12 BY MR. AXELSON:

13 Q. Now, Mr. Clark, using that diagram,
14 would you please point out to the jury where
15 Elegant Hair & Nails is located in the mall?

16 A. It's right here.

17 MR. AXELSON: Are you all able to see
18 that?

19 BY MR. AXELSON:

20 Q. Now, immediately to the left, as you
21 face Elegant Hair & Nails, what's the store that
22 was there in April of 1993?

1 A. Taco Laredo.

2 Q. And proceeding further around in that
3 direction, what would be the next thing you would
4 come to?

5 A. Entrance three.

6 Q. And it's shown on there as a single set
7 of doors as compared to entrance 3-B, for example,
8 which is shown as a double set of doors. Does that
9 fairly and accurately represent the way the doors
10 were located in April of 1993?

11 A. Yes, it does.

12 Q. All right. If I were standing in front
13 of Elegant Hair & Nails, what would be the store to
14 my immediate right?

15 A. This is Kay-Bee Toy store.

16 Q. And to the right of that?

17 A. Roy Rogers.

18 Q. And those are the stores that were
19 located there in April of 1993?

20 A. Yes, they were.

21 Q. All right. Were you working at Elegant
22 Hair & Nails on the 25th of April of 1993?

1 A. Yes, I was.

2 Q. What day of the week was that?

3 A. It was a Sunday.

4 Q. And what are the hours that the shop was
5 open during -- on Sundays?

6 A. 12:00 to 5:00.

7 Q. Now, was your health good at that time?

8 A. Yes, it was.

9 Q. Was there anything wrong with your right
10 leg?

11 A. No.

12 Q. Had you had any difficulties prior to
13 1993 with your right leg?

14 A. When I was 13, I broke my right leg in
15 half.

16 Q. And did you recover from that?

17 A. Yes, I did. In high school I ran track
18 all four years.

19 Q. Had you had any difficulties since you
20 recovered from that injury with your right leg?

21 A. No, I had not.

22 Q. Did you have any difficulties with your

1 neck and back in April of 1993?

2 A. After the injury, yes, I --

3 Q. I'm sorry. Before the injury.

4 A. No, I did not.

5 Q. Now, did anything unusual happen on the
6 afternoon of April the 25th of 1993?

7 A. Yes, it did.

8 Q. And what was that?

9 A. Roy Rogers was robbed.

10 Q. Approximately what time did that happen?

11 A. About 4:45.

12 Q. In the afternoon?

13 A. Yes.

14 Q. Where were you at the time that you
15 first learned of this incident?

16 A. Standing around the front of the shop.

17 Q. Who else was standing there at the front
18 of the shop?

19 A. I was the only one, and Jackie Figueroa
20 was sitting at the front desk.

21 Q. And where is the front desk located?

22 A. To the left of the shop.

1 Q. How did you learn that Roy Rogers had
2 been robbed?

3 A. I was standing out front, and I saw
4 Mr. Schubring and a female employee come out front,
5 and they were looking around, so I figured maybe
6 somebody walked out without paying their bill. And
7 he looked in my direction just as a black gentleman
8 walked past me, and he said, "That guy just robbed
9 me. Stop him," and he took off running. And I
10 turned to my left, and I said, "Jackie, call 911
11 and tell them Roy Rogers has been robbed. Tell
12 them entrance three," and then I took off running
13 behind.

14 Q. Did Jackie pick up the phone?

15 A. Yes, she did.

16 Q. All right. Now, what path did you
17 follow? Would you show us please on this -- on the
18 chart, Exhibit 27?

19 A. I was standing about here, I ran out of
20 the shop past Taco Laredo, down this corridor to
21 the right, and I went out the left-hand set of
22 double doors.

1 Q. Which door in the left-hand set of
2 double doors did you go through?

3 A. The left door.

4 Q. Let's go to the moment as you were
5 approaching the door, please. Would you tell us
6 what you did?

7 A. As I was running down the hallway, I
8 slowed down to push the door. I put both hands
9 up. I pushed with my left hand, and I stepped out
10 with my left foot, and before I could get all the
11 way out the door, the next thing I know I heard a
12 boom, and I was looking at the pavement.

13 Q. All right. On your face? I mean, you
14 were lying on your face on the pavement?

15 A. Well, my face was on my arm. My arm
16 stopped my face from hitting the pavement.

17 Q. Did you look back at the door?

18 A. Yes, I did.

19 Q. And what did you see?

20 A. It was kind of balancing against my leg.

21 Q. Which leg?

22 A. My right leg.

1 Q. And where was your right leg?

2 A. My right ankle was in between both
3 doors, part was inside the mall and the rest of me
4 was outside.

5 Q. What did you do then?

6 A. I got up quickly because I was kind of
7 embarrassed I fell.

8 Q. Did you feel any pain at that point in
9 time?

10 A. Immediately.

11 Q. And where was the pain?

12 A. Mostly in my leg, but I felt as though I
13 had twisted my neck.

14 Q. And what did you do after that?

15 A. I kind of walked out to the bus stop and
16 stood there and watched the pursuit.

17 Q. Were you able to run at that point in
18 time?

19 A. No. That's why I stopped. I just went
20 to the bus stop.

21 Q. How far away is the bus stop?

22 A. Maybe seven, eight steps.

BLOCK COURT REPORTING SERVICES, INC. (202) 638-1313

1 Q. Did you then return to the shop?

2 A. Yes, I did.

3 Q. And how did you return to the shop; by
4 what path?

5 A. I went back through one of the doors and
6 back around the same way I came in into the shop.

7 Q. Were you able to walk normally at that
8 time?

9 A. No, I was not.

10 Q. And how were you walking?

11 A. I was limping.

12 Q. And on which foot were you limping?

13 A. Well, my right foot was the one that was
14 hurting.

15 Q. Did you have any conversation with
16 Jackie Figueroa at that time?

17 A. Yes, I did.

18 Q. Did you tell her what had happened to
19 you?

20 A. Yes. I told her that my leg had got
21 caught in the door and it hurt real bad and would
22 it be possible for her to give me a ride home.

1 Q. Did she in fact give you a ride home
2 that night?

3 A. Yes, she did.

4 Q. When you got up the next morning, what
5 happened?

6 A. Well, my alarm clock went off, and I hit
7 it with my right hand as usual, and I turned to the
8 side and stepped out of bed, and I fell flat on my
9 face.

10 Q. Why did you fall flat on your face?

11 A. I didn't realize how much my leg had
12 swollen, and the pain had increased overnight.
13 When I stepped on it, I couldn't control my
14 balance, and I fell over.

15 Q. Would you describe how your leg looked
16 at that time?

17 A. It was swollen, purple, and red.

18 Q. And where was the swelling and the
19 purple and red?

20 A. Right around my ankle.

21 Q. This would be your right leg?

22 A. Yes.

1 Q. Did you report the incident to
2 Springfield Mall?

3 A. The next day I did.

4 Q. Did you make a report or simply call
5 to --

6 A. I called to make a report, and they said
7 they would send somebody down.

8 Q. Did anyone come down the next day?

9 A. No, they did not.

10 Q. Did you call on subsequent days?

11 A. Yes, I did.

12 Q. When were you finally able to make a
13 report to the mall?

14 A. I believe Wednesday they took a report
15 over the phone.

16 Q. Now, did you have any conversation with
17 Jerry Robinson on Thursday, April the 29th?

18 A. Yes, I did.

19 Q. And was that conversation face to face
20 or by telephone to begin with?

21 A. By telephone.

22 Q. And what conversation did you have with

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1 Mr. Robinson?

2 A. I explained to him what had happened and
3 that I had made a report, and I told him that I
4 understood through other mall employees if somebody
5 got hurt in the mall, that the mall would help
6 them.

7 MR. SCHROEDER: Your Honor, I'd object
8 to what his understanding is unless someone told
9 him, you know, how the mall responds to these sort
10 of things, and I don't think it's admissible. This
11 is also getting into what we discussed earlier.

12 THE COURT: I sustain the objection.
13 You can rephrase the question, Mr. Axelson.

14 BY MR. AXELSON:

15 Q. Did Mr. Robinson agree to do anything
16 for you?

17 A. No, he did not.

18 Q. What did he tell you?

19 A. He told me that if I didn't like what he
20 had told me, to sue them.

21 Q. What did you do after talking to him on
22 the telephone?

1 A. I went around the corner in the mall to
2 Snapshot Photo and talked to the manager there,
3 Eric Wright, (phonetic) and asked him would he come
4 down with me and take photos of the door.

5 Q. Did you then go over to the door?

6 A. Yes, I did.

7 Q. And what door would this have been?

8 A. Coming from the direction I came, which
9 was outside the mall towards the door, it was the
10 far right-hand door --

11 Q. The same door that you were injured on?

12 A. Yes.

13 Q. Did you then proceed to take some
14 photographs of the door?

15 A. Yes, we did.

16 Q. And this would have been the morning of
17 April 29th?

18 A. Yes.

19 MR. AXELSON: May I see Exhibit Numbers
20 1 through 13, please?

21 BY MR. AXELSON:

22 Q. Mr. Clark, I show you a group of

1 photographs here which have been marked as
2 Plaintiff's Exhibits 1 through 13, and, in
3 addition, there are two other photographs which are
4 marked as 1-A and 5-A which are blowups of 1 and
5 5.

6 Are these the photographs that you took
7 at entrance number three on the morning of April
8 29th, 1993?

9 A. Yes, they are.

10 Q. And do they show the door that you were
11 injured on?

12 A. Yes, they do.

13 Q. All right. I'd like to take a moment to
14 go through the photographs. Looking at photograph
15 Number 1, what's shown in that photograph?

16 A. The door that injured me is in my left
17 hand. There's a mall maintenance cart and two mall
18 maintenance repairmen.

19 Q. Looking at picture Number 2 -- Exhibit
20 Number 2, what's shown in that?

21 A. The inside of the door that injured me,
22 and there's a trash can behind the door.

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1 Q. And looking at picture Number 3?

2 A. It's the outside of the door with the
3 replacement hinge.

4 Q. And looking at Exhibit Number 4?

5 A. That's the inside of the door with a --

6 Q. Closer arm?

7 A. The closer arm.

8 Q. And that's the same thing that's shown
9 in picture 5, is it not?

10 A. Yes.

11 Q. Now, what's shown in picture Number 6?

12 A. That's a normal door.

13 Q. When you say normal door, what do you
14 mean by that?

15 A. It has the cover over the hinge.

16 Q. Are these the original hinges that were
17 on the door?

18 A. Yes, that's the original hinge.

19 Q. And looking at --

20 MR. SCHROEDER: Your Honor, I just want
21 to object. I mean, this is a different type of
22 door. It doesn't have the same hinge. I don't

1 understand the relevance of it.

2 THE COURT: Picture Number 6?

3 MR. SCHROEDER: Yeah.

4 MR. AXELSON: Picture Number 6 shows the
5 original hinge that was on the door. It's for
6 comparison with picture Number 3 which has the
7 replacement hinge.

8 THE COURT: Well --

9 MR. SCHROEDER: It's a different door.

10 THE WITNESS: It's the same set of
11 doors.

12 MR. AXELSON: One second, please.

13 THE COURT: Let the lawyers do their
14 arguing for you if you would, please. You're
15 objecting at this point to the testifying? They
16 haven't actually been moved into evidence, but he
17 at this point really should just be identifying the
18 photos.

19 MR. SCHROEDER: Yeah, I did not state an
20 objection to 1 through 13 in my objections to the
21 exhibits, and I don't have an objection to the
22 photograph being an exhibit. I think testimony

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1 about it is irrelevant because the photograph is of
2 a door that's not concerned with this lawsuit. I
3 just think we're probably wasting time talking
4 about a photograph of a door that's not involved.

5 THE COURT: It's for comparison
6 purposes?

7 MR. AXELSON: Your Honor, one of the
8 things that we're going to have expert testimony
9 about is the change in the pivot point of the door
10 which is caused by the replacement of the hinge.

11 THE COURT: Well, this witness is not an
12 expert. Why don't you have him just identify what
13 these photos are, and we'll leave it up to the
14 experts on whether they are of any relevance or if
15 they're helpful to the jury.

16 MR. AXELSON: That's fine.

17 BY MR. AXELSON:

18 Q. Looking then at picture Number 6, this
19 shows a different door?

20 A. Yes, it does.

21 Q. With a different kind of hinge?

22 A. Yes.

1 THE COURT: At Springfield Mall?

2 THE WITNESS: At Springfield Mall.

3 BY MR. AXELSON:

4 Q. And, in point of fact, it's the door
5 immediately adjacent to the door that hurt you, is
6 it not?

7 A. Yes.

8 Q. Looking at picture 7, is that your arm
9 in picture 7?

10 A. Yes, it is.

11 Q. And you're holding the door open?

12 A. Yes, I am.

13 Q. Now, the remainder of these pictures
14 were all taken at the same time, were they not?

15 A. Yes, they were.

16 Q. I'd like to refer you to picture Number
17 12, please. Would you take a look at that? What's
18 shown in that picture?

19 A. The inside of the door, a trash can
20 immediately behind the door.

21 Q. Was that trash can there on the day that
22 you were injured?

1 A. Yes, it was.

2 Q. Would you describe it to the jury,
3 please?

4 A. It's a concrete trash can with a plastic
5 insert and cover.

6 Q. And that was sitting there on the
7 morning -- or excuse me -- on the afternoon of the
8 25th of April?

9 A. Yes, it was.

10 MR. AXELSON: Your Honor, we'd move the
11 introduction of Photos 1 through 13 plus 1-A and
12 5-A in evidence at this time.

13 THE COURT: All right. Do you have any
14 objection?

15 MR. SCHROEDER: I don't have an
16 objection to the exhibits themselves. I do object
17 to 13 being on the same page as 14 and 15 because I
18 have objections to those exhibits.

19 MR. AXELSON: I've removed it.

20 MR. SCHROEDER: Okay. No objection.

21 THE COURT: Plaintiff's Exhibits 1
22 through 13 are admitted into evidence without

1 objection.

2

- - -

3 (Plaintiff's Exhibits Numbers 1 through
4 13 and 1-A and 5-A received into evidence)

5

- - -

6 MR. AXELSON: Your Honor, does the Court
7 permit me to hand these to the jury at this time?

8 THE COURT: Now that they've been
9 admitted into evidence, yes.

10 MR. AXELSON: Do we need to get them
11 marked by the clerk first?

12 THE COURT: Ladies and gentlemen of the
13 jury, I'm going to allow these photographs to be
14 passed among you. I'd ask that you not -- you can
15 take a look at them, but don't -- testimony will be
16 proceeding, so I ask that you not spend a great
17 deal of time with them. You'll be able to see them
18 back in the jury room with you when you're
19 deliberating. So I ask if you can both look at the
20 photographs and still continue to pay attention to
21 the testimony.

22 MR. AXELSON: Thank you, Judge.

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1 May I have the group of photographs that
2 have photograph Number 3 on them, please?

3 BY MR. AXELSON:

4 Q. Mr. Clark, I want to show you Exhibit
5 Number 3 again. Now, do you see the white markings
6 on the hinge?

7 A. Yes, I do.

8 Q. Were those white marks paint?

9 A. No, they were not.

10 Q. What were those white marks?

11 A. They look like either hammer or chisel
12 marks that scratched the paint off into the metal.

13 MR. AXELSON: May I see Exhibit
14 Number -- I think it's 36. It's this one right
15 here.

16 BY MR. AXELSON:

17 Q. Mr. Clark, I show you a device which has
18 been marked as Plaintiff's Exhibit Number 36 and
19 ask you to take a look at that, please. Is that
20 the type of hinge that was on the door that injured
21 you?

22 A. It's similar.

1 Q. What are the differences between that
2 particular hinge and the hinge that was on the door
3 that you can see in Exhibit Number 3?

4 A. On this one, it's not the same shape in
5 here.

6 Q. Okay. Is it the same color?

7 A. No. It's a different color. It's quite
8 a bit smaller.

9 Q. In terms of what?

10 A. Length.

11 Q. This is a short piece of hinge?

12 A. Yes.

13 Q. And the hinge that was on the door, did
14 it reach from the top to the bottom?

15 A. Yes, it did, and this hinge has the
16 cover plate on it.

17 Q. All right. Would you bear with me one
18 second, please? I show you an exhibit which has
19 been marked as Plaintiff's Exhibit 35. Now, does
20 that diagram have the shape of the hinge that was
21 on the door in April of 1993?

22 A. Yes, it does.

1 Q. That diagram also shows a security cover
2 coming -- which comes off of the door; is that the
3 security cover that you were referring to?

4 A. Yes.

5 Q. Which was not on the door in April of
6 1993?

7 A. Correct.

8 MR. AXELSON: And, Your Honor, we'd move
9 the introduction of Plaintiff's Exhibits 35 and 36.

10 MR. SCHROEDER: Your Honor, I just want
11 to object.

12 THE COURT: What was 35 now? The
13 diagram?

14 MR. AXELSON: 35 is the diagram showing
15 the shape of the hinge. This is the hinge itself.

16 THE COURT: Your objection?

17 MR. SCHROEDER: I object to the last
18 question about was this the hinge that was on the
19 door in April of 1993. I'd like the date
20 specified.

21 BY MR. AXELSON:

22 Q. Is this the shape of the hinge that was

1 on the door on April the 25th of 1993?

2 A. Yes.

3 Q. And that's the same hinge that's shown
4 in picture Number 3 which was taken April the 29th?

5 A. Yes.

6 THE COURT: Do you still have an
7 objection?

8 MR. SCHROEDER: Yeah. The question I
9 objected to was the security cover on it in April
10 of 1993.

11 BY MR. AXELSON:

12 Q. All right. When you took the
13 photographs, the security cover was not on the
14 hinge, correct?

15 A. Correct.

16 MR. AXELSON: All right. Your Honor,
17 we'd move the introduction of Plaintiff's Exhibits
18 35 and 36 in evidence at this time.

19 THE COURT: 36 is the actual hinge?

20 MR. AXELSON: The sample hinge, yes.

21 THE COURT: Do you have a continuing
22 objection?

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1 MR. SCHROEDER: I don't have an
2 objection to the exhibits, no. I have an objection
3 to the form of that question.

4 THE COURT: Are you satisfied now?

5 MR. SCHROEDER: Yes. They've
6 established it was on the day this picture was
7 taken. That's what I was concerned about.

8 MR. AXELSON: All right. Your Honor,
9 with the Court's permission, I'll hand these two
10 exhibits to the jury.

11 THE COURT: All right. Do you have any
12 objection, Mr. Schroeder?

13 MR. SCHROEDER: No.

14 THE COURT: So that was Exhibit 35 and
15 36?

16 MR. AXELSON: 35 and 36. 36 is the
17 actual piece of hinge.

18 - - -

19 (Plaintiff's Exhibits Numbers 35 and 36
20 received into evidence)

21 - - -

22 THE COURT: Let me make sure I've got

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1 this straight. 36 is not the actual -- it's a
2 similar-type hinge, but you didn't go and cut that
3 out of the door in question?

4 MR. AXELSON: No, I did not.

5 THE COURT: And 35 is a diagram of what
6 the hinge looked like with the security cover, and
7 that's the same as shown in Exhibit Number 3?

8 MR. AXELSON: That's correct.

9 THE COURT: But your allegation at least
10 is that there was no security cover on the day of
11 this accident?

12 MR. AXELSON: No security on the day of
13 the accident -- well, actually on the day the
14 photographs were taken, and the security -- I'm
15 sorry. The shape of that particular molding is not
16 quite the shape of --

17 THE COURT: Right. I understood the
18 testimony. All right. I'm clear. Thank you.

19 BY MR. AXELSON:

20 Q. All right. Did you have any
21 conversations with anyone while you were at the
22 door taking the pictures?

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1 A. Yes, I did.

2 Q. Who was that?

3 A. Jerry Robinson.

4 Q. And how did Mr. Robinson come to be at
5 the door?

6 A. He came out of the same entrance I did
7 with two maintenance men and the cart, the repair
8 cart.

9 Q. And what did Mr. Robinson tell you?

10 A. He told me to stop taking pictures
11 because there's absolutely nothing wrong with that
12 door.

13 Q. Did you continue to take pictures?

14 A. Yes, I did.

15 Q. And when you finished taking pictures,
16 where did you go?

17 A. Back into my shop.

18 Q. Did you seek any medical attention that
19 day?

20 A. Yes, I did.

21 Q. And where did you seek medical
22 attention?

1 A. Fairfax Hospital emergency room.

2 Q. And did you describe to the people at
3 Fairfax Hospital what had happened to you?

4 A. Yes, I did.

5 Q. Did they make any notes of what had
6 happened to you?

7 A. Yes, they did.

8 Q. Did they write that down in the -- in
9 your presence?

10 A. Yes, they did.

11 Q. What did you tell them had happened to
12 you?

13 A. I told them that I was running through
14 the door and the door recoiled and caught my foot
15 causing me to fall to the ground.

16 Q. Now, Mr. Clark, I show you an Exhibit
17 which has been marked as Plaintiff's 38-A. Is that
18 the write-up that was made at the hospital in your
19 presence?

20 A. Yes, it is.

21 Q. And the second page of that, is that the
22 instructions that you received from the hospital?

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1 A. Yes, it is.

2 Q. And your signature appears on the bottom
3 of the second page, does it not?

4 A. Yes.

5 MR. AXELSON: All right. Your Honor,
6 we'd move the introduction of Plaintiff's Exhibit
7 38-A in evidence at this time.

8 THE COURT: Any objection?

9 MR. SCHROEDER: No objection.

10 THE COURT: Plaintiff's Exhibit 38-A is
11 admitted into evidence without objection.

12 - - -

13 (Plaintiff's Exhibit Number 38-A
14 received into evidence)

15 - - -

16 THE COURT: Mr. Axelson, I'd have to say
17 I don't think that every single exhibit needs to be
18 published to the jury. I think that's very
19 distracting to the jury. Normally a couple of
20 photographs I don't have any problem with, but not
21 every single exhibit that gets admitted into the
22 case. For example, I don't think that the hospital

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1 notes will be helpful to the jury at this point.

2 BY MR. AXELSON:

3 Q. Now, what else happened to you while you
4 were at Fairfax Hospital? Were you examined?

5 A. Yes, I was.

6 Q. What sort of tests were performed on
7 you?

8 A. X-rays.

9 Q. Were you given any diagnosis?

10 A. Yes. They said it was a bad sprain.

11 Q. Of what?

12 A. My right ankle.

13 Q. Did you describe to them any other
14 symptoms that you had?

15 A. Yes. I told them I was having recurrent
16 back and neck pains.

17 MR. AXELSON: May I see Exhibits 38-B,
18 38-C, and 39-B, please? Thank you.

19 BY MR. AXELSON:

20 Q. Mr. Clark, showing you Plaintiff's
21 Exhibits 38-B, 38-C, and 39-B, are these the bills
22 that you received on that date for the services

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1 that were rendered on that date?

2 A. Yes, they are.

3 Q. And they are from which agencies?

4 A. Fairfax Radiology, Fairfax Emergency
5 Room, and Fairfax Hospital.

6 Q. That would be the emergency room
7 physicians?

8 A. Yes.

9 MR. AXELSON: Your Honor, we'd move the
10 introduction of his bills from that date in
11 evidence at this time.

12 THE COURT: Any objection?

13 MR. SCHROEDER: No objection.

14 THE COURT: Plaintiff's Exhibits 38-B
15 38-C and 39-B are admitted into evidence without
16 objection.

17 - - -

18 (Plaintiff's Exhibits 38-B, 38-C, and
19 39-B received into evidence)

20 - - -

21 BY MR. AXELSON:

22 Q. Now, Mr. Clark, were you advised to see

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1 a Dr. White?

2 A. Yes, I was.

3 Q. Did you make any attempt to see
4 Dr. White?

5 A. Yes, I did.

6 Q. What did that attempt consist of?

7 A. I called in and asked to make an
8 appointment, and they said yes, and I asked what I
9 would need to see the doctor, and they said, "You
10 would need cash up front."

11 MR. SCHROEDER: Your Honor, again, I
12 object to any hearsay testimony. They can have
13 Dr. White come in and talk about it.

14 THE COURT: I sustain the objection as
15 to what he was told.

16 MR. AXELSON: Your Honor, may I be heard
17 on this?

18 THE COURT: Approach the bench.
19 (Bench conference not recorded)

20 BY MR. AXELSON:

21 Q. Did you go to see Dr. White?

22 A. No, I did not.

1 Q. Why did you not go see Dr. White?

2 A. I didn't have the cash, the money to see
3 Dr. White.

4 Q. Now, subsequent to April the 29th of
5 1993, did you contact an attorney?

6 A. No, I did not.

7 Q. Did you contact an attorney's office?

8 A. Yes, I did.

9 Q. And who did you speak with?

10 A. Valerie Brown.

11 Q. And what is her position?

12 A. I guess she's a paralegal.

13 Q. For whom?

14 A. Gross & Wexell.

15 Q. And did you tell her what had happened
16 to you?

17 A. Yes, I did.

18 Q. Did you tell her what your symptoms
19 were?

20 A. Yes, I did.

21 Q. And what did she suggest to you that you
22 do?

1 A. That I see Dr. Smith.

2 Q. Where is Dr. Smith located? Where is
3 his offices located?

4 A. Springfield Plaza.

5 Q. Is that Dr. Andrew Smith?

6 A. Dr. Andrew Smith.

7 Q. How far away is that from Springfield
8 Mall?

9 A. Maybe a mile and a half, two miles.

10 Q. Did they make an appointment for you to
11 see Dr. Smith?

12 A. Yes, they did.

13 Q. When did you first see Dr. Smith?

14 A. I believe that was May 15th.

15 Q. Did Dr. Smith ask you to complete any
16 papers?

17 A. Yes, he did.

18 MR. AXELSON: May I see Exhibit 40-A,
19 please?

20 BY MR. AXELSON:

21 Q. Is this the document that you completed
22 for Dr. Smith?

1 A. Yes, it is.

2 Q. And you completed that on the day that
3 you were first in to see him?

4 A. Yes, I did.

5 Q. Did you give him a description of how
6 the injury occurred?

7 A. Yes, I did.

8 Q. And what was that?

9 A. That I was running through the mall door
10 and it recoiled on my leg and caused me to fall.

11 Q. And what date was that report given to
12 Dr. Smith?

13 A. 5-6-93.

14 Q. That would be May the 6th of '93?

15 A. Yes.

16 Q. So when you said May the 15th?

17 A. I was incorrect.

18 MR. AXELSON: Your Honor, we move the
19 introduction of Plaintiff's Exhibit Number 40-A in
20 evidence at this time.

21 THE COURT: Any objection?

22 MR. SCHROEDER: No objection.

1 THE COURT: Okay. 40-A's admitted
2 without objection.

3 - - -

4 (Plaintiff's Exhibit Number 40-A
5 received into evidence)

6 - - -

7 BY MR. AXELSON:

8 Q. Did you also report to Dr. Smith on your
9 neck and back pain?

10 A. Yes.

11 Q. And on your leg problems?

12 A. Yes.

13 Q. Did he give you a diagnosis for your leg
14 problems?

15 A. He said to him it looked like a second
16 degree sprain.

17 Q. And did he then proceed to treat you?

18 A. Yes, he did.

19 Q. And for how long did he treat you?

20 A. Approximately three, three and a half
21 months.

22 Q. And what did his treatments consist of?

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1 A. Back manipulations. He would wrap and
2 unwrap my ankle and check it to see if the swelling
3 had gone down then he would do manipulations on my
4 back, and neck, and he also applied electrodes to
5 my back and heat pads when I first came in.

6 Q. All right. Mr. Clark, looking at the
7 Plaintiff's Exhibit 40-A again for a moment, I want
8 you to direct your attention to the second page
9 about halfway down. Does that ask you to state the
10 date that your injury occurred?

11 A. Yes, it does.

12 Q. What does that say?

13 A. 4-18-93.

14 Q. And why does it say that?

15 A. Basically, I looked at a calendar and I
16 knew it was on a Sunday, so I just wrote down the
17 18th. I wasn't exactly sure of the date.

18 Q. Is that the date that you were injured?

19 A. No.

20 Q. When was the date that you were injured?

21 A. It was April 25th, 1993.

22 Q. One week later?

1 A. Yes.

2 Q. Now, did Dr. Smith express any interest
3 in the door itself?

4 A. Yes, he did. He told me that he
5 couldn't understand exactly how the accident had
6 occurred.

7 Q. And did he subsequently come to the
8 mall?

9 A. Yes. He met me there at lunch. He came
10 down and surprised me for lunch one day and asked
11 me to come out and show him which door it was.

12 Q. And did you do that?

13 A. Yes.

14 Q. And did you show him the door?

15 A. I pointed to it, yes.

16 Q. And did he play with, work with the
17 door?

18 A. Yes, he did.

19 MR. AXELSON: May I see Exhibit 40-D,
20 please?

21 BY MR. AXELSON:

22 Q. Mr. Clark, I show you a sheaf of

1 documents here which has been marked as Plaintiff's
2 Exhibit 40-D. There is a summary page on the top
3 of it and then a number of pages. Can you identify
4 those, please?

5 A. They look like charges from Dr. Smith.

6 Q. Are those charges for services that were
7 rendered to you by Dr. Smith?

8 A. Yes.

9 MR. AXELSON: Your Honor, I'm going to
10 withhold offering these at this time.

11 THE COURT: All right. That was
12 Plaintiff's Exhibit 40-D?

13 MR. AXELSON: Plaintiff's Exhibit 40-D.

14 THE COURT: All right.

15 BY MR. AXELSON:

16 Q. All right. Did there come a time when
17 Dr. Smith recommended that you have another
18 diagnostic test?

19 A. Yes, there was.

20 Q. And did he explain to you what kind of a
21 test he wanted you to have?

22 A. Yes.

1 Q. What was that?

2 A. It was an MRI.

3 Q. And what was that test to be of?

4 A. My right ankle.

5 Q. Did he explain to you why he wanted you
6 to have this test?

7 A. Yes.

8 Q. Why was that?

9 A. Because basically my leg hadn't healed
10 yet, and he thought there might be something wrong
11 inside and the only way to tell was the MRI.

12 Q. Did you subsequently have an MRI?

13 A. Yes, I did.

14 MR. AXELSON: Could I see Exhibits 41-A
15 and B, please?

16 BY MR. AXELSON:

17 Q. I show you two documents which have been
18 marked as Plaintiff's Exhibits 41-A and 41-B. Is
19 41-A the results of the MRI that was performed on
20 your leg?

21 A. Yes, it is.

22 Q. And did you carry that back to

1 Dr. Smith?

2 A. Yes, I did.

3 MR. AXELSON: Your Honor, we'd move the
4 introduction of Exhibit 41-A into evidence at this
5 time.

6 THE COURT: Any objection?

7 MR. SCHROEDER: No objection.

8 BY MR. AXELSON:

9 Q. And is --

10 MR. AXELSON: I'm sorry, Judge. I keep
11 interrupting you.

12 THE COURT: I'm just trying to make the
13 record. Give me a chance to say that it's admitted
14 so that the Court of Appeals -- so the Supreme
15 Court would know that.

16 MR. AXELSON: And I appreciate that,
17 Judge.

18 THE COURT: All right.

19 - - -

20 (Plaintiff's Exhibit Number 41-A
21 received into evidence)

22 - - -

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1 BY MR. AXELSON:

2 Q. Let's take a look at Exhibit 41-B
3 please. Is that the bill for the MRI that was
4 performed?

5 A. Yes, it is.

6 Q. When was the MRI performed on your right
7 leg?

8 A. The 6th -- June 10th 1993.

9 MR. AXELSON: Your Honor, we'd move the
10 introduction of 41-B in evidence at this time?

11 THE COURT: Any objection?

12 MR. SCHROEDER: No objection.

13 THE COURT: All right. Exhibit 41-B's
14 admitted without objection.

15 - - -

16 (Plaintiff's Exhibit Number 41-B
17 received into evidence)

18 - - -

19 BY MR. AXELSON:

20 Q. All right. Now referring to Exhibit
21 41-A, what was the diagnosis of your ankle at that
22 time?

1 A. Frank tear of the Achilles tendon, two
2 and a half to three centimeters.

3 Q. Thank you. Was that the first point in
4 time at which you realized that you had a ruptured
5 Achilles tendon -- or excuse me -- a torn Achilles
6 tendon?

7 A. Yes.

8 Q. Did you have any discussions with
9 Dr. Smith about what the treatment should be for
10 that?

11 A. Yes.

12 Q. And did he attempt to set you up with --
13 to see another doctor?

14 A. Yes, he did.

15 Q. And who was that doctor?

16 A. Dr. You Young.

17 Q. Were you able to see Dr. You?

18 A. Yes, I was.

19 Q. And did he provide any services to you?

20 A. We spoke, and he set up for surgery, but
21 he told me that I would need cash up front.

22 Q. Were you able to give him the cash up

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1 front?

2 A. No, I was not.

3 Q. Did he perform the surgery on you?

4 A. No, he did not.

5 Q. Who was the next doctor that you saw?

6 A. The next doctor that I saw was --

7 Q. Well, let me withdraw that question.

8 Did you eventually wind up seeing Dr. Ruben

9 Cabrera?

10 A. Yes, I did.

11 Q. And were you able to make arrangements
12 for treatment through Dr. Cabrera?

13 A. Yes, I was.

14 Q. What sort of treatment did he recommend
15 to you?

16 A. He said I would need surgery.

17 Q. Do you know when the first time that you
18 saw Dr. Cabrera was?

19 A. July 5th. July 5th, 15th.

20 Q. Bear with me one second. Did you give
21 Dr. Cabrera a statement describing what had
22 happened to you?

1 A. Yes, I did.

2 Q. And was that in the form of a letter?

3 A. Yes, it was.

4 Q. And was that letter dated?

5 A. Yes, it was.

6 MR. AXELSON: May I see Defendants'
7 Exhibit 5, please?

8 BY MR. AXELSON:

9 Q. Is this the letter that you provided to
10 Dr. Cabrera?

11 A. Yes, it is.

12 Q. And what's the date on that particular
13 letter?

14 A. July 15th.

15 Q. Of 1993?

16 A. 1993.

17 Q. Is that the first date on which you saw
18 Dr. Cabrera?

19 A. Yes, it is.

20 Q. Did he schedule you for surgery?

21 A. Yes, he did.

22 Q. And where did that take place?

1 A. Fair Oaks Hospital.

2 Q. Do you know when the surgery occurred?

3 A. Approximately six days later, the 21st.

4 Q. And what sort of surgery did you have?

5 A. A repair of the Achilles tendon.

6 Q. Were you placed under general

7 anesthetic?

8 A. Yes, I was.

9 Q. And how long were you in the hospital?

10 A. The first time I was in the hospital
11 three days, they sent me home, and I developed a
12 high fever, and they couldn't understand where it
13 came from so they sent me back to lower the fever
14 before they sent me home.

15 Q. How long were you in the hospital total
16 at that time?

17 A. Six days.

18 Q. And did you go back in on the same day
19 that you came out?

20 A. Yes, I did.

21 Q. So you were in the hospital from July
22 the 21st through the 27th?

1 A. Yes.

2 MR. AXELSON: May I see Exhibits 43-D
3 and 43-E and 44-C, please?

4 THE CLERK: 43-D?

5 MR. AXELSON: Yes. It should be the
6 following one and then drop down.

7 BY MR. AXELSON:

8 Q. Now, Mr. Clark, showing you what has
9 been marked as Plaintiff's Exhibit 43-D, is that
10 the hospital bill for the surgery that was
11 performed on your ankle and the hospitalization
12 July the 21st through the 24th?

13 A. Yes, it is.

14 Q. And looking at Plaintiff's Exhibit 43-E,
15 is that the bill for the anesthetist that
16 participated in the surgery?

17 A. Yes, it is.

18 Q. And showing you Plaintiff's Exhibit
19 44-C, is that the bill for the 24th through the
20 27th of July?

21 MR. AXELSON: Your Honor, we'd move the
22 introduction of these exhibits in evidence at this

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1 time.

2 MR. SCHROEDER: I do have an objection,
3 Your Honor. They haven't shown that these are
4 reasonable and necessary. I think it requires
5 expert testimony.

6 THE COURT: All right. I sustain the
7 objection to those exhibits.

8 MR. AXELSON: That's fine, Your Honor.
9 To their introduction at this time?

10 THE COURT: Yes.

11 MR. AXELSON: Your Honor, we'd also move
12 in evidence at this time Defendants' Exhibit 5
13 which is the letter or statement prepared by
14 Mr. Clark.

15 THE COURT: Well, you'll have to have it
16 marked as your exhibit.

17 MR. AXELSON: That's fine. Any
18 objection?

19 MR. SCHROEDER: I don't have any
20 objection. It's my exhibit.

21 THE COURT: You want to have it marked
22 in as a plaintiff's exhibit, don't you,

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1 Mr. Schroeder?

2 MR. SCHROEDER: Yes, I do.

3 MR. AXELSON: I think 47 would be the
4 next number we would use.

5 THE COURT: Okay. So this will be
6 Plaintiff's Exhibit 47, and it will be admitted
7 into evidence without objection.

8 - - -

9 (Plaintiff's Exhibit Number 47 received
10 into evidence)

11 - - -

12 BY MR. AXELSON:

13 Q. Mr. Clark, did Dr. Cabrera recommend
14 that you have any -- that you wear or use any
15 devices after the first surgery?

16 A. Yes.

17 MR. SCHROEDER: Your Honor, it's the
18 phrasing of the question. It's hearsay, and
19 Dr. Cabrera can testify about it. I'm just
20 concerned about how it comes in.

21 THE COURT: All right. To be perfectly
22 honest with you, I was reading Plaintiff's 47. I

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1 was doing what I told the jury not to do, and I
2 didn't even hear the question. Why don't you go
3 ahead and rephrase it, Mr. Axelson?

4 BY MR. AXELSON:

5 Q. Since shortly after your surgery, have
6 you worn any devices?

7 A. Yes. I wear a leg brace.

8 Q. And was that at the recommendation of
9 your doctor?

10 A. Yes, it was.

11 Q. And do you know what the cost of that
12 leg brace was?

13 A. Four hundred and some odd dollars plus
14 the shoe.

15 MR. AXELSON: Now, may I see Exhibit
16 42-B, please?

17 BY MR. AXELSON:

18 Q. Mr. Clark, referring to Plaintiff's
19 Exhibit 42-B, I would ask that you take a look at
20 that exhibit. Is that Dr. Cabrera's bill for the
21 services that he rendered to you?

22 A. Yes, it is.

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1 Q. And does it reflect the dates on which
2 you received service from Dr. Cabrera?

3 A. Yes, it does.

4 MR. AXELSON: Your Honor, I fully expect
5 exactly the same objection that Mr. Schroeder made
6 before. I'm going to again move the introduction
7 of Plaintiff's Exhibit 42-B in evidence at this
8 time.

9 THE COURT: Do you have any objection,
10 Mr. Schroeder?

11 MR. SCHROEDER: Same objection.

12 THE COURT: I sustain the objection at
13 this time. You, of course, can reintroduce it
14 later with the doctor.

15 MR. AXELSON: Thank you, Judge.

16 BY MR. AXELSON:

17 Q. Now, has Dr. Cabrera placed you on any
18 limitations in what you can do?

19 A. Yes, he has.

20 Q. And what are those limitations?

21 A. No sports activities, no walk racing, no
22 running, no dancing, and no jumping.

1 Q. And has he told you that those
2 limitations are permanent?

3 A. Yes, he did.

4 Q. When was the last time that you saw
5 Dr. Cabrera?

6 A. August 2nd.

7 Q. Of this year?

8 A. Yes.

9 MR. AXELSON: Your Honor, with the
10 Court's permission, I would like Mr. Clark to step
11 down and raise his pants leg so the jury can see
12 his right leg.

13 THE COURT: Any objection,
14 Mr. Schroeder?

15 MR. SCHROEDER: No objection.

16 THE COURT: All right. Go ahead.

17 BY MR. AXELSON:

18 Q. If you would step down here, Mr. Clark.
19 All right. Just go ahead and raise both your left
20 and your right pant leg, please. Now, is this the
21 brace that you're referring to?

22 A. Yes.

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1 Q. And would you roll down your right sock,
2 please and turn your leg.

3 A. (Complied).

4 Q. Now, on the back left-hand side of your
5 right ankle, there's a scar there. Is that the
6 scar from the surgery --

7 A. Yes, it is.

8 Q. -- that Dr. Cabrera performed on you?

9 A. Yes.

10 Q. And would you place your -- just
11 stand -- sort of back up and put your two legs
12 together so the jury can see the size of your
13 calves. Put your feet together.

14 A. (Complied).

15 Q. All right. And while you're standing
16 up, just turn completely around, please.

17 A. (Complied).

18 Q. All right. Thank you. And prior to
19 your injury in April of 1993, were your calves
20 approximately the same size?

21 A. My right calf was larger.

22 Q. Now, after you were injured, Mr. Clark,

1 did you go back out to look at the door that
2 injured you?

3 A. The next day.

4 Q. And would you describe to the jury
5 please how the door operated?

6 A. I was wondering exactly how it had
7 sprung back on me, so I opened the door, and as I
8 opened it, the further I opened it, the harder it
9 was to open, and when I would let it go, it would
10 swing back real fast and just would slam and then
11 it would bounce.

12 MR. AXELSON: May we approach the bench
13 one second?

14 THE COURT: Yes, sir.

15 MR. AXELSON: Judge, this is the point
16 in time at which I want to introduce Exhibit 46
17 which is the videotape. Mr. Clark participated in
18 making the videotape.

19 MR. SCHROEDER: Same objection to the
20 videotape. It's not representative. I also think
21 it's something that if it comes in at all it should
22 be done with the expert, but I think Mr. -- it's

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1 too prejudicial.

2 MR. AXELSON: I took the videotape.

3 Mr. Clark handled the door during the taping.

4 THE COURT: Ladies and gentlemen of the
5 jury, I'm going to send you out for an early lunch
6 right now. We normally break for lunch at 1
7 o'clock. I'd ask that you come back promptly at 2
8 o'clock. I don't know if with the new parking
9 garage if you still have trouble parking. Did you
10 have trouble parking this morning? Well, I should
11 say if you had trouble parking this morning, it
12 doesn't get any better after lunch. So if you
13 choose to use this extended lunch hour to leave the
14 courthouse for lunch, give yourself plenty of time
15 to come back and find a parking spot. We'll see
16 you back promptly at 2 o'clock.

17 - - -

18 (The jury left the courtroom at 12:43 p.m.)

19 - - -

20 THE COURT: All right. Why don't I see
21 the videotape.

22 MR. AXELSON: Yes, sir, Judge.

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1 Mr. Koerner has corrected me. That's yes, ma'am,
2 Judge.

3 THE COURT: Don't worry, Mr. Axelson.
4 It happens all the time. And the videotape is
5 Plaintiff's 36?

6 MR. AXELSON: 46.

7 THE COURT: Plaintiff's 46. I'm sorry.

8 MR. SCHROEDER: May I move around so I
9 can see?

10 THE COURT: Oh, of course.

11 MR. AXELSON: Judge, some explanation I
12 think would be in order. You're going to -- and
13 Mr. Clark will testify to this when the time
14 comes. There are four sequences. They concern two
15 different doors. The first sequence that you'll
16 see, Mr. Clark is standing holding the right door
17 open. He lets it go and it closes.

18 THE COURT: This is the right door of
19 entrance three?

20 MR. AXELSON: No. This is a separate
21 entrance. By the time we got around to trying to
22 take these pictures, entrance three had been

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1 altered. So we located two more doors that open in
2 the same direction that have the same replacement
3 hinge that are the same size, same manufacturer,
4 have the concealed overhead closer as the door that
5 injured Mr. Clark. They open the same way.

6 THE COURT: What do you mean when you
7 say replacement hinge?

8 MR. AXELSON: If I may see the exhibits
9 that have been introduced in evidence. Referring
10 to Exhibit 10, this is the replacement hinge shown
11 there. Exhibit 6 shows those are the hinges that
12 were originally on the door.

13 THE COURT: Okay. I thought this was
14 the door in question.

15 MR. AXELSON: That is the door in
16 question.

17 THE COURT: The morning after the
18 accident?

19 MR. AXELSON: Well, four days after the
20 accident.

21 THE COURT: But that's the condition of
22 the door the day of the accident?

1 MR. AXELSON: It is.

2 MR. SCHROEDER: No, it isn't. It is
3 not.

4 MR. AXELSON: With the exception
5 possibly of the security cover.

6 THE COURT: All I'm asking about is the
7 use of the word "replacement." Replacing what?

8 MR. AXELSON: Replacing the original
9 hinges.

10 THE COURT: It originally looked like
11 Exhibit Number 6, right?

12 MR. AXELSON: Yes.

13 THE COURT: And then sometime prior to
14 the accident, it more or less looked like Exhibit
15 Number 10, and you're referring to that -- this
16 darkened strip here as the replacement hinge?

17 MR. AXELSON: And that is the same --
18 essentially the same kind of hinge as that, as
19 Exhibit 36.

20 THE COURT: You've answered my
21 question. I know now what you mean by replacement
22 hinge. So you were saying there are sequences.

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1 MR. AXELSON: There are four sequences.
2 The first sequence you'll see, he's holding the
3 door open -- you were asking about the doors.
4 These were actually shot at entrance one of the
5 mall. The difference between entrance one and
6 entrance three is that entrance one has three sets
7 of double doors as opposed to entrance three which
8 had only two, and entrance one has a vestibule
9 whereas entrance three does not. In other words,
10 there's a second set of doors inside the ones
11 you'll see here.

12 MR. SCHROEDER: And the doors are taller
13 at entrance three -- or entrance one.

14 MR. AXELSON: Slightly.

15 MR. SCHROEDER: Several inches.

16 MR. AXELSON: A couple of inches. What
17 you will see, Judge, is Mr. Clark holding the
18 right-hand door --

19 THE COURT: And how long after the
20 accident were these videos made?

21 MR. AXELSON: Approximately 14 months.

22 THE COURT: All right.

1 MR. AXELSON: He is at the right-hand
2 pair of doors. There's the right-hand pair of
3 doors, the center pair of doors, and the left-hand
4 pair of doors. On the right-hand pair of doors,
5 the very first sequence, you'll see him standing
6 with the door held open. He lets it go and the
7 door closes. The second sequence, he is standing
8 on the right-hand door the center pair of doors,
9 and he holds the door open, lets it go, and it
10 closes. The third sequence he is standing holding
11 the right-hand door on the right-hand side --
12 excuse me -- on the right-hand set of doors. He
13 those the door open, and it opens and closes. And
14 the fourth sequence he's standing with the
15 right-hand door on the center set of doors, and he
16 throws it open and it closes.

17 So the first and third sequence have to
18 do with the right-hand door. The second and fourth
19 sequence have to do with the center pair of doors.

20

- - -

21 (Videotape Exhibit Number 46 played in open court)

22

- - -

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1 MR. AXELSON: Now, there is more to the
2 tape, Your Honor, but --

3 THE COURT: This is the so-called
4 replacement hinge I'm viewing right now?

5 MR. SCHROEDER: Yes.

6 MR. AXELSON: Yes.

7 THE COURT: Okay.

8 THE COURT: That's it?

9 MR. AXELSON: That's it.

10 THE COURT: Okay. I was waiting for --
11 I guess I was waiting for a door to slam shut.

12 All right. Mr. Schroeder, what's your
13 objection?

14 MR. SCHROEDER: My objection is, one,
15 its relevance; two, it's prejudicial; and, three, I
16 think they waived earlier in this case the right to
17 show these doors -- comparison between a door
18 that's not involved in this case and a door that
19 is.

20 Let me start with the last one first. I
21 deposed their door expert, and I asked the door
22 expert, "Do you feel that there are similar doors

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1 at the mall that were originally offset pivot
2 hinges replaced with ROTON continuous hinge,
3 Kawneer doors, replaced by the same people, that
4 testing those doors might aid in developing an
5 expert opinion in this case?"

6 Mr. Axelson says, "Objection. It
7 clearly would be a different situation."

8 Mr. Funk answers, "I believe the door in
9 question isn't there anymore."

10 I say, "Right."

11 Mr. Funk says, "I don't know how another
12 door is going to determine an opinion on a door
13 that's not there."

14 To me that says clearly that you can
15 find any door that's similar, but it's going to
16 operate differently. He goes on to say, "There are
17 so many different variations. There is not two
18 doors that have closed the same that I have ever
19 seen."

20 I think they're using this video, the
21 second part of the video where the last door he
22 pushes it open and it comes back fast, to say that

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1 this door is the same, and he's going to testify
2 that that's how this door acted. I don't think he
3 can do that. I think he can testify how the door
4 acted when this accident occurred if indeed he saw
5 it. He has not testified so far that he has seen
6 it. But to use the video, I think that's
7 prejudicial, I think it's cumulative, and I think
8 it's inappropriate given their earlier position on
9 the relevance of this sort of evidence.

10 THE COURT: Mr. Axelson, I have to say I
11 don't know how more probative other than the fact
12 that that door happens to be at the Springfield
13 Mall or would be if you went and did a videotape of
14 the door in front of this courthouse or the door in
15 front of this courtroom.

16 MR. AXELSON: Your Honor, you're quite
17 right. The fact that it's at Springfield Mall is
18 not why I want it in. What I'm wanting it in
19 for -- what I want it in for is to demonstrate the
20 different functions that I've described to the
21 jury. In that video you can see the functions that
22 I described, the five functions, especially in the

1 fourth sequence. You can see the door opening all
2 the way and hitting the full stop. You can see the
3 door with no backcheck, which you can see in the
4 third sequence. You can see it with no closing
5 control, which you can see in the third sequence.
6 You can, in the fourth sequence, see the latching
7 control.

8 The purpose of this is not -- the
9 purpose of this is to demonstrate those five
10 functions of a closer. That's all. I don't need
11 to make any mention of the fact that this is even
12 at Springfield Mall, although I think that's
13 probative.

14 THE COURT: I don't know that we need a
15 videotape of that. I thought it was perfectly
16 clear in the way you described it in the Motion in
17 Limine to me and the way you described it in
18 opening argument. I don't know that really this
19 videotape would be necessary to assist the jury in
20 these functions, and I think the fact that it has
21 the plaintiff in it and it appears to be some kind
22 of tests of the door in question, we all would

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1 agree that the door in question really no longer
2 exists in the condition it was in the at the time
3 of the accident.

4 MR. AXELSON: Your Honor, the defense is
5 going to say there's nothing wrong with that door.
6 I think I'm entitled to go into and show precisely
7 what it is we're saying was wrong with that door,
8 and in order to make that point, I need to be able
9 to show to the jury precisely what each one of
10 those functions is. This video makes it absolutely
11 crystal clear. No matter how many witnesses I put
12 up there to talk about it, one picture is worth a
13 thousand words. Of course it's prejudicial, yes.
14 Of course it's prejudicial. Mr. Schroeder doesn't
15 want it in because it shows exactly what was wrong
16 with the door.

17 THE COURT: I remember when I was
18 studying for the bar exam and they said for the
19 evidence portion that there's always going to be an
20 answer not admissible because it's prejudicial, and
21 the professor said, "Of course it's prejudicial."
22 Why would the other side be trying to introduce it?

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1 That's never the right answer on the bar exam." I
2 don't think it's the right answer today, to tell
3 you the truth. Of course all this evidence is
4 prejudicial to one side or the other or it
5 presumably would have no probative value.

6 So I agree with you on that point, the
7 fact that it's prejudicial. I mean the fact that
8 your client got up and showed that he was injured
9 was prejudicial to the defendant. I don't think
10 that's too helpful an analysis. But what I am
11 concerned about is perhaps Mr. Schroeder's initial
12 point that this is not the right witness. You
13 know, Mr. -- the plaintiff is not a door expert.

14 MR. AXELSON: I'm not -- all I want him
15 to do is identify this is a videotape that he
16 participated in and took. This is a videotape of
17 two different doors and this is what he did.

18 THE COURT: Why don't you just do that
19 with him identifying the videotape, and, again, at
20 the point we get to it, if that's an issue in the
21 case with the expert, the expert might be the best
22 person to discuss the door functions.

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1 MR. AXELSON: That's fine.

2 THE COURT: I would say I don't want the
3 jury to know this is at Springfield Mall I don't
4 want them to think this is some kind of scientific
5 test. At best it's just illustrative of your
6 functions.

7 MR. AXELSON: That's all I'm looking
8 for. There's no scientific test to it except that
9 it illustrates the closer functions.

10 THE COURT: Mr. Schroeder, is that --

11 MR. SCHROEDER: No. I do object to him
12 even identifying it in front of the jury. If it's
13 out of the jury's presence, I don't object to him
14 simply identifying it, but if he identifies it in
15 front of the jury, they're going to want to see it,
16 and if they don't get to see it, they're going to
17 want to know why not, and they're going to know I'm
18 the one who's saying it can't come in, and I think
19 that leads -- gives them the wrong impression.

20 On this prejudice thing, I'm arguing
21 it's too prejudicial. That's where a prejudice
22 objection comes into play.

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1 THE COURT: Let me see the tape one more
2 time. I guess when I said I was expecting
3 fireworks, I didn't see any door slamming shut,
4 frankly.

5 MR. AXELSON: That's the latching
6 control kicking in, Judge. That's why you didn't
7 see it.

8 MR. SCHROEDER: Your Honor, if the only
9 purpose they're putting this tape on is as he says,
10 to show you how a door works, they don't need to
11 show the second part of the tape. They can show
12 that from the first part, and that part is not too
13 prejudicial. It's the second part that's too
14 prejudicial.

15 THE COURT: Are you saying prejudicial
16 value? The prejudice to you outweighs its
17 probative value, if any?

18 MR. SCHROEDER: Well, the only probative
19 value is to explain, as he said, how the door
20 works. They can do that through Mr. Clark's
21 testimony and through the expert's testimony, but I
22 think using a door at Springfield Mall that's not

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1 even the same door and it has different qualities
2 is misleading.

3 THE COURT: I tend to agree with you on
4 that.

5 MR. AXELSON: Judge, I'm willing to do
6 away with describing it as being at Springfield
7 Mall.

8 MR. SCHROEDER: Every one of these
9 jurors said they had been to Springfield Mall, and
10 they might be able to identify it as being a
11 Springfield Mall door.

12 - - -

13 (Videotape Exhibit 46 played in open court)

14 - - -

15 THE COURT: You can see the buildings in
16 the reflection the glass. Now, where is the door
17 that's -- oh, that's one. Well, I tend to agree
18 with Mr. Schroeder that if you want to show
19 functions of the door, I think the first two
20 demonstrations demonstrate it.

21 MR. AXELSON: Correct, Judge, except for
22 the backcheck. You can't see the backcheck in --

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1 unless the door is moving. The only way you can
2 see backcheck is if the door is moving and then all
3 of a sudden slows down, and that's a critical
4 function. That's why the door came back on
5 Mr. Clark at entrance number three.

6 MR. SCHROEDER: You don't see the
7 backcheck in the second part of the film. Their
8 own expert is going to say that there's no
9 backcheck there.

10 THE COURT: I sustain the objection at
11 this point with this witness to the videotape being
12 shown to the jury at this time. I'm going to
13 reserve judgment as to whether it can come in
14 through the expert, or you can go ahead and outside
15 the presence of the jury have the plaintiff at
16 least identify the videotape, Plaintiff's Exhibit
17 47, as a test he participated in.

18 MR. AXELSON: 46, Your Honor.

19 THE COURT: 46, excuse me.

20 BY MR. AXELSON:

21 Q. Mr. Clark, you've seen us play the video
22 now twice?

1 A. Yes.

2 Q. That is you in the videotape?

3 A. Yes, it is.

4 Q. You participated in making those four
5 sequences of tape?

6 A. Yes, I did.

7 Q. And that occurred on the date that's
8 shown that appears on the tape itself?

9 A. Yes, it does.

10 MR. AXELSON: Your Honor, we'd move the
11 introduction of Exhibit 46 in evidence at this
12 time.

13 MR. SCHROEDER: Same objection as I've
14 stated before, Your Honor, and I'd also like to be
15 able to ask one question of Mr. Clark since we're
16 doing this out of the presence of the jury.

17 THE COURT: Voir dire on the point of
18 this videotape?

19 MR. SCHROEDER: Yeah.

20 THE COURT: Yes, sir.

21 MR. SCHROEDER: Who took the videotape?

22 THE WITNESS: Dave Axelson.

1 MR. SCHROEDER: Was anyone else there?

2 THE WITNESS: Just myself.

3 THE COURT: I'm going to sustain the
4 objection to the admissibility of the videotape at
5 this point, and with that, we're going to adjourn
6 for lunch, and I'll see you back at 2 o'clock.

7 - - -

8 (Recessed at 1:00 o'clock p.m.)

9 (Reconvened at 2:00 o'clock p.m.)

10 - - -

11 THE BAILIFF: Everyone please rise.
12 This honorable court is again in session. Please
13 be seated and come to order.

14 THE COURT: All right. Let's bring the
15 jury back.

16 MR. AXELSON: Judge, one second. I've
17 mentioned earlier that I would want to take some
18 witnesses out of order. At this point, with the
19 Court's permission, I will be doing so now.

20 THE COURT: All right. That's fine.
21 Which witness will you be calling?

22 MR. AXELSON: The first one I'm going to

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1 call is Mr. Schubring.

2 THE COURT: Peter Schubring?

3 MR. AXELSON: Yes.

4 THE COURT: And is he the very short
5 witness you mentioned?

6 MR. AXELSON: Judge, I've got maybe two
7 questions for him and that includes, "What's your
8 name?"

9 THE COURT: I was curious, when you said
10 very short, whether you meant in length or height,
11 length of his testimony or height. All right.
12 Let's bring back the jury.

13

- - -

14 (The jury returned to the courtroom at 2:03 p.m.)

15

- - -

16 THE COURT: Welcome back, ladies and
17 gentlemen of the jury. As you recall, right before
18 lunch we were in the midst of Mr. Clark's
19 testimony; however, he has some other witnesses
20 that have time constraints and have come from out
21 of town, so we're going to take two other witnesses
22 right now somewhat out of order, and then we're

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1 going to resume with the direct examination of
2 Mr. Clark, if you will bear with us.

3 Go ahead, Mr. Axelson.

4 MR. AXELSON: Thank you, Judge. Peter
5 Schubring.

6 PETER J. SCHUBRING,
7 having been first duly sworn by
8 The Clerk, a Notary Public
9 within and for the Commonwealth of,
10 Virginia was examined and testified
11 as follows:

12 - - -

13 DIRECT EXAMINATION

14 BY MR. AXELSON:

15 Q. Would you state your full name, please,
16 sir?

17 A. Peter Jerome Schubring.

18 Q. And your occupation, Mr. Schubring?

19 A. I'm a restaurant manager.

20 Q. For?

21 A. Roy Rogers, Springfield Mall.

22 Q. And you've been there for some time?

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1 A. Six years.

2 Q. And you were working as a restaurant
3 manager in Springfield Mall on April the 25th of
4 1993, correct?

5 A. On a Sunday.

6 Q. Was there a theft from your store on
7 that particular day?

8 A. Yes, there was.

9 Q. And quite a commotion resulted as a
10 result of that?

11 A. Correct.

12 Q. Did you observe Mr. Allan Clark, the
13 plaintiff in this case, after the theft had taken
14 place?

15 A. Yes, I did.

16 Q. And where were you headed at that time?

17 A. I was heading through entrance three
18 where the man who took the money went. And I was
19 on duty in the back room, and my employees informed
20 me we'd been robbed. So I came up and went around
21 the hallway out to entrance three, and I saw
22 Mr. Clark coming back towards me, and he was

1 limping.

2 Q. Was he inside the mall or outside the
3 mall?

4 A. He was inside the mall, and he was going
5 towards -- he wasn't quite to Taco Laredo, and he
6 was headed back towards his store.

7 Q. Mr. Schubring, I'm showing you what has
8 been marked Plaintiff's Exhibit 27 and introduced
9 in evidence. Would you identify please the
10 location on this diagram of your store?

11 A. Either my glasses are bad or I can't
12 make -- oh, here's Roy Rogers.

13 Q. And the Taco Laredo you're referring to
14 is?

15 A. Right here.

16 Q. And entrance number three is right up
17 there?

18 A. Right there.

19 MR. AXELSON: I have no further
20 questions for Mr. Schubring.

21 THE COURT: Any cross-examination?

22 - - -

1 CROSS-EXAMINATION

2 BY MR. SCHROEDER:

3 Q. Good afternoon, Mr. Schubring.

4 A. Good afternoon.

5 Q. Was there anybody else at Roy Rogers
6 running after this thief when it happened?

7 A. There was one of my employees. I did
8 not see him until I met him outside. He was
9 already on the outside of the building.

10 Q. Were you running after the thief as
11 well?

12 A. I did not see him leave my store. I was
13 just informed he went out towards that way.

14 Q. After that though --

15 A. After that is when I left.

16 Q. Okay. Did you see Allan Clark fall down
17 as he was going through the doors?

18 A. No. He was limping back.

19 Q. So you didn't see him until after he was
20 coming back?

21 A. Right.

22 MR. SCHROEDER: I don't have anything

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1 further.

2 THE COURT: All right. Any redirect?

3 MR. AXELSON: Thank you, Mr. Schubring.

4 No redirect and we have no further need for this
5 witness.

6 THE COURT: All right. Thank you very
7 much, sir. You're free to go. Thanks for coming
8 today. Mr. Axelson, call your next witness,
9 please.

10 MR. AXELSON: Alan Funk.

11 MR. SCHROEDER: Your Honor, may we
12 approach?

13 THE COURT: Yes, sir.

14 (At side bar:)

15 MR. SCHROEDER: I just want to bring it
16 to the Court's attention, pursuant to the Harrison
17 case, right now before he starts testifying. I'm
18 going to object to any opinions the witness gives.
19 His opinions that he gave at the deposition were
20 not based on any facts in evidence. In fact, it
21 was based on assumptions, and I think he cannot do
22 that under the Strawderman versus Commonwealth.

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1 Have you seen my trial brief in this matter?

2 THE COURT: No.

3 MR. SCHROEDER: Can I given you a copy?

4 THE COURT: Yes, sir.

5 MR. SCHROEDER: You don't need to look
6 at that now to determine this question I don't
7 think, but the Court is aware that an expert cannot
8 base his opinion on presumptions; he has to base it
9 on facts in evidence.

10 THE COURT: Well, he can be asked
11 hypothetical questions as long as there's some
12 basis to the facts here in evidence.

13 MR. SCHROEDER: I'm just saying there's
14 no basis for the opinion based on the facts in
15 evidence, and I just want the Court to be aware
16 that I will be objecting, assuming his testimony is
17 consistent with his deposition.

18 THE COURT: I'll just take it on a
19 question-by-question basis.

20 Go ahead, Mr. Axelson.

21 ALAN R. FUNK,

22 having been first duly sworn by

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1 The Clerk, a Notary Public
2 within and for the Commonwealth of
3 Virginia, was examined and
4 testified as follows:

5 - - -

6 MR. AXELSON: Bear with me one second,
7 Your Honor. Your Honor, Mr. Funk has a document
8 that I need which is right back here.

9 DIRECT EXAMINATION

10 BY MR. AXELSON:

11 Q. Would you state your full name, please,
12 sir?

13 A. Alan R. Funk.

14 Q. And, Mr. Funk, by whom are you employed?

15 A. Atlantic Door Control Incorporated.

16 Q. And what is Atlantic Door Control?

17 A. We are a distributor for sales, service,
18 installation of automatic and manual door closers.

19 Q. How long have you been in this position?

20 A. I've been in this position since July of
21 '91.

22 Q. And what is your position within

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1 Atlantic Door Control?

2 A. President and owner.

3 Q. And prior to that, for whom have you
4 worked in the field of doors?

5 A. I've worked for Spork Associates
6 (phonetic) as a manufacturer's representative for
7 all types of door and hollow metal wood and door
8 hardware, also for Builders Hardware Corporation as
9 a sales representative.

10 Q. Any other organizations you work for?

11 A. I've worked for Tri-state Automatic
12 Doors building automatic doors and manual closures,
13 was the vice president and general manager.

14 Q. And what is your educational background,
15 sir?

16 A. I have a Bachelor of Science in business
17 from Clatsburg University (phonetic).

18 Q. Are you a member of any professional
19 organizations?

20 A. I am a current member of the Door &
21 Hardware Institute, which is a professional
22 organization for the door hardware industry.

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1 Q. Have you held any positions within the
2 Door & Hardware Institute?

3 A. I have been past president, vice
4 president, and activities chairman.

5 MR. AXELSON: Your Honor, we would
6 submit that Mr. Funk is qualified as an expert in
7 the field of manual doors. Mr. Schroeder, do you
8 have any questions concerning his qualifications?

9 MR. SCHROEDER: Not at this time.

10 THE COURT: Is there any objection to
11 him being qualified as an expert?

12 MR. SCHROEDER: I do not.

13 THE COURT: All right. The motion is
14 granted. Mr. Funk is qualified as an expert
15 witness in the area of manual doors.

16 Ladies and gentlemen of the jury, let me
17 take a moment to explain to you what it means when
18 we say that somebody is an expert witness.
19 Normally witnesses are limited to testifying as to
20 facts within their knowledge. If a witness is
21 qualified as an expert in an area, that means that
22 he is allowed to give his testimony in the form of

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1 opinions so as long as the opinions are within his
2 field.

3 Now, I have qualified Mr. Funk as an
4 expert in the field of manual doors, so he can
5 testify in forms of opinions as long as they're
6 within that general field. You still need to
7 evaluate his testimony, however, and consider the
8 basis for his opinion, the manner by which he
9 arrived at the opinion, and the underlying facts
10 and data on which he relied in order to reach his
11 opinions.

12 Go ahead, Mr. Axelson.

13 MR. AXELSON: Thank you, Judge.

14 BY MR. AXELSON:

15 Q. Mr. Funk, have you had an opportunity to
16 examine certain photographs in this case which have
17 been admitted into evidence as Plaintiff's Exhibits
18 1 through 13?

19 A. Yes, I have.

20 Q. And I'm going to hand these to you now.
21 You've previously had an opportunity to examine
22 those photographs?

1 A. Yes.

2 Q. All right. Were you able to determine,
3 from looking at those photographs, what -- who the
4 manufacturer of that particular door was that's
5 shown in for example -- well, it would be any of
6 the doors that's shown in Exhibits 1 through 13?

7 A. The manufacturer of the door assembly is
8 Kawneer.

9 Q. And were you able to determine, from
10 looking at those pictures, what sort of closer that
11 door is equipped with?

12 A. This door is equipped with a Kawneer
13 Husky Sam -- they call it a Sam-II offset arm
14 closer.

15 Q. And do you know what hinges that door
16 would typically or normally be equipped with when
17 installed?

18 A. They would be technically called an
19 offset pivot hinge with a top assembly, middle
20 assembly, and bottom assembly.

21 Q. Now, referring or directing your
22 attention to photograph Number 3, Plaintiff's

1 Exhibit Number 3, are those offset pivot hinges
2 shown -- or is that an offset pivot hinge shown in
3 photograph Number 3?

4 A. No, it is not.

5 Q. What is that particular hinge?

6 A. This hinge is a ROTON 780-210 continuous
7 gearage.

8 Q. All right. And I would like you to take
9 a look at --

10 MR. AXELSON: May I see the hinge
11 please, and 35 as well? Exhibit 35. It's
12 previously been admitted. It's the diagram of the
13 hinge.

14 THE CLERK: That's a copy. That's not
15 the original.

16 MR. AXELSON: Well, I'll go ahead and
17 use the copy at this time.

18 BY MR. AXELSON:

19 Q. Mr. Funk, I want to show you what's
20 previously been admitted into evidence as
21 Plaintiff's Exhibit Number 35 and a section of
22 hinge which has been marked as Plaintiff's Exhibit

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1 36. Would you take a look at those, please?

2 A. (Complied).

3 Q. Now, you have described a particular
4 kind of hinge. Is that the hinge which is shown on
5 the particular door?

6 A. This is the new design Haggard Hinge
7 (phonetic), which is a new name of the company that
8 bought ROTON, but it is in almost complete design
9 the same hinge relative to the function and basic
10 outline. The snap cover may be slightly different.

11 Q. All right. And referring to Plaintiff's
12 Exhibit Number 35, the diagram of the hinge, does
13 that diagram show the hinge with the exception of
14 the snap cover that appears in the photograph,
15 especially photograph Number 3?

16 A. Yes.

17 Q. Now, do you have an opinion as to how
18 replacing the offset pivot hinges with a ROTON
19 continuous gear replacement hinge changes the
20 geometry of the door?

21 MR. SCHROEDER: Your Honor, I'd object
22 to the relevance of the question. He has to link

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1 it to what effect this has on the accident. I
2 think whether or not the pivot point is changed is
3 completely irrelevant unless there's some link
4 between it and the accident.

5 MR. AXELSON: Judge, I believe there is,
6 and I believe that's what Mr. Funk will testify to.

7 THE COURT: I overrule the objection.

8 BY MR. AXELSON:

9 Q. Do you have an opinion as to how the
10 replacement of the hinge would have affected the
11 pivot point of the door?

12 A. The replacement ROTON hinge would
13 definitely have an effect on the pivot point, the
14 way the door will now currently swing out.

15 Q. And did you prepare a diagram which
16 shows this?

17 A. Yes.

18 Q. Mr. Funk, I show you a very poor copy of
19 a diagram which has been marked as Plaintiff's
20 Exhibit 35-A. Does that diagram show how the pivot
21 point is changed as a result of the substitution of
22 the ROTON hinge for the original offset pivot

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1 hinges?

2 A. This illustrates in a very, you know,
3 simple manner that the original offset pivot point,
4 which is where the offset pivot is mounted
5 physically to the end of the door, will pivot out
6 at a 90-degree angle from that point. They call it
7 a three-quarter offset, so it stands three quarters
8 off the door.

9 Q. First of all, would you show us where
10 the pivot point appears on -- well, let's start
11 with the frame. Would you show me where the frame
12 of the door appears on this diagram?

13 A. The frame of the door will be ending
14 right here, and the door comes in right at this
15 point, and the offset pivot on a normal door would
16 set and swing there.

17 Q. There's an X here. What is that X?

18 A. That is the true pivot point of the
19 three-quarter offset.

20 Q. So this would be where the door would
21 pivot originally?

22 A. Yes.

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1 Q. All right. Is there a mark on here
2 which indicates the pivot point using the
3 replacement hinge?

4 A. It's hard to see from a distance. The
5 physical attachment of the ROTON hinge will cause
6 the pivot point to move approximately two inches
7 over toward the end of the frame, and that's where
8 the gear and the -- the gears and the actual motion
9 of the new hinge will start and open.

10 Q. All right. Is the pivot point using the
11 ROTON hinge shown on this diagram?

12 A. Yes.

13 Q. And would you point that out to the
14 jury, please?

15 A. There's a little X right here, and that
16 can be easily shown also off the diagram. If this
17 was a little larger you could superimpose this on
18 here, and the pivot point has to move over in order
19 to have that door mount properly.

20 Q. Assuming this is the door, just place
21 this on the -- just hold it there against the
22 diagram in the position the door would be in a

1 closed position, please.

2 A. The door?

3 Q. Yes.

4 THE COURT: Mr. Funk, you might -- if
5 you could possibly do this so I can see this as
6 well.

7 BY MR. AXELSON:

8 Q. I tell you what. Maybe let's step down
9 here in front, make it easy. Except now you can't
10 see.

11 THE COURT: I'll step down and walk
12 around.

13 MR. AXELSON: Thank you, Judge.

14 BY MR. AXELSON:

15 Q. All right. Would you lay the pen or
16 that marker there on the door as it would be in a
17 closed position?

18 A. Okay. The door would be in the closed
19 position from the frame right here. That's where
20 the door would sit on an offset normal hinge.

21 Q. And if you opened the door while it has
22 the offset pivot hinge, would you place the marker

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1 in the position that it would then occupy?

2 A. (Complied).

3 Q. Is this marked up here on the --

4 A. Yeah. It's not very clear, but here is
5 the center point of the -- of where the hinge would
6 be and the door would be positioned.

7 Q. Now, is that the ROTON hinge you're
8 referring to?

9 A. That is the three-quarter offset Kawneer
10 pivot.

11 Q. I'm sorry. What is this dashed line
12 over here?

13 A. Okay. This is the -- I can't see. It's
14 so hard the way it's copied.

15 Q. Well, I'll hand you your original then.

16 A. Yeah. Let me see the original.

17 THE COURT: I think I might have that.

18 THE WITNESS: Yeah. The offset hinge is
19 sitting in this position because that's where the
20 original offset pivot is sitting here. So
21 essentially you're attaching the physical offset
22 pivot to the end of the door, and that's the pivot

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1 point, and then it swings like that.

2 BY MR. AXELSON:

3 Q. All right. Now, put the pen in the
4 original position of the door, please, or the
5 marker, and now move it to where it would be after
6 the hinge had been replaced with a ROTON
7 replacement hinge. Is this shown up here?

8 A. Yes. We move over -- I can't scale
9 exactly.

10 Q. What I want you to do is demonstrate the
11 door opening.

12 A. This would be the door opening of an
13 offset pivot. This would be the door opening with
14 a ROTON continuous hinge.

15 Q. And does the door actually move further
16 out with a ROTON hinge?

17 A. Yes. It actually extends what they call
18 a swing clear.

19 Q. Thank you. Now, what impact does the
20 change in the pivot point and the final end
21 location of the door have on the door closer?

22 A. In the normal three-quarter offset, the

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1 original hinge -- pivots that were installed, it is
2 designed so that the door will open to its
3 90-degree or, in some cases, 105 degree of
4 opening. So the spindle is templated in such a way
5 that it will open that door to a 90-degree opening
6 with an arm that's attached to the top of the door
7 spindle and attaches to a slide track on the arm.

8 Q. Is that arm shown on any of these
9 photographs?

10 A. I believe it is. Right here. Picture
11 Number 4 shows it.

12 Q. Would you point out the arm, please?

13 A. This is what they call a Sam-II arm.
14 It's concealed in the head of the frame, and then
15 it has a slide track in the top of the door. It's
16 an architectural design for not seeing the arm as
17 you open the door unless the door is 90 degrees
18 open. It's really for architectural look.

19 Q. Now, is the door able to open to the
20 same point when you've moved the backcheck point --
21 excuse me -- when you've moved the pivot point?

22 A. In my opinion, I don't feel it's

1 possible to have that door open to a full 90
2 degrees because you're physically moving the pivot
3 point in a different position. The arm is a fixed
4 length. It's designed to open to a certain degree,
5 and then that hits what they call dead stop. It
6 means that's the final limit the door can go. It
7 hits a plastic stop and a track on the top of the
8 door. If it goes past that, then it's supposed to
9 stop with the shock absorbing force.

10 Q. All right. Let's talk for a minute
11 about the functions of a closer, specifically the
12 Kawneer Husky concealed overhead closer that was
13 installed on this particular door. What are the
14 functions of a closer?

15 A. A closer has several functions. One --
16 the main function of a closer is to keep a door
17 under control at all times opening and closing. It
18 has an opening force on the closer that is fixed
19 with a spring, an integral spring and piston is the
20 closer which is hydraulically controlled with
21 valves. So the closer has an opening force. It
22 has at the -- at about 75 degrees it's supposed to

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1 go into what they call backcheck.

2 Q. What is backcheck?

3 A. Backcheck is a cushioning effect caused
4 by the internal part of the closer and the
5 hydraulics to prevent the door from being damaged
6 by going past 90 degrees and causing stress on the
7 door.

8 Q. All right. If I'm pushing a door open,
9 the door is in a closed position and I'm starting
10 to push it open, what am I doing as far as the
11 closer is concerned during, say, the first 50 or 60
12 degrees of opening?

13 A. You're compressing a coil spring inside
14 of a cylinder.

15 Q. And what's the function of that spring?

16 A. A spring is to keep the door, give it a
17 pressure of opening and a returned spring of close.

18 Q. So when I take my hands off it, that
19 spring's going to expand?

20 A. And it's going to open back up, which is
21 really primarily designed for your closing
22 function.

1 Q. All right. When I get the door to past
2 the 60-degree point, when I get it to 75 or 80
3 degrees, what is the closer doing?

4 A. The closer, under normal adjustments,
5 should be going into backcheck mode. The backcheck
6 on a Kawneer Husky closer is fixed. It's a fixed
7 backcheck, which means it's designed to start to --
8 the hydraulic -- the internal fluid is cushioning
9 now, and you're actually forcing fluid out of the
10 closer to make it open, so you're giving it that
11 cushion effect so that the door will not go past 90
12 or into a mode that might damage the door.

13 Q. If the backcheck is functioning properly
14 and I have my hands on the door and I push it
15 fairly firmly and then take my hands off so that
16 the door is swinging free but I've given enough
17 push that it keeps going past when I let go of it,
18 what is the backcheck going to do?

19 MR. SCHROEDER: Your Honor, I object. I
20 don't what relevance -- I don't think there's been
21 any testimony that's how the door was used.

22 THE COURT: I sustain the objection to

1 the question as phrased.

2 MR. AXELSON: Your Honor, it's a
3 hypothetical question at this point. I'm asking
4 him to describe the functions of the door.

5 THE COURT: You didn't phrase it in the
6 form of a hypothetical. If you want to do that,
7 you can. You have to be pretty clear about all the
8 facts you're asking him to assume, and there has to
9 be some basis in the record for each of those
10 facts.

11 BY MR. AXELSON:

12 Q. Mr. Funk, assuming that we are dealing
13 with a Kawneer Husky concealed overhead closer
14 which is fully functional and assuming that the
15 backcheck is set to kick in at the 70-degree mark
16 and assuming that a person were to give the door a
17 push in opening the door and then release the door
18 at the point when the door was approximately 45 or
19 50 degrees open and assuming that the push was
20 sufficient that the door continued to open beyond
21 that point, what would the backcheck do, in your
22 opinion, at that point?

1 A. If you're forcing -- you're making the
2 door open?

3 Q. Yes?

4 A. The backcheck is going to dampen the
5 opening. The pressure on that door to open is
6 going to be extreme, I mean, to get that door to go
7 past where it's supposed to go.

8 Q. What do you mean by dampening?

9 A. There's -- the backcheck is a cushioning
10 effect, so it is protecting the door from going
11 past 90 degrees.

12 Q. All right. Now, going back to the
13 functions of a closer. Assuming that I push the
14 door and continue to push it, what's going to
15 eventually happen?

16 A. If the backcheck is --

17 Q. I'm just -- I'm not concerned about the
18 backcheck at this point.

19 A. It's going to come to a point of dead
20 stop. Dead stop is a term that means it has come
21 to the limit of its opening degree by physical
22 restraint.

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1 Q. All right. Now, the next thing I want
2 you to assume is that I am standing outside the
3 door, and this is a Kawneer door equipped with a
4 Kawneer Husky concealed overhead closer, and I have
5 physically opened the door to the dead stop point
6 and I have it fully open and I now release the
7 door, assuming that the closer is functioning
8 properly, what is going to happen?

9 A. The closing speed valve will gradually
10 release the oil, and the door should take between
11 four and eight seconds to close.

12 Q. And is that control of the closing speed
13 a function of the closer?

14 A. Yes. The closing speed is adjusted --
15 is adjustable and the latch is adjustable. The
16 latch is the final degree of what they call check
17 so that the door doesn't slam closed.

18 Q. Now, of the functions that we've
19 discussed, the dead stop, the backcheck, the spring
20 compressing and then reexpanding to close the door,
21 the closing control, and the latch check, which of
22 those are adjustable on a Kawneer Husky concealed

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1 overhead closer?

2 A. Closing speed and latch only.

3 Q. And how are they adjusted?

4 A. There are two screws exposed at the top
5 of the header that can be adjusted with a standard
6 screwdriver. You rotate the screw, and you're
7 actually limiting the amount of oil passing through
8 the valve.

9 MR. AXELSON: May I have Exhibit 37-B,
10 please?

11 MR. AXELSON:

12 Q. Mr. Funk, I show you a very small
13 diagram which is marked as Plaintiff's Exhibit
14 37-B. Does that diagram show the underside of a
15 Kawneer Husky concealed overhead closer of the type
16 that was in this door?

17 A. Yes, it does.

18 Q. And are the adjusting screws shown on
19 that particular?

20 A. Yes, they are.

21 MR. AXELSON: Your Honor, we'd move the
22 introduction of Exhibit 37-B in evidence at this

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1 time.

2 THE COURT: Any objection?

3 MR. SCHROEDER: I did object to it. I
4 still don't know why it's relevant. I don't see
5 what any of this has to do with the accident.

6 THE COURT: All right. Well, at this
7 point I'll allow it in just to illustrate the
8 expert's testimony.

9 - - -

10 (Plaintiff's Exhibit Number 37-B
11 received into evidence)

12 - - -

13 BY MR. AXELSON:

14 Q. All right. Would you point out -- I
15 think we better step down here in front of the jury
16 or they're not going to be able to see it. Would
17 you point out the two adjusting screws?

18 A. They're located underside of the
19 closer. There's two screws that can be turned
20 clockwise or counterclockwise, depending on the
21 amount of speed and latch adjustment.

22 Q. Step down there so the jurors can all

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1 see it.

2 A. It's hard to see. It's really way up
3 into the top, but it is there.

4 Q. Now, assuming that you are dealing with
5 a properly adjusted and functional Kawneer Husky
6 concealed overhead closer, when you push -- if one
7 were to give the door a push open and were to
8 engage the backcheck, you would be putting a
9 certain amount of energy into the closer, would you
10 not?

11 A. Yes.

12 Q. Would any of that energy that you put
13 into the closer that was absorbed by the backcheck
14 be returned in the closing?

15 A. No.

16 Q. Assuming that you are opening a door
17 with a properly functioning Kawneer Husky concealed
18 overhead closer, you would be compressing a spring,
19 would you not?

20 A. Yes.

21 Q. Would any of that energy be returned to
22 the closing of the door?

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1 A. Under normal conditions, your speed of
2 close will be controlled by the valves.

3 Q. But the energy that you put into
4 compressing the spring will be returned?

5 A. Yes, it will.

6 Q. The speed at which the return occurs is
7 controlled not by the spring but by the valves?

8 A. By the valves.

9 Q. Now, looking at these pictures, again
10 pictures 1 through 13, especially pictures 3 and 10
11 and 9, do you see any markings on the door --
12 excuse me -- the hinge that's shown there?

13 A. Yes, I see marks.

14 Q. And have you had an opportunity to
15 review the depositions that were given by Brian
16 Embrey and Nelson Beavers (phonetic)?

17 A. Yes.

18 Q. Did they describe to you the maintenance
19 that they performed on this particular door?

20 A. Yes, they did.

21 Q. What maintenance did they tell you that
22 they had performed on this particular door?

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1 MR. SCHROEDER: Your Honor, we're
2 getting a little bit of hearsay here. He can base
3 his opinion on it, but I think he can't start
4 recounting what it is he remembers out of these
5 depositions.

6 MR. AXELSON: Let me rephrase that.

7 BY MR. AXELSON:

8 Q. Mr. Funk, are you aware of the testimony
9 that was given by Mr. Beavers and Mr. Funk (sic) as
10 to the maintenance that they performed on this
11 door?

12 A. Yes.

13 Q. Does the maintenance that they described
14 as having performed on this door include tightening
15 the screws -- excuse me -- the bolts that hold the
16 hinge on?

17 A. Yes.

18 Q. Now, keeping in mind that fact and the
19 markings that are on the hinge that are shown
20 there, do you have an opinion as to what those
21 markings are on the hinge?

22 MR. SCHROEDER: Your Honor, I will

1 restate my objection I made the first time he was
2 going to express an opinion. I don't see the
3 relevance of it to how this accident occurred and
4 how this door operated in which it could have
5 caused this accident. He said he would explain to
6 you why it was his first opinion had something to
7 do with this accident. I haven't heard it.

8 THE COURT: Mr. Schroeder, let me stop
9 you there. Ladies and gentlemen of the jury, we're
10 going to take a brief recess. We'll be right
11 back.

12 - - -

13 (The jury left the courtroom at 2:37 p.m.)

14 - - -

15 THE COURT: All right. Mr. Schroeder,
16 if you have an objection, just get up and state the
17 legal basis of the objection and not make speeches
18 to the jury. All right? That sounds more like a
19 closing argument to me, which is why I sent the
20 jury out. Save something for closing argument.

21 What's the legal basis of your objection
22 to this line of questioning about the marks on the

1 door.

2 MR. SCHROEDER: It's irrelevant. It has
3 nothing to do with his opinion about how this
4 accident occurred, how the door operated such that
5 it could cause this accident.

6 THE COURT: Well, this expert is not
7 necessarily going to be the one and only expert who
8 links up everything. I mean, presumably he's going
9 to testify that the door was malfunctioning. Now,
10 do these marks on the door, Mr. Axelson, have
11 anything to do with whether the door was
12 malfunctioning or not?

13 MR. AXELSON: Yes, Judge, they do. I am
14 almost there.

15 THE COURT: Why don't you proffer for me
16 what these marks on the door have to do with it?
17 Are you saying it's improperly maintained?

18 MR. AXELSON: Your Honor, what it is is
19 the marks that were made in removing the cover
20 plate to get to get the bolts. The reason they had
21 to get to the bolts was because they were coming
22 loose. The reason they were coming loose is

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1 because there was no backcheck on the door.

2 The vibration is causing the door bolts
3 to come loose. That's the point, and that's part
4 of our showing that there was knowledge on the part
5 of the defendants and an opportunity to correct
6 this problem. The whole thing is tied together.
7 They have moved the pivot point on the door. As a
8 result, the door, when it's being opened, is
9 hitting the dead stop. That's causing vibration.
10 That's causing the bolts to work loose. It's all
11 tied together. I just haven't quite gotten to that
12 step yet.

13 THE COURT: To the linkage yet
14 is that what you're saying?

15 MR. AXELSON: Yes. I have to lay the
16 groundwork for all of this, the maintenance that's
17 done on the door, the cover plate, the markings on
18 the hinges, all of which I've done. And now we're
19 just about at the point where I ask Mr. Funk does
20 he have an opinion as to what the marks were, how
21 the closers were functioning, all the rest of it.

22 THE COURT: And that's based on reading

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1 the depositions of the two people maintained the
2 doors?

3 MR. AXELSON: No. There's other things
4 that go into it. His description of how the
5 accident occurred, from Mr. Clark. The door
6 closing very quickly on him, that goes into it as
7 well. He also has the deposition testimony of
8 Steven Johnson who is postal worker who has not --
9 or mail carrier who has not testified as yet.

10 MR. SCHROEDER: Your Honor, I'm sorry.
11 I was not intending to make a speech in front of
12 the jury. And I wouldn't be making these
13 objections if I hadn't taken his deposition. I
14 know that he's going to say, at least on
15 cross-examination, that the hinge has nothing to do
16 with this door closing too fast. I know that he's
17 going to say that these marks have nothing to do
18 with the door closing too fast.

19 He's using these marks as to infer that
20 the door was not properly maintained, that -- he's
21 making presumptions about why these marks were on
22 the door. He makes the presumption that the marks

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1 were there because the door was out of alignment,
2 but he'll also say that alignment has nothing to do
3 with whether or not this door closed too fast. The
4 whole issue here is did the door close too fast,
5 and I'm telling you that these hinges and all that
6 have nothing to do with that, and that's why I'm
7 getting frustrated because I know that's what he's
8 going to say, and I think we're really wasting a
9 lot of time on all these nonissues.

10 THE COURT: Well, I can't rule ahead of
11 time that that's what he's going to say because I
12 don't know that. I wasn't at his deposition, and I
13 have to take it as it comes. Mr. Axelson's telling
14 me that he's going to link this all of up somehow
15 and it has something to do with the accident, and
16 certainly the plaintiff's entitled to put on his
17 case, and you're entitled to put on
18 cross-examination.

19 MR. SCHROEDER: It's just one of those
20 situations where the cat's going to be out of the
21 bag, and I'm going to ask you to put it back in.
22 By that time they will have heard it. That's the

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1 problem I have with it.

2 THE COURT: Well, again, I don't know
3 until I hear your cross-examination. Mr. Axelson
4 has told me that the markings on the door are going
5 to show that because the door had a different pivot
6 point because these hinges were changed that it
7 didn't reach backstop, and that put some kind of
8 strain on the door which caused the door to be
9 poorly -- improperly maintained --

10 MR. AXELSON: Vibrating, and that causes
11 the bolts to work loose which is the maintenance
12 that they performed.

13 THE COURT: And that caused the door to
14 slam shut?

15 MR. AXELSON: No. No.

16 THE COURT: The accident was not caused
17 by there being failure of the backstop or markings
18 on the door.

19 MR. AXELSON: It is, Judge. It is
20 caused by a failure of backcheck. What Mr. Clark
21 did was push the door open and then let go of it.
22 The door, if it had had backcheck, it would have

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1 slowed down on its way to being fully opened. It
2 wouldn't have hit the full stop point, and then if
3 it had had closing control, it would have come back
4 slowly, and if it had had latching control, it
5 would have gotten to that six inches and would have
6 slowed down even more and not been able to grab his
7 ankle.

8 What caused this accident was the fact
9 that the door had no hydraulic control. The reason
10 that it had no hydraulic control was because they
11 had changed the pivot point, among other things,
12 and that was causing the door to slam against the
13 full stop position, and that was putting stress on
14 the closer, and that caused the closer to go
15 completely out of whack so that it no longer had
16 any hydraulic action whatsoever: no closing
17 control, no latching control, no backcheck. And
18 one of the symptoms of that is, when it keeps
19 hitting the full stop position, that that puts a
20 tremendous amount of vibration on the door and on
21 the hinge, and the bolts work loose. That's why
22 they had to keep coming in and tightening the

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1 bolts.

2 THE COURT: Okay. This witness can say
3 all that within a reasonable degree of certainty
4 within his field?

5 MR. AXELSON: Mr. Funk?

6 THE WITNESS: Yes.

7 THE COURT: I don't need a proffer.

8 MR. AXELSON: Yes, I mean that's --

9 THE WITNESS: What really brought this
10 diagram into play was the diagram that you sent me
11 to tell me that it didn't -- you know, on the
12 diagram -- defendant's diagram that showed the
13 swing of the door being the same. It's nowhere
14 near the same. The pivot point is definitely not
15 the same. It does have an effect.

16 THE COURT: I'm going to overrule the
17 objection that started all of this, based on your
18 promise to link this all up for the jury.

19 MR. AXELSON: I'll do my best, Your
20 Honor.

21 THE COURT: Let's bring the jury back.
22 I'm satisfied that the markings on the door have

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1 some probative value as to whether this door was
2 functioning properly or not at this point.

3 - - -

4 (The jury returned to the courtroom at 2:44 p.m.)

5 - - -

6 THE COURT: Welcome back, ladies and
7 gentlemen of the jury. Go ahead, Mr. Axelson.

8 BY MR. AXELSON:

9 Q. All right. Mr. Funk, you have had the
10 benefit, have you not, of reading the deposition of
11 Steven Johnson?

12 A. Yes.

13 Q. And you have had the benefit of reading
14 the various statements as to how the accident
15 occurred which were provided to you by Mr. Clark?

16 A. Yes.

17 Q. And you have had the benefit of the
18 depositions of Mr. Embrey and Mr. Nelson Beavers,
19 who were employees of the defendants, correct?

20 A. Yes.

21 Q. And you've had the benefit of viewing
22 the photographs which have been admitted into

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1 evidence, photographs 1 through 13, correct?

2 A. Correct.

3 Q. And you of course have the benefit of
4 your experience in the field of manual doors?

5 A. Yes.

6 Q. Now, do you have an opinion, to a
7 reasonable degree of certainty, as to those
8 markings which appear on the photographs on the
9 hinge, as to what caused those?

10 A. In the photograph Number 3 and Number
11 10, the marks on the edge of the door, in my
12 opinion, appear to be where they've pried off the
13 cover plate on several occasions to get the -- to
14 get to the bolts to tighten the bolts.

15 Q. And what is the significance of them
16 having to get to the bolts to tighten the bolts?

17 A. I believe the testimony of the
18 maintenance staff indicated that the bolts kept
19 coming loose.

20 Q. And what is the significance of the fact
21 that the bolts kept coming loose?

22 A. Something was putting stress on the

1 bolts, the attaching-through bolts. They go
2 completely through the door, and they are actually
3 the attachment and what holds the hinge to the face
4 of the door.

5 Q. And what is it that would be putting, in
6 your opinion, stress on those bolts?

7 A. I believe it's the door going past its
8 normal stopping point and hitting a dead stop
9 position, causing some stress on the closer and on
10 the hinges.

11 Q. Would it do that if the backcheck were
12 properly functioning, in your opinion?

13 A. If the backcheck was properly adjusted
14 under normal conditions, the backcheck would
15 prevent the door from hitting dead stop.

16 Q. Now, do you have an opinion to a
17 reasonable certainty based on your experience as to
18 whether or not the door -- strike that.

19 You have read Mr. Clark's version of how
20 this incident occurred?

21 A. Yes.

22 Q. Do you have an opinion to a reasonable

1 degree of certainty as to whether or not the door
2 could have closed rapidly enough to catch
3 Mr. Clark's foot if the closing control and the
4 latch control were properly functioning?

5 A. Can you restate that again?

6 Q. Do you have an opinion as to whether or
7 not the door could have closed rapidly enough to
8 catch Mr. Clark's foot if the closing control and
9 the latch control had been functioning properly?

10 A. I don't see how it could come back that
11 fast and catch somebody's foot as the door is
12 closing under normal conditions.

13 Q. Do you have an opinion as to whether or
14 not the backcheck was properly -- would have --
15 strike that. Let me ask the question a different
16 way.

17 Do you have an opinion, to a reasonable
18 certainty, as to whether or not the door could have
19 reached its full open position and then closed
20 rapidly enough to catch Mr. Clark's foot if the
21 backcheck had been functioning properly?

22 A. The backcheck is designed to prevent the

1 door from going past the normal degree of opening
2 and causing a recoil effect that would cause the
3 door to come back too fast.

4 Q. So if the -- do you have an opinion as
5 to whether or not the backcheck was functioning,
6 assuming that the door closed rapidly enough to
7 cash Mr. Clark's foot?

8 A. In my opinion, the backcheck probably
9 was not functioning as it was designed in order to
10 have that door come closed with the speed at which
11 it did.

12 Q. All right. Mr. Funk, assuming that I am
13 opening the door and I open it relatively slowly
14 and reach, say, the midpoint, 45 degrees, and
15 release it, and I want to compare that with a
16 situation in which I open the door very rapidly and
17 release it. Is the speed at which the door is
18 going to close affected by the speed at which I
19 open the door?

20 A. It should not have an effect. You can
21 open the door slowly or quickly, and the door
22 should still close at normal speed.

1 Q. All right. Now, assuming that I am
2 opening the door -- this is a Kawneer door equipped
3 with a Kawneer Husky concealed overhead closer --
4 do I gain any information in the process of opening
5 the door, as I'm simply pushing on the door, that
6 tells me how fast that door is going to close?

7 A. No.

8 MR. AXELSON: May we approach the bench,
9 Your Honor?

10 THE COURT: Yes, sir.

11 MR. AXELSON: Your Honor, this is the
12 point in time which I would go in with this witness
13 the videotape.

14 THE COURT: I thought about the
15 videotape, and I think I agreed with Mr. Schroeder
16 that the probative value is outweighed by the
17 prejudice. I think no matter how many disclaimers
18 you put on it, they're going to think it's some
19 kind of scientific test with doors at Springfield
20 Mall and not the same doors far removed in time,
21 and I just don't feel the probative value is --

22 MR. AXELSON: Note my objection, Your

1 Honor.

2 THE COURT: Yes, sir.

3 MR. AXELSON: I have no further
4 questions for this witness, Your Honor.

5 THE COURT: All right.

6 Cross-examination.

7 - - -

8 CROSS-EXAMINATION

9 BY MR. SCHROEDER:

10 Q. Good afternoon, Mr. Funk. All the
11 opinions that you've given today, you've made the
12 assumption that there's normal conditions, normal
13 use of the door, haven't you?

14 A. Yeah, I said that, normal.

15 Q. In fact, your opinions in this matter
16 were formulated completely as of May 24th, weren't
17 they?

18 A. I don't -- what date was that?

19 Q. That was the date you had your
20 deposition taken?

21 A. I believe so, yeah.

22 Q. And at that point in time, you had spent

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1 five hours working on this case; isn't that
2 correct?

3 A. Yes.

4 Q. And at that point in time, you had not
5 seen the doors at the mall in person?

6 A. No, just pictures.

7 Q. Okay. And at that point in time, you
8 had not looked at any technical literature other
9 than the manufacturer's drawings that you've shown
10 to the jury today?

11 A. Kawneer, yes.

12 Q. And you had not read any depositions at
13 that point in time, had you?

14 A. No.

15 Q. In fact, all the information you got
16 about the testimony of the depositions or what
17 people said happened came through what Mr. Axelson
18 had told you at that point in time; isn't that
19 correct?

20 A. I believe so, yes.

21 Q. And when I took your deposition on May
22 24th, I asked you if there was anything else left

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1 to do, and isn't it true that then the only thing
2 you said was left to do in the case was to talk to
3 someone at Kawneer?

4 A. Yes.

5 Q. Did you talk to someone at Kawneer?

6 A. Not to the factory, but I talked to
7 several distributors who sell Kawneer.

8 Q. Okay.

9 THE COURT: How do you spell the name of
10 that company?

11 THE WITNESS: K-A-W-E-E-R.

12 MR. SCHROEDER: I think there's an N in
13 there.

14 THE COURT: I just -- every time someone
15 says it I hear it differently. I thought first it
16 was Conair like my hair dryer. All right. I'm
17 with you. Thank you.

18 BY MR. SCHROEDER:

19 Q. You talked a little bit about backcheck
20 today, and isn't it true that the reason for
21 backcheck is so that the door does not open beyond
22 its 90-degree or 105-degree stop point?

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1 A. Its recommended, yes, degree of opening.

2 Q. Backcheck is a built-in design in a
3 Kawneer closer, isn't it?

4 A. It's fixed.

5 Q. It's not adjustable?

6 A. Correct.

7 Q. Now, you've said today that the pivot
8 point changed in the door because they put the
9 ROTON hinge on a door with a Kawneer closer; isn't
10 that correct?

11 A. Yes.

12 Q. And that essentially inhibited the swing
13 from 90 degrees to about 75 degrees full opening?

14 A. I don't know the exact degree that it
15 did, but it is definitely limited to less than 90
16 degrees.

17 Q. Okay. Now, no industry standard that
18 you're aware of says that it's a bad practice to
19 use ROTON hinge with Kawneer closer?

20 A. No, I do not know of anything that's
21 stated to that fact.

22 Q. Okay. And what is ANSI, A-N-S-I? What

1 does that stand for?

2 A. American National Standards Institute.

3 Q. And the use of a ROTON hinge with a
4 Kawneer closer, that's not prohibited under ANSI
5 standards, is it?

6 A. I do not believe so.

7 Q. And you're not aware of any publication
8 that says in that sort of publication, the ROTON
9 with the Kawneer closer, that there's something
10 wrong with that?

11 A. I've seen nothing to that effect, no.

12 Q. You actually sell the ROTON replacement
13 hinge, don't you?

14 A. We sell ROTON and some other products.

15 Q. And you sell the Kawneer closer, too,
16 don't you?

17 A. We sell it as a service item.

18 Q. Now, you've been to other malls and saw
19 the same sort of configuration in doors, the ROTON
20 hinge with the Kawneer closer, haven't you?

21 A. Yes.

22 Q. And also other manufacturers of

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1 concealed overhead closers. And in those doors
2 there was the same effect, the door only opened 75
3 to 80 degrees max?

4 A. Correct.

5 Q. Now, are you aware of any legal
6 requirements concerning on how far doors have to
7 open?

8 A. According to the new ADA standard, a
9 minimum of 32 inches of clear opening.

10 Q. Okay. How far did this door that we're
11 talking about open?

12 A. I'm not really sure. I never really
13 measured it, but depending on whether -- what
14 degree it opened, I believe it was a 36-inch door.
15 I'm assuming that. But are you asking me whether
16 it's met the standard?

17 Q. Yes.

18 A. I really can't say without putting an
19 actual tape measure on that door to the degree of
20 opening it's supposed to be for wheelchair
21 accessibility.

22 Q. Well, let me ask you this. If it was

1 36-inches wide and it opened 75 degrees, would it
2 have met the standard?

3 A. I can't say unequivocally yes, but in
4 most cases, it probably would.

5 Q. Well, I just want to be sure about
6 something. This door did satisfy all legal and
7 industry standards regarding how far it opened,
8 didn't it?

9 A. I don't have that knowledge because I've
10 never been to the site, and, again, I did not
11 measure the door. But if the door has a clear
12 32-inch opening, which is the degree -- the point
13 at which the door and the frame actual clear
14 opening is, I'm just not aware of getting that
15 measurement, but 32 inches is the standard.

16 Q. Okay. Well, you remember having your
17 deposition taken?

18 A. Yes.

19 Q. And do you remember being asked, "And it
20 also satisfied industry standards for how far that
21 door has to open at a minimum," and you responded,
22 "Yes"?

1 A. Well, I guess I did.

2 Q. Now, the use of a ROTON hinge, that
3 doesn't make the door close any faster by itself,
4 does it?

5 A. No. The hinge has no purpose of closing
6 or opening other than supporting the door through
7 its entire opening and closing cycle. It serves
8 the same purpose technically as an offset pivot
9 does. It is a hinge that keeps the door in line.

10 Q. If the closing of this door took four
11 seconds or more from full open to close, it
12 satisfies all standards regarding closing speed,
13 doesn't it?

14 A. Yes. They give a variation of between
15 four and eight seconds according to Kawneer, which
16 is certainly a safe amount of time.

17 Q. Are you aware of -- given the
18 depositions and information you've received about
19 what happened in this case, are you aware of any
20 witness saying that this door took less than four
21 inches to close?

22 A. Four seconds?

1 Q. Four seconds. Excuse me.

2 A. I have to recollect; possibly the
3 postman or somebody made some remark. I don't know
4 exactly what he said, but I know that he thought
5 the door -- he avoided the door for his own
6 reasons, I guess.

7 Q. Well, we'll hear from the postman. But
8 other than the postman?

9 A. No.

10 Q. Okay. If it did take less than four
11 seconds, isn't that something that someone should
12 attend to as soon as someone makes you aware of it?

13 A. Yes. Maintenance normally, when you do
14 a check on a door, you check opening and closing.
15 You check the speed at which it closes. You check
16 the latch, make sure the door is properly supported
17 and is closing so that the door will lock at night.

18 Q. What other evidence are you relying upon
19 to make the assumption -- are you making the
20 assumption in this case that the door took less
21 than four seconds to close?

22 A. I'm making the assumption that the door,

1 in order to come back, I guess, allegedly to injure
2 someone would have to take, you know, less time
3 than four seconds -- you know, four to eight
4 seconds.

5 Q. So it's because the accident happened, I
6 take it, that you're saying this door took less
7 than four seconds?

8 A. No. A lot of the information I've
9 been -- had given to me showing different
10 conditions of the door, conditions of the hinge,
11 just the actual physical capabilities of the door
12 closer that I'm aware of.

13 Q. All right. You mentioned the condition
14 of the door. The marks on the door have nothing to
15 do with closing speed, do they?

16 A. Not with closing speed in itself.

17 Q. Okay. And if this door had been
18 adjusted many times, does that have anything to do
19 with closing speed that you know of?

20 A. If the door is in need of adjustment,
21 then that means the closing speed is not to
22 standards. The closer should be readjusted and at

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1 some point, I believe, it was stated that some
2 closers were replaced when they lost their checking
3 and closing speed.

4 Q. Who stated the closers were replaced?

5 A. I believe in some of the depositions of
6 the maintenance people there was a possibility some
7 of the closers were replaced. I don't know what
8 doors, but it's -- I mean, these are mechanical
9 devices. They don't last forever. They do need
10 replacement from time to time.

11 Q. Well, you don't know -- when you
12 formulated your opinion in this case as of May
13 24th -- you haven't changed your opinion, have you,
14 since then?

15 A. As far as what I said?

16 Q. Yes.

17 A. I don't believe so. I think the door
18 did close too fast.

19 Q. When you formulated your opinion, you
20 didn't know what the procedures were for
21 maintenance or how they did it at the mall, did
22 you?

1 A. No, but I know that the only way to
2 maintain a hinge is to -- you have to take the snap
3 cover off.

4 Q. Well, you're not really saying that the
5 installation or maintenance in this case was below
6 industry standards though, are you?

7 A. No.

8 Q. And you're not saying that the mall
9 maintenance people don't know how to do their job,
10 are you?

11 A. I'm not going to -- I'm not going to
12 state that, but I believe that the tightening of
13 the bolts on a constant basis is a symptom of
14 another problem, that these bolts should not come
15 loose periodically. The snap cover is primarily
16 there for -- to be permanently on there unless
17 there's a need of replacement.

18 Q. Whether the snap cover's on there has
19 nothing to do with how fast the door closes, does
20 it?

21 A. No.

22 Q. And whether the bolts are tight or loose

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1 has nothing to do with the door closing too fast,
2 does it?

3 A. The tightening of the bolts?

4 Q. Yes.

5 A. No, that doesn't affect the speed.

6 Q. So I just want to be clear. What are
7 the reasons that you're saying the door closed too
8 fast? What makes you think that was the case? Why
9 have you expressed that opinion?

10 A. Because when someone goes through the
11 door and the backcheck is not engaged, the door's
12 going to hit dead stop. So if the backcheck's not
13 working, then the closer is basically in failure
14 mode, and it's going to its final limit, and when
15 it hits the final dead stop, it's going to hit
16 something very solid and it's going to come back.
17 It's got the recoil at that point. If the
18 backcheck isn't controlling the closer, nothing's
19 controlling it, just the arm.

20 Q. Doesn't it depend on how fast you go
21 through the door?

22 A. Yes. I have no knowledge of how fast

1 the door was opened.

2 Q. Did you get a chance to read Jackie
3 Figueroa's testimony, a young lady who saw this
4 accident happen?

5 A. I don't believe I have that one.

6 Q. Mr. Axelson didn't give you that?

7 A. It doesn't seem to -- I don't seem to
8 recollect it.

9 Q. Are you aware that she's the only person
10 who actually saw him go through the door?

11 A. I guess you're telling me that.

12 Q. Wouldn't it have been important for you
13 to understand how this accident occurred in order
14 to give the opinion that you think this door closed
15 too fast?

16 A. I think the condition of the door could
17 cause a lot of things to happen. I don't know
18 exactly how the door physically hurt the
19 individual, but there certainly is a lot of
20 conditions here that will indicate to me that the
21 door needs work. It needs to be, you know,
22 repaired.

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1 Q. You don't see how it could be that this
2 door could come back so fast under normal
3 conditions that it could have hit Mr. Clark on the
4 back of his right ankle, do you?

5 A. I don't see how --

6 MR. AXELSON: Objection. One second. I
7 don't understand what is meant by normal
8 conditions. Does he mean properly adjusted
9 conditions? Is that what's meant by the question?

10 THE COURT: What do you mean by normal
11 conditions, Mr. Schroeder?

12 BY MR. SCHROEDER:

13 Q. How about normal use of the door as you
14 understand the condition of the door to have been?

15 A. Would it do --

16 Q. Do you see how it could have come back
17 so fast it would have --

18 A. No.

19 THE COURT: Any redirect?

20 MR. AXELSON: Yes, Your Honor.

21 - - -

22 REDIRECT EXAMINATION

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1 BY MR. AXELSON:

2 Q. Following up on that last question,
3 Mr. Funk, assuming that the closer is functioning
4 properly, does it make any difference how hard you
5 push the door?

6 A. A properly adjusted closer?

7 Q. A properly adjusted closer.

8 A. It will open until it hits check, and it
9 will close under normal speed.

10 Q. The speed that's set by the closer and
11 the spring?

12 A. Yes. Right. Whatever that closing
13 speed valve is set, under normal conditions it
14 should close at that speed.

15 Q. And if the closer has no backcheck, no
16 closing speed control, and no latch control, then
17 under those circumstances, the speed at which you
18 open the door will have an impact on how fast it
19 closes?

20 A. Absolutely. It's -- that's kinetic
21 energy. As fast as you open it, it's going to
22 close.

1 MR. AXELSON: Thank you.

2 MR. SCHROEDER: I have some recross
3 based on that last question.

4 THE COURT: All right.

5 - - -

6 RECROSS EXAMINATION

7 BY MR. SCHROEDER:

8 Q. Is it your testimony that this door had
9 no closing or latch speed?

10 A. No.

11 MR. SCHROEDER: Thanks.

12 THE COURT: All right. Thank you very
13 much. Is this witness subject to recall?

14 MR. AXELSON: One second, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. AXELSON:

17 Q. Is it your opinion, Mr. Funk, that the
18 closing speed and latching speed on this door on
19 the day that Mr. Funk was injured, that those two
20 were properly adjusted?

21 A. That's kind of the same question,
22 different, but, yes, I think that there was

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1 definitely an effect, you know, this closer had on
2 the way it closed.

3 Q. Is it your opinion that the closing
4 speed and latching speed were properly adjusted and
5 fully functional on the day that Mr. Clark was
6 injured?

7 A. I can't see how they could have been a
8 hundred-percent correct because the backcheck would
9 have taken effect, and it would have cushioned the
10 door from opening so fast.

11 MR. AXELSON: Thank you.

12 THE COURT: All right. I think the
13 witness's testimony's getting very repetitive at
14 this point, so, Mr. Funk, I'm going to thank you
15 for your time today. Is this witness subject to
16 recall?

17 MR. AXELSON: No, Your Honor. We're
18 satisfied Mr. Funk can return home.

19 THE COURT: All right. You may be
20 excused. Thank you very much.

21 Mr. Axelson, did you now want to
22 continue the direct testimony of your client?

1 MR. AXELSON: I have one other fairly
2 short witness, Mr. Johnson, that I'd like to call
3 at this point in time.

4 MR. SCHROEDER: Your Honor, I'd like to
5 approach.

6 THE COURT: Yes, sir.

7 (At side bar:)

8 MR. SCHROEDER: Renew my motion to
9 strike his testimony. It's not based on any
10 evidence that's come out today.

11 THE COURT: What's your response to
12 that?

13 MR. AXELSON: Your Honor, I think he's
14 testified based on -- he's established what he
15 relied on was the photographs, his review of the
16 depositions of Mr. Embrey and Mr. Beavers, his
17 understanding of the closer. I think it's
18 adequately supported, well supported.

19 MR. SCHROEDER: All that went to was
20 this issue about the hinge and the backcheck which
21 he said had nothing to do with how fast this door
22 closed. He said he was going to tie it all

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1 together. He hasn't done it. In fact, Mr. Funk
2 said he doesn't see how this accident could have
3 happened.

4 THE COURT: No. He said he doesn't see
5 how it could have happened if everything had been
6 adjusted correctly.

7 MR. SCHROEDER: But he also said there
8 was some adjustment; he couldn't tell how much it
9 was.

10 THE COURT: I haven't read these
11 depositions, but apparently these maintenance
12 people were constantly readjusting the screws, and
13 he says that's a sign of some kind of -- that's
14 symptomatic of some problem with the door, there's
15 some problem with the door.

16 MR. SCHROEDER: He didn't testify to
17 that.

18 MR. AXELSON: Then that's a jury issue
19 at the very least.

20 MR. SCHROEDER: That is not what he
21 testified to. I think he has to put that evidence
22 in himself. If he can't do that, then I think he

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1 can start by showing the basis for him to say
2 that. He's just giving his opinion of what he
3 recollects about a deposition.

4 MR. AXELSON: Your Honor, if
5 Mr. Schroeder wants to establish, and he certainly
6 will have an opportunity to do this, that that's
7 not the maintenance that was performed, then that
8 would go to whether there's an adequate basis for
9 Mr. Funk's testimony and his opinions. He's
10 testified as to what his opinions are and what
11 they're based on. Now, if those are wrong, that's
12 how you attack the testimony of an expert.

13 MR. SCHROEDER: I'm telling you it's
14 wrong. It is not true. It's his burden to show
15 the factual basis for his opinions, not my burden
16 to dispute an assumption -- an incorrect
17 assumption.

18 THE COURT: That's what
19 cross-examination of an expert's all about. You
20 should have pointed out on cross-examination where
21 the maintenance people didn't say that.

22 MR. SCHROEDER: What am I supposed to

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1 do? Hand him the deposition and say, "Find where
2 they say it"?

3 MR. AXELSON: If that's what it takes.

4 MR. SCHROEDER: I think it's very unfair
5 to require me to disprove something that's not in
6 evidence right now. I can do it, but I think it's
7 unfair to require it.

8 THE COURT: What I'm saying is, as I
9 told the jurors, when an expert is qualified, you
10 still need to analyze the basis for his opinion,
11 the facts on which he relied in order to reach his
12 opinion, the manner in which he gave his opinion.

13 Now, based on what I've heard -- I'm not
14 going to go back now and let him sit and read the
15 depositions to see if that was true. If that was
16 incorrect, I think it should have been attacked on
17 cross-examination.

18 MR. SCHROEDER: I can't do that unless I
19 have him sit there and read every page of that
20 deposition.

21 MR. AXELSON: The standard that
22 Mr. Schroeder is advocating is that we have to

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1 prove as a fact every single factor that goes into
2 Mr. Funk's opinion. That's not the standard. He
3 simply states what his understanding of the facts
4 are, and that's the basis of his opinion. If
5 Mr. Schroeder wants to attack it and show that
6 those facts are incorrect, he can do that.

7 THE COURT: I'm going to deny the motion
8 to strike. I think the expert's testimony can
9 stand and the jury can give what weight it wants to
10 it.

11 MR. AXELSON: Thank you, Judge.

12 MR. SCHROEDER: Thank you, Judge.

13 THE COURT: You're calling Mr. Johnson;
14 is that correct?

15 MR. AXELSON: That's correct, Judge.

16 STEVEN W. JOHNSON,
17 having been first duly sworn by
18 The Clerk, a Notary Public
19 within and for the Commonwealth of
20 Virginia, was examined and
21 testified as follows:

22 - - -

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1 DIRECT EXAMINATION

2 BY MR. AXELSON:

3 Q. Would you state your full name, please,
4 sir?

5 A. Steven Wayne Johnson.

6 Q. And, Mr. Johnson, by whom are you
7 employed?

8 A. U.S. Postal Service.

9 Q. And how long have you been working for
10 the postal service?

11 A. Six years.

12 Q. And your current route, does it include
13 Springfield Mall?

14 A. Yes, it does.

15 Q. How long has your route included
16 Springfield Mall?

17 A. A year and a half.

18 Q. Did it include Springfield Mall in April
19 of 1993?

20 A. Yes.

21 Q. Did it include Springfield Mall for a
22 period of months prior to April of 1993?

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1 A. Approximately two, three months before
2 that.

3 Q. How often would you go to the mall in
4 the course of your duties as a mailman?

5 A. I'm at the mall every day.

6 Q. That's part of your route every single
7 day?

8 A. Right.

9 Q. And how many days a week do you go
10 there?

11 A. Monday through Saturday.

12 Q. Do you have a day off?

13 A. My day off's Thursday, but I usually
14 work Thursday.

15 Q. Now, are you familiar with entrance
16 number three at Springfield Mall?

17 A. Yes.

18 Q. Is that entrance part of your normal
19 route at the mall?

20 A. Yes, it is.

21 Q. Was it part of your normal route at the
22 mall in April of 1993?

1 A. Yes.

2 Q. And do you know the defendant -- excuse
3 me -- the plaintiff, Alan Clark?

4 A. Just from delivery of the mall.

5 Q. And did you know him as an employee of
6 Elegant Nails at Springfield Mall?

7 A. Yes.

8 Q. Now, just to make certain we're talking
9 about the same place, I have here a diagram which
10 has been marked as Plaintiff's Exhibit Number 27.
11 Is this which is marked on here as entrance number
12 three the entrance that you would typically use
13 when you're delivering mail to the mall?

14 A. That's the one, yes.

15 Q. All right. Now, in the course of your
16 entering the mall, did you become aware of a
17 problem with a door at entrance number three?

18 A. I became aware of the problem. If
19 you're looking at the doors, on the outside of the
20 mall, the door on the right, the extreme right.

21 Q. And that's of the four doors at entrance
22 number three?

1 A. Right.

2 Q. And what was the nature of the problem
3 that you became aware of?

4 A. The door would not completely open. It
5 wouldn't open fully, you know, without being there
6 was some tension on the door.

7 Q. And what would happen, after you had
8 opened the door, if you released it?

9 A. Well, if you opened the door to a
10 certain point, I would say halfway or not quite
11 halfway, there was some tension on the door, and if
12 you pulled it anymore, it would spring back.

13 Q. And what was your response to realizing
14 this problem? What did you do once you realized
15 the door had the problem?

16 A. I started using another door.

17 Q. Now, are you able to relate the period
18 of time in which you became aware of this problem
19 to April the 25th, the date on which Mr. Clark was
20 injured? Are you able to say how long before that
21 date you were aware of the problem?

22 A. Maybe a couple weeks.

1 Q. Did you ever see anyone else have a
2 problem with the door in the course of your going
3 in and out of that entrance?

4 A. It's a bus stop at that entrance, and
5 I've seen people come into the mall that would use
6 the door and not be able to get through it
7 properly, you know, without looking back at the
8 door once they're through seeing that, you know,
9 gee, that door should open a little bit more than
10 that.

11 Q. And was this before the time at which
12 you came aware of Mr. Clark's injuries?

13 A. It was before.

14 Q. How did you become aware that Mr. Clark
15 had been injured?

16 A. Just on my normal delivery pattern of
17 the mall. I saw him one day or a couple days
18 prior. He seemed to be okay, and then the next day
19 I'd go and deliver -- or the next time I saw him,
20 and he had a cane or a cast with a noticeable limp,
21 and I would stop and say, you know, "What
22 happened?"

1 Q. And did he tell you how he'd been
2 injured?

3 A. He told me about the door and that he
4 was injured by that door.

5 Q. Now, are you getting any benefit out of
6 your testifying here today?

7 A. None.

8 Q. You're not being paid for your
9 testimony; you're just here to testify?

10 A. That's correct.

11 Q. Thank you, Mr. Johnson. I have no
12 further questions.

13 THE COURT: Any cross-examination?

14 MR. SCHROEDER: Yes, Your Honor.

15 - - -

16 CROSS-EXAMINATION

17 BY MR. SCHROEDER:

18 Q. Good afternoon, Mr. Johnson. Did you
19 ever make a report to anybody at the mall about the
20 way this door was acting?

21 A. No. The reason that I didn't is because
22 the mall -- their mail comes to my route. I sort

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1 their mail, but I don't see them on a daily basis
2 as far as taking their mail to their office. They
3 have a box, a P.O. Box, that's at the office that
4 they come and pick up their mail. Once I sort the
5 mail, I take it over to a box clerk, hand the mail
6 off, they put it in their box, and they pick it
7 up.

8 So as far as not -- if I was to deliver
9 their mail and see them in the office every day, I
10 probably would have said something to them, but it
11 would be almost an out-of-the-way stop for me to go
12 upstairs where their office is because I wouldn't
13 see them every day.

14 Q. So you didn't feel it was important
15 enough to go upstairs?

16 A. Well, no, not really.

17 Q. Do you know if anyone else informed the
18 mall about how this door was acting prior to the
19 accident?

20 A. I'm not sure if they did. I'm not aware
21 of it.

22 Q. Did you actually see anybody ever become

1 injured by the way this door was acting?

2 A. Not injured, no.

3 Q. Now, you say you stopped using this door
4 because -- is that because it didn't open all the
5 way and you had all these bags with you?

6 A. My bag on my shoulder, mail in my hand.

7 Q. You had some trouble getting through
8 this door that didn't open?

9 A. Right.

10 Q. So you used the other doors?

11 A. Right.

12 MR. SCHROEDER: That's all I have.

13 Thank you.

14 THE COURT: All right. Thank you very
15 much. Any redirect, Mr. Axelson?

16 MR. AXELSON: One second, Your Honor.

17 THE COURT: Yes, sir.

18 MR. AXELSON: I have nothing further for
19 this witness.

20 THE COURT: All right. Thank you very
21 much, Mr. Johnson. You're free to leave. I assume
22 Mr. Johnson's not subject to recall; is that

1 correct?

2 MR. AXELSON: That's correct.

3 THE COURT: All right. Thank you,
4 Mr. Johnson. You're free to go or you can remain
5 in the courtroom, whichever you prefer.

6 MR. AXELSON: Judge, at this point I
7 would recall Mr. Clark to the stand.

8 THE COURT: All right. I think this is
9 a good point to take our afternoon recess. I
10 normally look for some kind of point around this
11 time to do that. Ladies and gentlemen, I think
12 this morning outside of your presence I discussed
13 the trial schedule with the attorneys, and it
14 occurs to me I should tell you that as well.

15 We're going to start at 10 o'clock in
16 the morning. I normally take a break sometime
17 around 11:30. I look for a natural break in the
18 testimony, if somebody finishes a direct or if
19 somebody finishes the cross-examination. I rarely
20 interrupt counsel in the middle of one or the other
21 unless it's going to be very lengthy. So about
22 11:30 we'll take a 15-minute break, break for lunch

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1 at 1:00, have a one-hour lunch. I look for another
2 natural breaking point sometime around 3:30 in the
3 afternoon; we take a 45-minute break -- excuse me.
4 Wishful thinking -- a 15-minute break, and we
5 resume again at quarter of 4:00, and then we stop
6 for the evening sometime between 4:30 and 5
7 o'clock, and you can pretty much count on that
8 schedule.

9 On the last day of the trial, if you're
10 deliberating, you know, at that point -- as I
11 always say, you're the captain of your ships at
12 that point, and if you want to work into the -- if
13 you're still deliberating at 5 or 6 o'clock and
14 want to keep going into the evening, I generally
15 let you within reason. I don't want you here at
16 midnight deliberating, but that's the trial
17 schedule we're going to be maintaining for the next
18 couple of days.

19 All right. We'll take a break now.
20 We'll resume in 15 minutes.

21 - - -

22 (The jury left the courtroom at 3:22 p.m.)

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1

2 (Recessed at 3:22 o'clock p.m.)

3 (Reconvened at 3:43 o'clock p.m.)

4 - - -

5 THE BAILIFF: Please be seated and come
6 to order.

7 THE COURT: All right. Let's bring back
8 the jury.

9 THE COURT: Mr. Clark, you can get back
10 on the witness stand now. That's fine, and I'll
11 just remind you that you're still under oath from
12 this morning.

13 THE WITNESS: Thank you.

14 - - -

15 (The jury returned to the courtroom at 3:44 p.m.)

16 - - -

17 THE COURT: All right. Ladies and
18 gentlemen, we're now going to shift gears and
19 resume with Mr. Clark's direct examination by
20 Mr. Axelson.

21 MR. AXELSON: Thank you, Judge.

22 - - -

1 DIRECT EXAMINATION CONTINUING

2 BY MR. AXELSON:

3 Q. Mr. Clark, in some of the photographs
4 that you have been shown --

5 MR. AXELSON: May I have the Exhibits 1
6 through 13, please?

7 MR. AXELSON:

8 Q. -- specifically photograph Number 12,
9 you've described this object behind the door?

10 A. Yes.

11 Q. That's what?

12 A. A concrete trash can with a plastic
13 liner.

14 Q. And that trash can was there on the day
15 that you were injured, correct?

16 A. Yes, it was.

17 Q. Now, have you had an opportunity to look
18 at the bottom of the door adjacent to that trash
19 can, on the outside of the door?

20 A. Yes, I have.

21 Q. And did you look at the bottom of that
22 door on the morning -- or excuse me -- on April

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1 29th when you took the photographs that were shown
2 in that picture?

3 A. Yes, I did.

4 Q. Were there any markings or damage to the
5 door at the point where the door would have
6 contacted the trash can?

7 A. No, there was not.

8 Q. Now, Mr. Clark, do you have an estimate
9 as to the amount of time it took the door to close
10 from the point at which you released it, when you
11 were pushing it open, until it recoiled and hit
12 your foot?

13 A. It had to be under a second or within
14 half a step.

15 MR. AXELSON: One second, please, Your
16 Honor.

17 THE COURT: Yes, sir.

18 BY MR. AXELSON:

19 Q. Mr. Clark, you testified earlier about
20 the restrictions that Dr. Cabrera had placed you
21 on. How have those restrictions affected your
22 life?

1 A. Well, I have two teenage children, and
2 basically on the weekends I can't do anything with
3 them. I can just go watch. It makes it very hard
4 in my social life because basically all I can do is
5 go to a movie or go to dinner, and after awhile
6 that becomes boring.

7 Q. Had you done other things prior to the
8 time when you were injured --

9 A. Yes.

10 Q. -- as part of your social life?

11 A. Yes.

12 Q. Had you had other activities with your
13 children prior to the time you were injured?

14 A. Yes.

15 Q. What sort of activities had you engaged
16 in with your children before the time you were
17 injured?

18 A. Coaching them in different sports, you
19 know, shagging flies with my son, running with my
20 daughter, swimming, bowling. We did a number of
21 things just to keep it interesting.

22 Q. And you are no longer able to do those?

1 A. No, I am not.

2 Q. You live quite close to your children,
3 do you not?

4 A. I live about a block away.

5 Q. And you see them on a very regular
6 basis?

7 A. Yes, on the weekends.

8 Q. Now, how much longer are you going to be
9 wearing the brace that you're wearing?

10 A. Off and on as needed for about a month.

11 Q. And then?

12 A. Then he says I can go slow and see how I
13 feel without it.

14 Q. But he has not released you from the
15 restrictions that you're on?

16 A. Not as of this time.

17 Q. That's all the questions I have. Thank
18 you, Mr. Clark.

19 THE COURT: Thank you, Mr. Axelson. Any
20 cross-examination?

21 MR. SCHROEDER: Yes, Your Honor.

22 - - -

1 CROSS-EXAMINATION

2 BY MR. SCHROEDER:

3 Q. Good afternoon, Mr. Clark. Let's go
4 back to your testimony about the accident itself.
5 You were standing at the front desk talking to
6 Jackie Figueroa when you first heard this
7 commotion; is that correct?

8 A. Right around the front desk, not at the
9 front desk.

10 Q. Okay. And you understood someone said,
11 "Stop that guy, he's just robbed us"; is that --

12 A. I was looking out into the mall, and I
13 saw Mr. Schubring and a female employee looking
14 around. At that time I thought somebody had maybe
15 taken something or walked out on their bill.
16 Mr. Schubring looked in my direction and noticed
17 the suspect leaving, and he said to me -- because I
18 know him. I eat there all the time -- he said,
19 "Hey stop that guy for me. He just robbed us,"
20 and at that time the suspect took off, and that's
21 when I told Jackie to dial 911. At that time she
22 picked up the phone and started dialing as I took

1 off after the suspect.

2 Q. You said it was Schubring said to you
3 personally, "Stop that guy"?

4 A. Yes. He looked right at me when he said
5 it. He could have been saying it in general, but
6 we made eye contacts.

7 Q. You don't work for Roy Rogers, do you?

8 A. No, I do not.

9 Q. You were working for Elegant Nails at
10 that time?

11 A. Yes.

12 Q. And you weren't employed by Springfield
13 Mall at that time, were you?

14 A. No, I was not.

15 Q. Okay. And you weren't a security
16 officer at Springfield Mall, were you?

17 A. No. I was just an employee at
18 Springfield Mall.

19 Q. Now, before you took off and started
20 chasing this thief, a group of people passed by you
21 that were doing the same thing, weren't they?

22 A. I don't recall that.

1 Q. Do you remember having your deposition
2 taken on March 22nd, 1994?

3 A. Yes, I do. I remember there was a group
4 of people involved in the chase. I don't remember
5 whether or not they took off past me before I took
6 off running.

7 Q. Okay. Now, there were at least four
8 people in that group, weren't there?

9 A. Including myself, it's possible.

10 Q. Well, there were two Roy Rogers'
11 employees and you think there were one or two
12 people from the Time Out Store?

13 A. Yeah, but they left out behind the door
14 after I'd already gone through. They were behind
15 me.

16 Q. How did you know who was behind you?

17 A. Because I had taken off as they were
18 coming out of Time Out, and Time Out is more or
19 less across from Kay-Bee Toy store.

20 Q. Weren't they all in a bunch when you saw
21 them running with the Roy Rogers' people?

22 A. No. Roy Rogers' people were standing in

1 front of Roy Rogers. Kay-Bee people were right
2 inside the Kay-Bee right there by like the
3 photograph machine in the entrance.

4 Q. But they had passed by you before you
5 took off, didn't they?

6 A. I'm not sure.

7 Q. Well, do you remember --

8 A. I don't believe so.

9 Q. Do you remember having your deposition
10 taken on March 22nd?

11 A. Yes.

12 Q. Do you remember being asked, "But they
13 were in front of you? They had already passed by
14 you?" -- and this is page 30 -- and you'd answered,
15 "Yes," and page 31 I asked, "When you took off?"
16 and you answered, "Yes"?

17 A. Well, I'm sure that the employees from
18 Roy Rogers was not in front of me; they were behind
19 me.

20 Q. Well, do you remember being asked, "Do
21 you know now who the people were?" -- on page 30 --
22 and you answered, "Two of them for sure were Roy

1 Rogers employees, the cashier and the manager, and
2 I think maybe one or two from the Time Out"?

3 A. Right. But people from Roy Rogers
4 wasn't in front of me when I took off. They were
5 behind me.

6 Q. Weren't they part of the group?

7 A. No. There wasn't a group. A bunch of
8 people took off running, and by the time I got
9 outside, there was a bunch of people outside. But
10 the ones that I saw taking off running after me
11 there was two from Roy Rogers and maybe a few
12 people -- I don't know how many came out -- from
13 Time Out.

14 Q. They had already passed by you, didn't
15 they?

16 A. Not the people from Roy Rogers.

17 Q. Who was it that had passed by you?

18 A. I don't remember if anybody had passed
19 by me. I turned to look at Jackie and said, "Dial
20 911," and I saw her pick up the phone and start to
21 dial, and then I turned and started running. I
22 wasn't really paying attention to what was going on

1 around me:

2 Q. I'm sorry. Mr. Clark, do you remember
3 being asked at your deposition, "When you say
4 several people took off after the robber?" You
5 answered, "Yes," and then you were asked, "Do you
6 remember how many people we're talking about here?"
7 and you said, "No, I don't recall."

8 Then you were asked, "Do you know who
9 the people were?" and you answered, "Two of them
10 for sure were the Roy Rogers' employees, the
11 cashier and manager, I think maybe one or two from,
12 the Time Out."

13 I asked, "From the what?" and you
14 answered, "Time Out. It's a video arcade right
15 across from my store," and I asked --

16 MR. AXELSON: Objection, Your Honor.
17 This is not proper cross-examination impeachment.
18 If he wants to ask the witness a particular
19 question and contradict him with what he's asked
20 before, that would be proper, but he's just reading
21 the deposition at this point.

22 THE COURT: It seems to me to be a very

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1 minor point, but if you're going to credibility,
2 you've already read this testimony once and the
3 witness has explained it. I don't know how much
4 further we can go with it.

5 MR. SCHROEDER: I'll move on, Your
6 Honor.

7 BY MR. SCHROEDER:

8 Q. Now, the people that you saw take off
9 after the thief, they ran through the right-hand
10 set of doors, didn't they?

11 A. I saw the thief run through the
12 right-hand set of doors.

13 Q. Didn't you see the other people run
14 through the right-hand set of doors?

15 A. It might have been after I was already
16 outside. I don't recall. Everything happened so
17 fast. When something like that happens, there's
18 all kinds of commotion. Everybody's running and
19 chasing.

20 Q. The reason you went out the left-hand
21 side of the doors was because everybody else was
22 going out the right-hand side of the doors?

1 A. Well, basically I saw the suspect go out
2 the right-hand set of double doors, and he cut to
3 the left to go into the parking lot right. Now,
4 the people who were going out the hand set of
5 doors, I don't know whether they were just
6 customers and didn't know or whether they were
7 people in the chase.

8 Q. When you took off after this thief, do I
9 understand you went from here to the left-hand side
10 of the door at that angle?

11 A. Not exactly.

12 Q. Why don't you show the jury what your
13 path was?

14 A. I came out here. I ran around past Taco
15 Laredo. I was somewhere in here, and I saw him go
16 through these doors out this way so I just ran out
17 through this door.

18 Q. So your path was from here to there?

19 A. Not exactly. I was more or less kind of
20 in the middle because there is people coming into
21 the mall, so I was running where I could see, and
22 then I went out this door because you never know if

1 somebody's coming around this corner, so I wouldn't
2 run too close to the corner because there's benches
3 right here where people sit. Sometimes they get up
4 and walk around and look out this window.

5 Q. You weren't coming from over here
6 though, were you?

7 A. No.

8 Q. You were over here?

9 A. Yeah, more or less right here in the
10 middle.

11 Q. Okay. Now, Mr. Clark, you were running
12 when you went through the doors, weren't you?

13 A. I had slowed down and pushed the door
14 open.

15 Q. You were still running when you went
16 through the door, weren't you?

17 A. Yes.

18 Q. Now, you don't even recall how far you
19 pushed the door open, do you?

20 A. Okay. I remember I was running in heavy
21 shoes because I had bought Timberland shoes, so I
22 was running in those, and I remember I saw him cut

1 across. And I remember right when I got to that
2 door, I slowed down, I put both hands up, and I
3 pushed with my left hand to get the door out of my
4 way because I was going to go kind of like at an
5 angle out because the door opened this way. And as
6 I stepped out, I heard boom, and it caught my foot
7 and I fell.

8 Q. Okay. You heard boom. Did you feel
9 something?

10 A. Yes, I did.

11 Q. Was that when you heard the boom?

12 A. It was about simultaneous. All I know
13 is it felt like when I was running somebody put a
14 lasso on my foot and yanked it out from under me.

15 Q. Now, the door didn't make a noise, did
16 it?

17 A. Yeah. When it hit my leg, it made a
18 noise.

19 Q. And when you pushed it open --

20 A. No, it didn't make a noise. As far as I
21 was expecting, the door was going to open like any
22 other door I'd ever been in. It was going to open,

1 and I was going to be in the parking lot, and that
2 was my assumption and goal.

3 Q. And after you pushed the door open and
4 were going through it, the next thing you knew the
5 door slammed on your -- where did it hit you on the
6 leg?

7 A. Towards the inside right here because I
8 guess my foot turned because of the way I was
9 running. You know how when you're in stride and it
10 hit right between the ankle, I guess, the Achilles
11 tendon.

12 Q. Was the rest of your body outside of the
13 door when the door hit your leg?

14 A. When I looked up and looked back at my
15 leg, part of my leg was in the door, the rest of my
16 body was outside.

17 Q. Well, the door did not hit any part of
18 the left side of your body?

19 A. No, I did not.

20 Q. It did not hit your left leg, correct?

21 A. Right.

22 Q. The only part of your body the door hit

1 was your right leg?

2 A. Right ankle.

3 Q. And you say it hit on the inside of the
4 ankle?

5 A. What it did was it trapped my leg
6 between the closed door and the door that was
7 closing.

8 Q. Okay. So the door, when it hit your
9 leg, your leg -- your right ankle was still within
10 the mall itself?

11 A. Right. Because I have scratches on my
12 outside of my right leg from the closed door, but
13 the impact was on the inside of my right leg.

14 Q. So your body, except for your right leg,
15 had cleared the swing path of the door at the time
16 the door had hit your right ankle?

17 A. Yes.

18 Q. Where was your right foot planted at the
19 moment you approached the door when you put your
20 hands on the bar?

21 A. It was probably just before the door.

22 Q. At the threshold of the door?

1 A. Mm-hmm, and it caught me probably when I
2 was in mid-stride or towards the end of my stride.

3 Q. And when you looked back, you saw your
4 foot caught between -- it's two doors there?

5 A. Right.

6 Q. And they both swing out, correct?

7 A. Correct.

8 Q. And your foot was caught between the
9 door you went through, which swings out to the
10 left, and the adjacent door, which swings out to
11 the right?

12 A. Right.

13 Q. And when it caught your foot, you
14 just -- your momentum completely stopped, and you
15 fell flat on your face?

16 A. Yes.

17 Q. How long is your leg? Have you had your
18 inseam measured?

19 A. I have no idea.

20 MR. SCHROEDER: Your Honor, I'd like to
21 have a measurement taken of the witness's leg.

22 THE COURT: All right. Well, perhaps we

1 could do this after we adjourn for the day, and it
2 could just be stipulated tomorrow for the jury when
3 we resume?

4 MR. SCHROEDER: That's fine.

5 THE COURT: All right.

6 BY MR. SCHROEDER:

7 Q. And then you limped to the bus stop to
8 watch the apprehension of the thief?

9 A. Yes, and he was apprehended on the
10 sidewalk in front of Macy's. Because I guess since
11 we called 911, the cruisers in the area, they came
12 right over and saw him being chased, and told him
13 to put his hands on his head and lay on the ground,
14 and once they did that, I walked back into the
15 mall.

16 Q. Did you seek medical treatment that day?

17 A. No. That day it was close to closing.
18 I called the mall for security to come down because
19 I wanted them to know what had happened, and nobody
20 came down. And Jackie was leaving, and I had asked
21 her for a ride, so I left to go home with Jackie.

22 Q. And it's your testimony that the next

1 day your ankle was swollen and purple and red?

2 A. Yes.

3 Q. Did you seek medical attention that day?

4 A. No, I didn't, but I did call the mall
5 and I did call Fairfax Hospital, and they told me
6 that I needed to bring cash with me or they could
7 not see me.

8 Q. Who said that?

9 A. The lady I spoke to at the emergency
10 room.

11 Q. At Fairfax Hospital?

12 A. Yes.

13 Q. Said you had to bring cash?

14 A. Yes, to the emergency room, or they
15 would not treat me.

16 Q. Okay. Now, did you go to work on
17 Monday?

18 A. Yes, I did.

19 Q. And what does your work entail when you
20 were working there? What did you do?

21 A. Unless I was working on a client, I just
22 sat down, read the paper or read a book. When I

1 was working on a client, I stood. Basically I did
2 all functions of a cosmetologist except for face
3 and nails.

4 Q. Wasn't any heavy lifting involved?

5 A. No.

6 Q. And you worked the next -- you worked on
7 Tuesday and Wednesday as well, didn't you?

8 A. Yes, I did.

9 Q. And it was on Tuesday that you reported
10 that the mall took your report about you being
11 injured in the accident, wasn't it? The 27th would
12 be Tuesday.

13 A. It was Tuesday or Wednesday.

14 Q. Now, you went to Fairfax Hospital on
15 Thursday, the 29th?

16 A. Yes, I did.

17 Q. And they treated you, didn't they?

18 A. Yes, they did.

19 Q. They didn't say anything about cash
20 then, did they?

21 A. They asked how I was going to pay the
22 bill, and I told since I was at work -- I explained

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1 to them that I was working at the time it occurred,
2 so they took it as a workman's comp case.

3 Q. You didn't tell them that when you'd
4 called them, did you?

5 A. No, I did not.

6 Q. And at Fairfax Hospital, you told them
7 that you had caught your leg, your leg had been
8 caught in the door, didn't you?

9 A. Yes.

10 Q. And they told you that you had a bad
11 sprain, correct?

12 A. Yes, they did.

13 Q. And they also told you to stay on
14 crutches a couple of days, didn't they?

15 A. Yes, they did.

16 Q. And they told you to go see an
17 orthopaedist too, didn't they?

18 A. Yes, they did.

19 Q. And they told you to stay off the foot
20 too, didn't they?

21 A. That was my basic instructions.

22 Q. Okay. Now, you didn't use the crutches

1 all the time after that, did you?

2 A. I didn't use them all the time. When I
3 was in the shop, I would use them to go back and
4 forth to the bathroom or out in the mall, but when
5 I worked on a client, I would balance on my good
6 leg and lean the crutches against the wall.

7 Q. You didn't use your crutches when you
8 went out to take pictures on May 10th, did you?

9 A. No, I did not.

10 Q. Or May 4th. I'm sorry.

11 A. No, I did not. I leaned them against
12 the wall while we were taking the pictures to show
13 Mr. Wright where to take the pictures.

14 Q. But there were times that you didn't use
15 your crutches, weren't there?

16 A. Yes, there were times I did not use the
17 crutches.

18 Q. And you didn't think the crutches or
19 cane were really that necessary because you just
20 thought you had a bad sprain?

21 A. I used the cane more than I used the
22 crutches, but I used the crutches also.

1 Q. But you didn't think the cane or the
2 crutches were necessary?

3 A. Yes, I did think they were necessary.

4 Q. Do you remember having your deposition
5 taken on March 22nd?

6 A. Basically, yes.

7 Q. Do you remember being asked, "Did you
8 have any sort of injuries or incidents during that
9 time frame," referring to the time frame just after
10 the accident. You said, "No. Before the MRI I
11 just considered it a bad sprain so that's why I
12 sometimes -- I didn't think that the crutches or
13 the cane was necessary"; do you remember that
14 testimony?

15 A. I inferred to that's why I didn't use
16 them all the time. I didn't mean that they weren't
17 necessary for my recovery.

18 Q. Now, Fairfax Hospital had told you to go
19 see another doctor, didn't they, an orthopaedist?

20 A. Yes, they did.

21 Q. And you didn't see the doctor because
22 your attorney, Mr. Gross or his office, had

1 instructed you to go see Dr. Smith; isn't that the
2 reason?

3 A. That is not true. I called the doctor
4 and spoke to the receptionist to set up an
5 appointment. They told me they would not see me
6 without money. When I talked to Mr. Gross's
7 paralegal who was Valerie Brown, I told her my
8 problem. I told her I did not have money, and she
9 says, "Well, I'm going to send you to this doctor.
10 He'll take a look at your back, and he'll take a
11 look at your leg for you."

12 Q. You do remember having your deposition
13 taken on March 22nd, correct?

14 A. Correct.

15 Q. It's page 52. Do you remember being
16 asked, "Did you go to see the other doctor?" You
17 answered, "I didn't go see that doctor. I went and
18 saw another doctor."

19 "QUESTION: Why didn't you go see the
20 doctor they suggested?

21 "ANSWER: Because I was instructed by my
22 attorney to go see another doctor.

1 "QUESTION: This was Mr. Gross?

2 "ANSWER: Yes"?

3 A. It was Mr. Gross's office and later

4 on --

5 Q. That was your testimony then, wasn't it?

6 A. Yes, it was.

7 Q. Okay. And Gross sent to you Andrew

8 Smith, didn't he?

9 A. Mr. Gross didn't; Valerie Brown did.

10 Q. Do you remember being asked, "And Gross

11 sent you to who?" and you answered, "Andrew

12 Smith." And I asked, "And Smith is what? A

13 chiropractor?" and you answered, "Yes"?

14 A. I was referring to Mr. Gross's office.

15 Also later in that deposition I did explain to you

16 that I didn't go to the other doctor because I did

17 not have cash.

18 Q. You went to go see Mr. Smith or

19 Dr. Smith, the chiropractor, shortly after that,

20 correct?

21 A. Yes, I did.

22 Q. You didn't go see any other

1 orthopaedist, did you?

2 A. No. Most of the orthopaedists that I
3 know of won't see anyone without cash.

4 Q. Dr. Cabrera saw you, didn't he?

5 A. Yes. That was through arrangements that
6 were made for me.

7 Q. And he didn't require any cash?

8 A. No, he did not.

9 Q. And other than Dr. White and Dr. -- was
10 it You Young? Is that the other one?

11 A. Yes.

12 Q. Those were the only two you actually
13 contacted, weren't they?

14 A. Yes.

15 Q. Okay. So you didn't make any other
16 search for another orthopaedist to go see, even
17 though Fairfax Hospital told you to do that?

18 A. Yes, I did. I went to Social Services,
19 and they recommended me to South County Health
20 Clinic. South County Health Clinic had to verify
21 my injuries, and then they sent me to the doctor of
22 their choice because they were helping me out, and

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1 that's who sent me to Dr. Cabrera, so I used every
2 opportunity I could to find someone to help me.

3 Q. When did you do that?

4 A. That was shortly after I spoke to
5 Dr. You Young.

6 Q. And that was shortly after you had the
7 MRI in June, wasn't it?

8 A. Yes.

9 Q. Now, you went to go see Dr. Smith, the
10 chiropractor. Dr. Smith required you to sign a
11 form, didn't he, giving him an assignment of the
12 proceeds from any lawsuit you filed concerning this
13 accident?

14 MR. AXELSON: Objection, Your Honor.
15 I'm not sure what the relevance of that would be.

16 THE COURT: What's the relevance of
17 this, Mr. Schroeder?

18 MR. SCHROEDER: He's identified
19 Dr. Smith as a witness for the plaintiff in this
20 case, and I think it goes to bias of the witness.
21 The witness's testimony -- payment to this witness
22 for his services is contingent upon Mr. Clark

1 winning this case.

2 THE COURT: All right. I'll allow this
3 one question on this point from this witness.

4 MR. AXELSON: If that's the question,
5 Your Honor, yes.

6 THE COURT: All right.

7 THE WITNESS: What was the question?

8 BY MR. SCHROEDER:

9 Q. Did you sign the assignment of proceeds
10 form?

11 A. I signed a bunch of papers. I'm not
12 exactly sure what I signed.

13 MR. AXELSON: May we approach the bench,
14 Your Honor.

15 THE COURT: Yes, sir.

16 MR. AXELSON: I don't think this is what
17 Mr. Schroeder is representing it to be. I mean I
18 know what an assignment form is. Secondly, that
19 mentions insurance which I have been scrupulously
20 avoiding, and I think what he's referring --
21 Mr. Schroeder's referring to is the assignment of
22 insurance proceeds which is totally different.

1 THE COURT: All right. Is this health
2 insurance or is this proceeds of litigation?

3 MR. SCHROEDER: That's what he signed
4 right there.

5 THE COURT: Yeah. What does it say? "I
6 authorize payments of medical benefits to the
7 undersigned physicians for services described
8 above." This is a health insurance claim form. If
9 you want -- if you have evidence that this doctor
10 isn't going to get paid unless he wins this
11 lawsuit, that's fine.

12 MR. SCHROEDER: He could win the lottery
13 to get paid. I mean, this doctor ordered an
14 assignment.

15 THE COURT: I'm going to sustain the
16 objection to this exhibit. I think it's health
17 insurance. You can certainly ask the doctor.

18 MR. SCHROEDER: I wasn't going to admit
19 it as an exhibit.

20 MR. AXELSON: But he's asking a question
21 that's -- I mean, I don't see how he can even
22 respond to this question without explaining it. I

1 certainly can't do any redirect on it.

2 THE COURT: I'm going to sustain the
3 objection to questioning the witness from this
4 exhibit to introduce insurance, and its prejudicial
5 value outweighs what probative value it has.

6 MR. AXELSON: Judge, I would like the
7 jury instructed that they are to ignore the last
8 series of questions. I can't rehabilitate the
9 witness on this.

10 MR. SCHROEDER: He can ask Dr. Smith.

11 THE COURT: You can ask Dr. Smith. Is
12 he going to be here live?

13 MR. AXELSON: Yes.

14 THE COURT: We can bring this up then.

15 MR. AXELSON: That's fine, but I still
16 can't ask the witness anything to correct whatever
17 impression that Mr. Schroeder has left with the
18 jury.

19 THE COURT: He answered any other
20 questions.

21 MR. AXELSON: Well, he has --

22 THE COURT: Wait a minute,

1 Mr. Schroeder.

2 MR. AXELSON: He has been asked if he's
3 executed an assignment.

4 THE COURT: Of the proceeds of this
5 litigation.

6 MR. AXELSON: Yeah.

7 THE COURT: And I don't think he's
8 answered it, has he?

9 MR. AXELSON: Mr. Schroeder certainly
10 left the impression that such a thing exists.

11 MR. SCHROEDER: The insurance name on
12 this is Edward Gross. He's the attorney. I mean,
13 this is -- he's getting whatever Gross has. That's
14 what it says. There's also -- I have a letter too
15 from Andrew Smith's office confirming that he's
16 assigned the lawsuit.

17 THE COURT: Why don't we get this from
18 the doctor then?

19 Ladies and gentlemen of the jury, I'm
20 asking that you disregard the last question. We'll
21 explore that area with Dr. Smith when Dr. Smith
22 testifies.

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1 BY MR. SCHROEDER:

2 Q. You went to see Dr. Smith and he gave
3 you periodic treatments?

4 A. Yes, he did.

5 Q. Okay. And what was it that he did to
6 you?

7 A. When I first went in, he would put
8 electrodes on my back and heating pads on my neck,
9 back, and lower back, and he would put a couple of
10 electrodes on my calf with a small heating pad.
11 And then after that he would do manipulations to my
12 neck, back, and lower back, and he would wrap and
13 unwrap my ankle and take a look at it to see if the
14 swelling had started going down.

15 Q. Now, you saw Dr. Smith periodically?

16 A. Yes. More at first, and then as my
17 therapy went on, it was less.

18 Q. You saw him on May 6th; is that correct?

19 A. I'm not sure of the date.

20 Q. Do you have the plaintiff's exhibit book
21 in front of you there?

22 A. No.

1 THE COURT: The clerk has the exhibits.

2 MR. SCHROEDER: Can I show the
3 witness --

4 THE COURT: Do you have a specific
5 exhibit in mind?

6 MR. SCHROEDER: Exhibit 40-C.

7 BY MR. SCHROEDER:

8 Q. Now, when you went to go see Dr. Smith,
9 they would ask you how you're feeling, wouldn't
10 they, and you would tell them how things were?

11 A. More or less.

12 Q. Okay. Would you take a look at
13 Plaintiff's Exhibit 40-C?

14 A. Yes.

15 Q. And have you ever seen that before?

16 A. No. Usually I saw it at a distance on
17 the clipboard. I wasn't privileged to this.

18 Q. This was the chart though that they
19 kept?

20 A. I believe so.

21 Q. Okay. And do you see on there at the
22 bottom --

1 MR. AXELSON: Objection, Your Honor.

2 This would be hearsay clearly. This witness has
3 not seen it.

4 MR. SCHROEDER: Okay. I'll rephrase the
5 question.

6 THE COURT: It's been admitted into
7 evidence, hasn't it?

8 MR. AXELSON: No, Your Honor, I have not
9 introduced this exhibit.

10 THE COURT: All right. I'm sorry. I
11 thought this was one of the ones he testified that
12 was completed in his presence.

13 MR. AXELSON: That was 40-A, Judge.

14 THE COURT: All right. I sustain the
15 objection.

16 BY MR. SCHROEDER:

17 Q. Did you tell Dr. Smith's -- someone at
18 Dr. Smith's office that your leg was feeling better
19 on May 14th?

20 A. I don't recall.

21 Q. Do you recall telling them between May
22 14th and May 17th that you were walking better?

1 A. I don't recall. I remember the swelling
2 started to go down, and eventually it felt better
3 than it did, you know, when I had the initial
4 injury, but I don't know if you would call it
5 feeling better as far as being able to run or do
6 anything like that, no.

7 Q. Do you recall telling them on May 13th
8 that your ankle was better?

9 A. I don't recall this. I remember we
10 talked, but even after the time -- we got to a
11 point to where it leveled off but it stayed the
12 same, and it was still like a useless limb. I had
13 to walk with my toe pointed to the outside and use
14 my heel to walk because I couldn't walk naturally.

15 Q. Do you recall telling or showing the
16 doctor on May 19th that you could dorsiflex?

17 A. No, I don't remember that.

18 Q. You didn't tell your doctor that that
19 day?

20 A. I don't know what dorsiflex is.

21 Q. It's being able to move your toe towards
22 your knee?

1 A. No, then I didn't tell him that.

2 Q. And you told Dr. Smith on June 4th that
3 the pain in your right calf feels worse?

4 A. Basically he told me it wasn't getting
5 any better, and that's when he ordered the MRI.

6 Q. You didn't tell him that?

7 A. From time to time, depending on what day
8 it was, my leg hurt a little bit worse, a little
9 bit more. I don't remember telling him that.

10 Q. And didn't the swelling get worse on
11 June 8th?

12 A. He might have noticed it was swollen a
13 little bit more. I don't recall.

14 Q. Wasn't there discoloration noted on June
15 11th?

16 A. My leg was discolored the whole time.

17 Q. Look at 40-C.

18 MR. AXELSON: Objection, Your Honor.

19 Mr. Clark is not familiar with that document. He's
20 asking Mr. Clark to verify something that he's
21 totally unfamiliar with.

22 THE COURT: I sustain the objection.

1 BY MR. SCHROEDER:

2 Q. Did you tell Dr. Smith or did you show
3 your leg to Dr. Smith between --

4 A. Every time I went in.

5 Q. Did you tell or show Dr. Smith about the
6 discoloration any time between May 6 and June 11th?

7 A. I'm not quite sure of the exact dates I
8 went in, but if I went in, I showed him my leg
9 every time because I was still having problems with
10 it along with the treatments of my back.

11 Q. So he saw your leg every day you went to
12 go see him?

13 A. Yes. He took a look at it. He'd unwrap
14 it because he wrapped it for me because I don't
15 know how to wrap, and he would wrap it for me and
16 unwrap it, and sometimes he would apply heat pads
17 on it.

18 Q. And if there was something wrong with
19 your leg, you would tell him about it?

20 A. Well, he'd ask me, how do you feel or
21 how you doing, and I'd tell him I can't walk any
22 better, but some days it felt better; some days it

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1 felt the same. Basically, he noticed it wasn't
2 getting any better. When I went in for the last
3 time before the MRI, he said, "This should be
4 healed by now, is what he told me." He says, "I'm
5 going to order an MRI, and this is where I want you
6 to go," and I did so, and that's the facts.

7 Q. So you told him -- whenever your leg was
8 hurting, you would tell him is that the answer to
9 the question? Do you have an answer to that
10 question?

11 THE COURT: He did answer the question.

12 BY MR. SCHROEDER:

13 Q. How long was your leg discolored?

14 A. I don't know exactly.

15 Q. When did you go see the door with
16 Dr. Smith?

17 A. I don't remember the exact date. I
18 didn't go with Dr. Smith. I was already at work,
19 and Dr. Smith came up and surprised me for lunch.
20 He came into the shop and said hello and greeted
21 me. He goes, "Why don't you take me out, and let's
22 take a look at that door," and so I walked out, and

1 I showed him which door it was.

2 Q. Do you remember when that was?

3 A. No, not exactly.

4 Q. How long had you been seeing him?

5 A. Maybe a week, a little longer, maybe not
6 even that.

7 Q. Now, the leg brace that you wear, the
8 purpose of that leg brace is so your foot won't
9 dorsiflex, isn't it?

10 A. Yeah, so it won't move forward, bend up.

11 Q. That's the reason you have it?

12 A. Yes.

13 Q. Okay. And you were prescribed that
14 brace in September of 1993, weren't you?

15 A. Yes, I was.

16 Q. And Dr. Cabrera gave it to you then?

17 A. Yes. Well, he didn't give it to me. I
18 had to have it made.

19 Q. You had it made and you got it in
20 September?

21 A. Right.

22 Q. And then you went to go see Dr. Cabrera

1 on October 7th, and you weren't wearing the brace,
2 were you?

3 A. The reason I wasn't wearing the brace
4 was because when they first gave it to me, the
5 doctor took the cast off at the time he put my foot
6 into that shoe. Okay. In order to make my foot
7 fit the shoe -- because I had to buy a shoe that
8 would fit my left foot and my right foot. It was
9 too tight -- they had to cut the shoe. My leg
10 swelled up, and it wouldn't fit into the shoe. And
11 if you'll notice right here on the brace, it curves
12 it in right here. My leg was so swollen I couldn't
13 get it past this, and so I had to stay on crutches
14 until the swelling went down, so some days I
15 couldn't wear it because it wouldn't fit.

16 Q. Dr. Cabrera was very mad at you that you
17 weren't wearing the brace, wasn't he?

18 A. And I explained to him why I wasn't
19 wearing it. He said that it was very important
20 that I wear it, and he explained to me why.

21 MR. SCHROEDER: Just a moment, Judge, if
22 you'll indulge me.

1 THE COURT: Yes, sir.

2 MR. SCHROEDER: Your Honor, I don't have
3 anything more at this time. I may want to call him
4 as an adverse witness after we hear the other
5 testimony.

6 THE COURT: All right.

7 MR. SCHROEDER: Thank you.

8 THE COURT: Any redirect?

9 MR. AXELSON: No, Your Honor.

10 THE COURT: All right. Thank you very
11 much, Mr. Clark. You may step down at this time.

12 MR. AXELSON: Your Honor, I'd like to
13 call Mr. Gerald Robinson as an adverse witness very
14 briefly.

15 THE COURT: All right.

16 MR. AXELSON: I understand the Court's
17 time constraints. We have Dr. Cabrera's deposition
18 to read, but I think that's more than an hour.

19 THE COURT: Okay. Then we'll finish up
20 with Mr. Robinson tonight then, and we'll start
21 tomorrow morning with the doctor's deposition.

22 GERALD ROBINSON,

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1 having been first duly sworn by
2 The Clerk, a Notary Public
3 within and for the Commonwealth of,
4 Virginia was examined and testified
5 as follows:

6 - - -

7 DIRECT EXAMINATION

8 BY MR. AXELSON:

9 Q. Mr. Robinson, what is your position with
10 Springfield Mall, or what was your position with
11 Springfield Mall in April of 1993?

12 A. I was the director of operations.

13 Q. When Mr. Clark describes having seen you
14 on the 29th of April of 1993 out by entrance number
15 three, he's correct, is he not; you were there?

16 A. I was.

17 Q. When those pictures were being taken,
18 correct?

19 A. I was.

20 Q. This diagram that's been marked and
21 introduced as Plaintiff's Exhibit Number 27
22 accurately reflects the stores that have been

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1 identified and the location of entrance number
2 three in April of 1993, does it not?

3 A. It does.

4 MR. AXELSON: May I see Exhibits 28, 29,
5 30, 31, and 32, please?

6 MR. SCHROEDER: Which ones were those
7 again, please?

8 MR. AXELSON: 28 through 33, I believe.

9 BY MR. AXELSON:

10 Q. Mr. Robinson, one of your functions or
11 duties or one of the tasks that you perform IS you
12 walk around the mall and look at things that are a
13 problem or look for problems, is it not?

14 A. Yes, it is.

15 Q. And you record those problems on a
16 Dictaphone as you walk around the mall, do you not?

17 A. I do.

18 Q. And then that Dictaphone is then
19 transcribed and passed out to the various people
20 who would be concerned about the problems that you
21 note as part of your management; is that correct?

22 A. That's correct.

1 Q. And the length of time that it takes you
2 to fill up the Dictaphone or the tape-recording
3 varies, correct?

4 A. Yes. I normally don't fill it up. The
5 maximum length of time I would wait would be about
6 five working days.

7 Q. And you date them at the start of when
8 you start a new tape? For example, you would say
9 well, today is August the 16th, and then the notes
10 that were on there would include August the 16th
11 through possibly as late as August the 21st,
12 correct?

13 A. That's correct.

14 Q. And these are called operations
15 bulletins, are they not?

16 A. That's correct.

17 Q. I have here a document which has been
18 marked as Plaintiff's Exhibit Number 28. This is
19 one of your operations bulletins, is it not?

20 A. Yes, it is.

21 Q. And those reflect the comments that you
22 made and the observations that you made as you were

1 walking around the mall at some point in time,
2 presumably the next four or five days, after the
3 date on that, correct?

4 A. That's correct.

5 Q. And the date on it is March the 11th of
6 1993, true?

7 A. True.

8 Q. Now, about the fifth paragraph or sixth
9 paragraph down -- one, two, three, four, five,
10 six -- there's a reference to Jim, and that would
11 be Jim Harrington (phonetic), correct?

12 A. That's correct.

13 Q. Mr. Harrington was the head of
14 maintenance at the time?

15 A. He was.

16 Q. And there is a reference on that, "Up at
17 entrance three we have some problems with that one
18 door closing. You need to work on it so that it
19 closes fairly tight. Unfortunately we have a lot
20 of draft in there, and we've had numerous
21 complaints from Taco Laredo"?

22 A. That's correct.

1 Q. That was in reference to a door at
2 entrance number three, was it not?

3 A. It was.

4 Q. And in point of fact, if you stood on
5 the inside of the mall and were looking out and
6 were inside the doors, it would have been the far
7 left-hand door, would it not?

8 A. Yes, it would have.

9 MR. AXELSON: Your Honor, we move the
10 admission of Plaintiff's Exhibit Number 28 in
11 evidence at this time.

12 THE COURT: Any objection?

13 MR. SCHROEDER: I don't see what the
14 relevance is. I mean, it says it's drafty and it
15 wouldn't close. I mean, I don't know what that has
16 to do with anything in this case.

17 THE COURT: I overrule the objection,
18 and Plaintiff's Exhibit Number 28 will come into
19 evidence.

20 MR. AXELSON: Thank you, Your Honor.

21 - - -

22 (Plaintiff's Exhibit Number 28 received

1 into evidence)

2

3 BY MR. AXELSON:

4 Q. Now, Mr. Robinson, as a part of the
5 procedures at Springfield Mall, there is something
6 called a weekly exterior door check that is made,
7 is there not?

8 A. Yes.

9 Q. And that is a form that is filled out
10 by, I believe, security, is it not?

11 A. Yes, it is.

12 Q. And it's done every week, correct?

13 A. Correct.

14 Q. I would like to direct your attention to
15 Plaintiff's Exhibit Number 29, which I thought I
16 had given to you. Maybe I picked it up myself.

17 THE COURT: I think you have it. I'm
18 not sure.

19 MR. AXELSON: Thank you, Judge.

20 BY MR. AXELSON:

21 Q. Mr. Robinson, I direct your attention to
22 this particular document. Now, would you look at

1 the back of it, please? On Plaintiff's Exhibit
2 Number 29, is there a reference to entrance number
3 three?

4 A. Yes, there is.

5 Q. And it reflects some kind of a problem
6 with right doors latch locks difficult to secure,
7 does it not?

8 A. It does.

9 Q. It's not clear from this what door
10 that's a reference to, is it?

11 A. No, it's not.

12 Q. However, this is a document from
13 Springfield Mall -- I mean, this is your weekly
14 exterior door check, is it not?

15 A. It is, yes.

16 MR. AXELSON: Your Honor, we'd move the
17 introduction of Plaintiff's Exhibit Number 29 in
18 evidence at this time.

19 THE COURT: Any objection,
20 Mr. Schroeder?

21 MR. SCHROEDER: No objection.

22 THE COURT: Plaintiff's Exhibit 29 is

1 admitted into evidence without objection.

2 MR. AXELSON: Thank you, Judge.

3 - - -

4 (Plaintiff's Exhibit Number 29 received
5 into evidence)

6 - - -

7 BY MR. AXELSON:

8 Q. Now, Mr. Schroeder, (sic) the mall
9 maintains what are called incident reports, does it
10 not?

11 A. Yes.

12 Q. That are filed by security when events
13 happen at the mall that are of significance?

14 A. Yes.

15 Q. I direct your attention to Plaintiff's
16 Exhibit Number 30, and this is one such incident
17 report?

18 A. It is.

19 Q. And it reflects the -- what's called
20 strong-arm robbery of money from the Roy Rogers in
21 Springfield Mall, does it not?

22 A. It does.

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1 Q. And it reflects the date on which this
2 occurred, does it not?

3 A. Yes, it does.

4 Q. And what is the date given on the
5 incident report?

6 A. April 25th, 1993.

7 MR. AXELSON: Your Honor, we move the
8 introduction of the incident report into evidence
9 at this time.

10 THE COURT: Any objection?

11 MR. SCHROEDER: No objection.

12 THE COURT: All right. It's admitted
13 without objection.

14 MR. AXELSON: Thank you, Judge.

15 - - -

16 (Plaintiff's Exhibit Number 30 received
17 into evidence)

18 - - -

19 BY MR. AXELSON:

20 Q. Now, the mall also maintains a daily
21 log, does it not?

22 A. I'm sorry?

1 Q. The mall also maintains what is called a
2 daily log, does it not?

3 A. A security log, yes, sir.

4 Q. It also maintains a log which reflects
5 events and situations which occur on a daily basis?

6 A. Yes.

7 Q. And mall personnel are responsible for
8 basically writing down anything of significance
9 that they hear about that day?

10 A. That is a security log. Most of the
11 security officers input on that. I have a separate
12 engineering log as well.

13 Q. All right. But the security log
14 reflects events of significance that happen on
15 particular days?

16 A. Yes.

17 Q. I would ask that you take a look at
18 Plaintiff's Exhibit Number 31, and I would direct
19 your attention to the second page. There's an
20 entry down at the bottom which indicates 1700. Do
21 you see what I'm referring to?

22 A. Yes.

1 Q. ✓ 1700 would be military time for 5
2 o'clock, 5:00 p.m., correct?

3 A. That's correct.

4 Q. And that report that's reflected next to
5 1700 is, in essence, the same incident that's
6 reflected in the incident report that was just
7 introduced, is it not?

8 A. Yes, it is.

9 Q. And that also is dated April the 25th of
10 1993, correct?

11 A. Yes, it is.

12 Q. So this is the daily security log that
13 reflects all of the incidents that happen that
14 particular day?

15 A. That's correct.

16 Q. And those include the robbery from Roy
17 Rogers?

18 A. Yes, it does.

19 MR. AXELSON: Your Honor, we move the
20 introduction of Plaintiff's Exhibit 31 at this
21 time.

22 THE COURT: Any objection?

1 MR. SCHROEDER: No objection.

2 THE COURT: All right. It's admitted.

3 - - -

4 (Plaintiff's Exhibit Number 31 received
5 into evidence)

6 - - -

7 BY MR. AXELSON:

8 Q. And the final exhibit, Mr. Robinson, I
9 have here -- and it's difficult to read the date,
10 but it's 27 April of 1993. Is that in fact another
11 daily security log?

12 A. It is.

13 Q. Maintained by the mall?

14 A. It is.

15 Q. And turning to the second page of that,
16 there's an entry there -- there's a number there,
17 1310 on the left-hand side?

18 A. Yes, sir.

19 Q. Again military time, 1:10 p.m.?

20 A. That's correct.

21 Q. 1 o'clock in the afternoon. There's a
22 reference there to, "Elegant Nails' employee was

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1 asked to chase after a fleeing suspect on Sunday.
2 The store manager for Roy Rogers made the request.
3 While running and attempting to open a door at
4 entrance number three, the employee ignored his --
5 excuse me -- injured his lower leg. Mr. Allan
6 Clark explained further that he was in pain and
7 would see a doctor tonight."

8 Is that the entry that appears there?

9 A. It is.

10 Q. And this is from the 27th of April of
11 1993?

12 A. That's correct.

13 MR. AXELSON: Your Honor, we'd move the
14 introduction of Plaintiff's Exhibit Number 32 in
15 evidence at this time?

16 THE COURT: Any objection?

17 MR. SCHROEDER: No objection.

18 THE COURT: Okay. It's admitted.

19 MR. AXELSON: Thank you, Judge.

20 - - -

21 (Plaintiff's Exhibit Number 32 received
22 into evidence)

1

2

BY MR. AXELSON:

3

Q. Now, Mr. Robinson --

4

MR. AXELSON: May I see Plaintiff's Exhibits Numbers 35 and 36, please? One is the hinge and one is this.

7

THE COURT: One is the hinge itself?

8

MR. AXELSON: The hinge itself. There's a piece of hinge.

10

THE WITNESS: Could these be these?

11

BY MR. AXELSON:

12

Q. That's the piece of hinge right there.

13

Now, we have the original of the -- let me substitute this for this.

15

Mr. Robinson, you would be familiar, would you not, with the replacement hinges that are used at Springfield Mall?

18

A. Yes.

19

Q. And I show you Plaintiff's Exhibit Number 36, which is a piece of replacement hinge which has previously been introduced in evidence. That is of a type of hinge very similar to the

1 hinge that was on the door at entrance number
2 three, the right-hand door as you were standing on
3 the outside looking in?

4 A. Correct.

5 Q. The primary differences would be the
6 shape of the hinge, the color of the hinge, the
7 length of it -- obviously it's a full-length
8 hinge -- and there's some slight difference in the
9 shape of the hinge, is there not?

10 A. I'm not sure.

11 Q. All right. But this is at least very
12 similar to the hinge that is used?

13 A. It is, yes.

14 Q. And you don't know specifically when
15 that hinge was replaced?

16 A. Specifically the exact date, no, sir.

17 Q. Are you able to say approximately when
18 it was replaced?

19 A. Sometime after the complaint that we
20 received from Taco Laredo regarding the draftiness
21 from that door.

22 Q. So the draftiness from the door is what

1 triggered the replacement of the hinge, correct?

2 A. It could have contributed to it. I'm
3 not saying that is the sole reason it was
4 replaced. I do not know.

5 Q. I'm sorry. Let me rephrase the question
6 then. The complaint that's reflected in your
7 operations bulletin was part of what triggered the
8 replacement of the hinge?

9 A. It could have been a contributing
10 factor.

11 Q. But the only thing you're certain about
12 is the replacement of the hinge occurred after that
13 operations bulletin?

14 A. Yes.

15 MR. AXELSON: I have no further
16 questions for Mr. Robinson.

17 THE COURT: All right. Any
18 cross-examination?

19 MR. SCHROEDER: Just one thing, Your
20 Honor. I'm not waiving any right to call him as a
21 witness in my case.

22 THE COURT: No, of course not.

1

- - -

2

CROSS-EXAMINATION

3

BY MR. SCHROEDER:

4

5

6

7

Q. Mr. Robinson, when there were complaints about -- from Taco Laredo about the draftiness, what sort of hinge did the door have on it at that time?

8

9

A. At that time it had the regular pivot hinges, what we call the three offset pivot hinges.

10

11

12

Q. And what if anything -- what did you understand the condition of those hinges to be at that time?

13

14

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A. The hinges when I surveyed them were in fairly good shape. The only thing was when you closed the door -- I opened the door fully. It closed properly except once it got to the latching position -- that last six inches -- it seemed to go about three or four inches and stop. And as a result, during the wintertime, we were getting a lot of draft through there, and Taco Laredo, the restaurant, has an open side where they were complaining about the drafts, and we were trying to

1 find some reason to get it to close that last two
2 inches.

3 Q. The complaints from Taco Laredo, there
4 was no complaint about the door closing too fast,
5 was there?

6 A. No, absolutely not, just the draft.

7 - - -

8 REDIRECT EXAMINATION

9 BY MR. AXELSON:

10 Q. Mr. Robinson, you got a complaint about
11 the door not latching correctly, and the response
12 of Springfield Mall was to replace the hinge; is
13 that what you're telling us?

14 A. No, sir.

15 MR. AXELSON: Thank you. Nothing
16 further.

17 THE COURT: All right. Thank you very
18 much, Mr. Robinson. You may step down.

19 Ladies and gentlemen, we're going to
20 adjourn for the evening now. I'd ask that you
21 report back tomorrow morning promptly at 10
22 o'clock, and we'll start promptly at 10:00.

1 Actually you should probably come a couple minutes
2 early. We will be in this courtroom tomorrow, so
3 if you could assemble outside the courtroom. And,
4 Counsel, you can leave your papers in the courtroom
5 overnight if you like.

6 Let me say, as I mentioned to you this
7 morning before you were sworn in during the jury
8 selection process, I'd ask that you not discuss the
9 case tonight with anyone at home or with any of
10 your friends or co-workers. I'm sure they'll be
11 very curious about what you did today; however,
12 part of your oath is that you're not going to
13 discuss this case with anybody, even among
14 yourselves, until the case is over with. You can
15 discuss among yourselves, of course, when you're
16 deliberating.

17 I'd also ask -- I know it's been a long
18 day, and you're probably tired and just want to go
19 home and watch TV -- please don't be amateur
20 detectives and go to Springfield Mall and examine
21 these doors. I think they're probably not the same
22 as they were at the time of the accident, and it's

1 something I want you to decide this case solely
2 based on the evidence that you've heard here today
3 and that you will hear tomorrow and the next day in
4 the courtroom and not on an independent
5 investigation.

6 Also, I noticed that the law student or
7 recent law graduate was not selected for the jury.
8 We had a case a few weeks ago where we had a law
9 student who went home every night and researched
10 the legal issues involved in the case. Don't do
11 anything like that or do any reading up on these
12 kinds of issues, if any of you are mechanical
13 engineers and you have books at home. I just want
14 you to decide the case on the evidence that the
15 attorneys present and not any independent reading
16 or investigation you might do. Go home. Have a
17 nice evening. Don't talk about the case. We'll
18 see you back tomorrow morning.

19 - - -

20 (The jury was excused for the day at 4:39 p.m.)

21 - - -

22 THE COURT: All right. We'll see you

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1 back tomorrow morning at 10 o'clock.

2 MR. AXELSON: Judge, it's been my
3 experience that the paper that I leave here in the
4 courtroom is the one that I need later, so we
5 probably won't leave much of anything.

6 THE COURT: This is not a high-document
7 case, but for the documents that involve boxes and
8 boxes and boxes --

9 MR. SCHROEDER: Can we take that
10 measurement?

11 THE COURT: I didn't want to have
12 Mr. Clark measured in front of the jury. I thought
13 that might be embarrassing for him. Why don't you
14 all get together and measure Mr. Clark's inseam,
15 and I'm sure there won't be any dispute about it.

16 - - -

17 (Whereupon the hearing concluded at
18 4:40 o'clock p.m.)

19 - - -

20

21

22

1 UNITED STATES OF AMERICA)

2 SS:

3 COMMONWEALTH OF VIRGINIA)

4 I, JOAN V. CAIN, a Certified Shorthand
5 Reporter and Notary Public within and for the
6 Commonwealth of Virginia do hereby certify:

7 That the witness whose deposition is
8 hereinbefore set forth, was duly sworn and that the
9 within transcript is a true record of the testimony
10 given by such witness.

11 I further certify that I am not related
12 to any of the parties to this action by blood or
13 marriage and that I am in no way interested in the
14 outcome of this matter.

15 IN WITNESS WHEREOF, I have hereunto set
16 my hand this _____ day of _____, 1994.

17

18

19

20 My Commission expires:

21 May 31, 1997

22

BLOCK COURT REPORTING SERVICES, INC. (202) 638-1313

1 V I R G I N I A

2 IN THE CIRCUIT COURT FOR

3 THE COUNTY OF FAIRFAX

4 - - - - - x

5 ALGERNON (ALLAN) CLARK, :

6 Plaintiff, : At Law No:

7 vs. : 126947

8 FRANCONIA ASSOCIATES, et al., :

9 Defendants. : PAGES 289 - 617

10 - - - - - x

11

12 Jury Trial before JUDGE JANE MARUM ROUSH, held at the
 13 offices of Fairfax Circuit Court, 4110 Chain Bridge
 14 Road, Fairfax, Virginia, commencing at 10:06 A.M.,
 15 Wednesday, August 17, 1994, before RANDY T. SANDEFER,
 16 Court Reporter and Notary Public.

17

18

19

20

21

22

1 A P P E A R A N C E S O F C O U N S E L :

2 FOR ALGERNON CLARK,

3 DAVID R. AXELSON, P.C.

4 BY: DAVID R. AXELSON, ESQUIRE

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11 MURPHY, McGETTIGAN, RICHARDS & WEST, P.C.

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1 C O N T E N T S

2 D-X C-X RD-X RC-X

3

4 PLAINTIFF'S EVIDENCE:

5 R. Cabrera 311 337 370 371

6 L. Smith 401 438

7

8 DEFENDANT'S EVIDENCE:

9 R. Gordon 467 489 508

10 A. Clark 510

11 G. Robinson 522 535 550

12 M. Sporkin 552 571 613

13

14 PLAINTIFF'S REBUTTAL:

15 R. Cabrera 376 380 384

16

17

18

19

20

21

22

E X H I B I T S

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1 P R O C E E D I N G S

2 - - -

3 JUDGE ROUSH: Good morning. I understand
4 there is some preliminary matters that need to be
5 taken care of?

6 MR. AXELSON: There are, Your Honor. They
7 should be very brief. And I have one very slight
8 problem. Mr. Koerner, who was going to read
9 Dr. Cabrera's deposition, was downstairs on a 9:30
10 matter. I am hoping that he will be here before we
11 deal with the other matters.

12 If not, I may have to ask the Court to
13 either take a brief recess, or if the Court could
14 supply a law clerk to read it. But we will deal with
15 that when the time comes.

16 JUDGE ROUSH: All right.

17 MR. AXELSON: The first thing that I want
18 to read to the Jury this morning are the Request for
19 Admissions. And I think with about three exceptions,
20 there is no objection to them. I think if
21 Mr. Schroeder would care to state his objections to
22 any that he has, then we could deal with them.

1 JUDGE ROUSH: Well, why don't you let me
2 ask him?

3 MR. AXELSON: I have highlighted what I
4 anticipate reading to the Jury. Unfortunately, this
5 is my only copy, Judge.

6 JUDGE ROUSH: What are your objections,
7 Mr. Schroeder?

8 MR. SCHROEDER: I object to 3B.

9 JUDGE ROUSH: All right. What is wrong
10 with that?

11 MR. SCHROEDER: It's irrelevant. It's not
12 a duty to keep records of when someone checks or does
13 normal maintenance. I think that it's misleading. I
14 think that when you read something like that, the Jury
15 is going to think, "Well, what are they hiding here?"

16 It's like saying that we have to keep
17 records every time we put a nail into a piece of wood.
18 This is normal maintenance.

19 JUDGE ROUSH: Well, you could argue this to
20 the Jury.

21 MR. SCHROEDER: There is no contention here
22 that we have pulled evidence or hidden evidence. I

1 don't think it's relevant. I don't know what it adds
2 to the case.

3 JUDGE ROUSH: Well, there is no dispute
4 that the original hinges were all set and I understand
5 that you have no record of that, or that you have no
6 documentation of that.

7 MR. SCHROEDER: Right.

8 JUDGE ROUSH: Well, what is the point of
9 that, Mr. Axelson?

10 MR. AXELSON: Your Honor, I think that it
11 is significant to point out to the Jury that the
12 defense has no evidence other than what people say
13 they remember about it.

14 If there were, in fact, written records, we
15 could go back and refer to them and say, "Okay, this
16 hinge was replaced on thus and thus such a day. It
17 was tightened and the last maintenance was done on
18 such and such a day. The last maintenance that was
19 done on the closer was done on thus and thus such a
20 day."

21 We can't prove any of that, we can't
22 establish any of that because there are no records. I

1 think that I'm entitled to say that to the jury.

2 MR. SCHROEDER: I think that he can say
3 that without suggesting that there should be records,
4 though; that's my point. It doesn't add anything. He
5 can go up and say we don't know exactly what day this
6 thing was. We heard Jerry Robinson say that he didn't
7 know exactly what day it was.

8 It doesn't matter whether there were
9 records or not.

10 JUDGE ROUSH: I think that I agree with
11 Mr. Schroeder that this is kind of just a red herring,
12 in terms of their record keeping. I think that it
13 does suggest some culpability on the Defendants' part
14 for not maintaining records. Certainly if the
15 Defendants' in their case come forward and present
16 any, this would be appropriate in rebuttal.

17 But I will sustain the objection.

18 MR. AXELSON: Your Honor, if the
19 Defendants' place witness on the stand who might have
20 been in the position to keep records, I should have
21 the opportunity to ask them that there are no written
22 records of this. That would be proper cross

1 examination. You are not precluding that question?

2 JUDGE ROUSH: No.

3 MR. AXELSON: Thank you, Judge.

4 MR. SCHROEDER: Judge, I have the same
5 objection to 8D. It is a very similar Request for
6 Admission.

7 Again, it goes to records regarding regular
8 maintenance in general.

9 JUDGE ROUSH: Well, it's more than that.
10 You are saying that you are maintaining it on a weekly
11 basis.

12 MR. SCHROEDER: That's going to be
13 established through testimony though, not records.

14 JUDGE ROUSH: I am going to overrule the
15 objection to 8D.

16 MR. SCHROEDER: The last one is 16E. All
17 that I ask is that the entire answer be read.

18 JUDGE ROUSH: Yes, that's consistent with
19 my prior ruling.

20 MR. AXELSON: Your Honor, my problem with
21 that is that there is a great deal of editorializing
22 in the Defendants' position in there which I didn't

1 ask him for. What he has done is he has made a speech
2 in the middle of answering the Request for Admissions.

3 JUDGE ROUSH: You have got to take the good
4 with the bad. My ruling is that if you read the
5 entire question, you have to head the entire answer.

6 MR. AXELSON: May I see the -- 3B, the
7 Court has ruled is out. 8 the Court has ruled that I
8 can -- excuse me, 8D -- the Defendants' have no record
9 showing that --

10 JUDGE ROUSH: The whole answer, yes. 8D is
11 in and if you want to read part of the answer to the
12 last one --

13 MR. SCHROEDER: 16E.

14 JUDGE ROUSH: 16E, the whole answer.

15 MR. AXELSON: 16E.

16 JUDGE ROUSH: Let me say, also, that
17 yesterday at the end of the day that one of the
18 exhibits that was introduced into evidence was a video
19 cassette that was taken apart?

20 MR. AXELSON: Yes, Judge. What I have is
21 a -- I'm sorry.

22 JUDGE ROUSH: Once something is submitted

1 into evidence as part of the record of the case --

2 MR. AXELSON: This is simply a device that
3 allows a small cassette to be played. The video was
4 taken on a small cassette.

5 JUDGE ROUSH: With regards to records, I
6 don't know what the Court of Appeals says or the
7 Supreme Court, for example, has the ability to play
8 that tape. I think that it should be kept together
9 unless that is some sort of extraordinarily expensive
10 device.

11 MR. AXELSON: It isn't, I think that it's a
12 hundred bucks or so, Judge. It was not my intention
13 to admit this. This is essentially the same thing as
14 the video camera. It makes possible to view what is
15 on there.

16 JUDGE ROUSH: What I suggest you do is get
17 that tape copied onto a normal VHS tape and substitute
18 that as an exhibit.

19 MR. AXELSON: I will do that.

20 THE COURT: All right. Do you have any
21 other matters?

22 MR. AXELSON: Judge, I do. I'm trying to

1 see whether or not exactly how I want to do these.

2 Do you have the complete 16E? Because I
3 didn't include that; I don't have it in my files
4 anywhere.

5 MR. SCHROEDER: Yes.

6 MR. AXELSON: And then the first thing we
7 are going to do this morning is read Dr. Cabrera's
8 deposition. There were a couple of objections that I
9 made in the middle of that and I think that
10 Mr. Schroeder has that.

11 MR. SCHROEDER: You just need the second
12 page.

13 MR. AXELSON: Yes, I want to see whether I
14 want to use it or not.

15 All right, I'm not going to read 16, Your
16 Honor.

17 JUDGE ROUSH: All right.

18 MR. AXELSON: And I will not read -- this
19 would be 8D.

20 And Judge, would you note my objection to
21 the Court's rulings, please?

22 JUDGE ROUSH: Yes, sir.

1 MR. AXELSON: I think that this allows any
2 individual responding to admissions to make a speech
3 about the case and I think it is restrictive on the
4 use of Request for Admissions.

5 JUDGE ROUSH: I'm concerned about basically
6 streamlining the communication. Otherwise,
7 Mr. Schroeder will want to get up and read his part of
8 the answer. I think it is confusing -- that is a
9 short enough answer. If it went on for pages my
10 response might be different.

11 It puts Mr. Schroeder in the position of
12 introducing evidence in your case, and I am quite sure
13 he is well aware of that. But I understand your
14 position.

15 MR. AXELSON: Thank you, Judge. Now, with
16 regard to Dr. Cabrera's deposition, we have a de bene
17 esse deposition that was taken on July 12th. And I
18 have here the original which I will hand up to the
19 Court, which has not been marked in any way.

20 I have a reading copy and a witness copy
21 which have been marked. And if the Court would turn
22 to --

1 THE COURT: Now, do you want me to rule on
2 the objections now?

3 MR. AXELSON: I think so. It would make
4 it --

5 JUDGE ROUSH: Have you consulted on both of
6 them or you haven't consulted on them at all?

7 MR. AXELSON: We have consulted on these,
8 these that are on page 60.

9 JUDGE ROUSH: I can't really rule on
10 objections in a vacuum. I suggest that we go to a
11 point by point objection. We will have a bench
12 conference and that way I could put them in the
13 context of this deposition.

14 Now we need a reader, is that right?

15 MR. AXELSON: That's the problem.

16 JUDGE ROUSH: Well, normally the Court
17 doesn't supply readers, but I have a law clerk and
18 told him that he should come and watch the trial. So,
19 this would be a good opportunity for him.

20 Let's go ahead and bring the Jury in and
21 why don't you see if he can come and read?

22 MR. AXELSON: Judge, when Mr. Koerner

1 arrives, would the Court like to switch off and have
2 us use him or would the Court prefer that I not --

3 JUDGE ROUSH: No, if we are in the middle
4 of it we will just go on.

5 MR. AXELSON: I think that's fine; just so
6 that we are clear.

7 Your Honor, I'm going to read the Request
8 for Admissions first before we do the deposition.

9 JUDGE ROUSH: All right.

10 - - -

11 (Jury returned to the Courtroom at 10:17
12 o'clock a.m.)

13 - - -

14 JUDGE ROUSH: Welcome back, Ladies and
15 Gentlemen of the Jury. Prior to your coming in this
16 morning, we were taking care of some preliminary
17 matters.

18 At this point, Mr. Axelson is going to be
19 reading to you from responses to what we call Request
20 for Admissions. And prior to -- as you probably just
21 detected yesterday from the references to the de bene
22 esse deposition and that type of thing -- prior to the

1 trial, the attorneys engage in what we call pretrial
2 discovery. And they took depositions and they
3 responded to interrogatories.

4 And one of the mechanisms for pretrial
5 discovery is that at one point they serve on another
6 what is called a Request for Admissions. And in that
7 they ask the other party to admit or deny a certain
8 fact, or that a document is accurate, for example.
9 And the party who answers those admissions is bound by
10 those admissions.

11 So, Mr. Axelson is now going to read to you
12 from the Request for Admissions that they served on
13 the Defendants and that the Defendants answered. And
14 those answers are binding on the Defendant in this
15 case.

16 Go ahead.

17 MR. AXELSON: Thank you, Judge.

18 "On April 25th, 1993, Springfield Mall was
19 owned by Defendant, Franconia Associates, admitted.

20 "On April 25th, 1993, Springfield Mall was
21 managed by Defendant, the Fisher Group, Incorporated,
22 admitted.

1 "On April 25th, Defendant, the Fisher
2 Group, was the agent of Franconia Associates insofar
3 as mall management is concerned, admitted.

4 "On April 25th, 1993, Plaintiff Clark was
5 an employee of Elegant Nails Plus, admitted.

6 "The original hinges on the door were
7 offset pivot hinges, admitted.

8 "Prior to April 25th, 1993, the original
9 offset pivot hinges were replaced by the Defendants,
10 admitted.

11 "The replacement hinge was a ROTON
12 continuous hinge, admitted.

13 "The original closer on the door was a
14 Kawneer Husky concealed overhead closer, admitted.

15 "The majority of the other exterior doors
16 at the Mall also were originally equipped with Kawneer
17 Husky concealed overhead closers, admitted.

18 "In normal operation, the Husky closer
19 contains a spring which is compressed as the door it
20 controls opens. This spring then provides the energy
21 which then closes the door, admitted.

22 "On April 25th, 1993, the Husky closer

1 installed with the door," the door being a reference
2 to a particular door in this case, "contained a spring
3 which was compressed as the door was opened. This
4 spring would then provide the energy to close the
5 door, admitted.

6 "When functioning properly, the closer
7 controls the rate at which a door will close from its
8 fully open position to approximately 10 degrees open,
9 the closing speed, and the rate at which the door will
10 close from approximately 10 degrees open to fully
11 closed, the latching speed, admitted.

12 "In normal operation, the closing and
13 latching speeds of the door are adjusted by turning
14 two screws on the Husky closer; one of which adjusts
15 closing speed, the closing speed valve, while the
16 other adjusts latching speed, the latching speed
17 valve, admitted.

18 "On April 25th, 1993 at approximately 4:30
19 p.m., money was stolen from the Roy Rogers Restaurant
20 located on the first level of the Mall by an
21 individual named Joseph Darnell Hamilton, admitted.

22 "Hamilton was pursued from the restaurant

1 by a number of individuals, including Peter Schubring,
2 the restaurant manager, admitted.

3 "Other individuals, including the Plaintiff
4 Clark, joined the pursuit of Hamilton, admitted that
5 Clark joined the pursuit. Hamilton left the Mall
6 through one of the doors at entrance number 3,
7 admitted.

8 "While still in pursuit of Hamilton,
9 Plaintiff Clark attempted to leave the Mall through
10 the door, admitted.

11 "Plaintiff Clark reported his injuries to
12 Mall personnel on or about April 27th, 1993, admitted.

13 "On June 10th, Fairfax City Imaging Center
14 performed an MRI and determined that Plaintiff Clark
15 had a frank tear of the Achilles tendon in his right
16 leg, admitted.

17 "In July, 1993 Dr. Ruben Cabrera performed
18 surgery to repair Plaintiff Clark's torn Achilles
19 tendon, admitted."

20 JUDGE ROUSH: All right. Call your next
21 witness.

22 MR. AXELSON: The next witness would be

1 Dr. Ruben Cabrera, by de bene esse deposition.

2 JUDGE ROUSH: Okay. Ladies and Gentlemen,
3 let me take a moment to explain to you -- as was
4 mentioned to you yesterday, Dr. Cabrera has other
5 commitments today and is unable to be at the trial.
6 His deposition was taken prior to the trial. This
7 means that he went to the attorneys' offices and there
8 was a Court Reporter there, he was sworn, and he
9 testified under oath, and his deposition is now going
10 to be read to you.

11 Mr. Axelson is going to ask the questions
12 and my law clerk is going to play the role of
13 Dr. Cabrera. And he will read the deposition.

14 Just realize, of course, that this is just
15 a reading of the deposition; this is not, in fact,
16 Dr. Cabrera.

17 I would ask Mr. Heran, if you would -- and
18 all attorneys as well -- normally, when we read
19 depositions, I don't think this is an opportunity to
20 show us your acting skill. If you could just read it
21 in sort of a dead pan since, obviously, we don't know
22 what kind of inflection was put on this at the time

1 that the deposition was taken.

2 Mr. Heran, if you would take the witness
3 stand, you need to be sworn by the clerk, as well.

4 - - -

5 MR. HERAN,

6 having been first duly sworn by
7 the clerk, a Notary Public
8 within and for the State of Virginia,
9 to read the part of Dr. Ruben
10 Cabrera's de bene esse deposition,
11 was examined and testified as
12 follows:

13 - - -

14 MR. AXELSON: Your Honor, so that Mr. Heran
15 is aware of this, the parts that are going to be read
16 are highlighted in yellow. If an entire page is to be
17 read, it has in yellow at the top, "Read all." If an
18 entire page is to be omitted, it has in yellow at the
19 top, "Omit all."

20 JUDGE ROUSH: Okay. And if you get to the
21 objections, we will stop.

22 Oh, here is Mr. Koerner.

1 MR. AXELSON: Why don't we use Mr. Koerner?
2 He is a bit more familiar with the language.

3 JUDGE ROUSH: Sorry, Mr. Heran, that was
4 your big opportunity.

5 Ladies and Gentlemen of the Jury,
6 Mr. Koerner was originally scheduled to read this, but
7 he was in court downstairs. Now he is freed up and
8 everything that I said on Mr. Heran now goes to
9 Mr. Koerner.

10 Let me just say, as I said to Mr. Heran, I
11 would like you to read this, if you would, in a
12 monotone and not using any acting abilities that you
13 have developed as an attorney and putting some drama
14 in this.

15 And if you would now be sworn by the clerk?

16

- - -

17 THOMAS F. KOERNER, ESQUIRE,
18 having been first duly sworn by
19 the clerk, a Notary Public
20 within and for the State of Virginia,
21 to read the part of Dr. Ruben
22 Cabrera's de bene esse deposition,

1 proceeded as follows:

2 - - -

3 JUDGE ROUSH: You are familiar with
4 whether you should read a page or not based on the
5 page markings?

6 MR. KOERNER: Yes, Your Honor.

7 - - -

8 (The following was read into the record.)

9 - - -

10 BY MR. AXELSON:

11 Q. Good morning, Dr. Cabrera. I don't know
12 what time this deposition is going to be read to the
13 jury, so I am going to say good morning to you even
14 though it may be afternoon. Would you state your
15 full name please?

16 A. Ruben, R U B E N, D. Cabrera. C A B R E
17 R A.

18 Q. Dr. Cabrera, you are in fact a medical
19 doctor?

20 A. Yes.

21 Q. Do you have a field of specialty?

22 A. Orthopedic surgery.

1 Q. And how long have you been practicing in
2 the field of orthopedic surgery?

3 A. I finished my training in 1955. So in
4 private practice since 1955.

5 Q. Where were you trained?

6 A. I was trained at D.C. General Hospital in
7 Washington, D.C.

8 Q. And where have you practiced since 1955?

9 A. I practiced in Cuba for about eight
10 years. Then I had to leave Cuba for political
11 reasons, went to Spain and then about four months
12 later I was given a visa to come to this country.

13 Q. And you have been here since then?

14 A. Yes.

15 Q. That would in the early 60's?

16 A. '64, I have been in this country since
17 1964.

18 Q. Are you board certified in any areas of
19 specialty?

20 A. Yes, I am certified by the American Board
21 of Orthopedic Surgery, and also I am a member of the
22 American Academy of Orthopedic Surgeons.

First Deposition of Ruben D. Cabrera, M.D. - Direct

1 Q. So the jury understands, what do you have
2 to go through in order to become board certified?

3 A. Okay. You have to -- you actually need
4 about six years after you finish medical school. You
5 need surgical training, that I had. And also a
6 rotating internship where we deliver babies and we're
7 in medicine and pediatrics, et cetera, plus four
8 years of residency.

9 Q. And when did you become board certified?

10 A. Board certified, I don't remember the
11 date, but it is after 1964.

12 Q. Since that time, you have been an active
13 practitioner in your specialty in this area?

14 A. Yes. Except --

15 Q. The Northern Virginia area?

16 A. I practiced in Washington, D.C. for about
17 two years.

18 Q. All right. The plaintiff would submit
19 that Dr. Cabrera is qualified as an expert in the
20 field of orthopedic surgery. Mr. Schroeder, do you
21 wish to question Dr. Cabrera at this time about his
22 qualifications?

First Deposition of Ruben D. Cabrera, M.D. - Direct

1 MR. SCHROEDER: No.

2 - - -

3 JUDGE ROUSH: Mr. Schroeder, do you have
4 any dispute that the Doctor is an expert in orthopedic
5 surgery?

6 MR. SCHROEDER: I do not, Your Honor.

7 JUDGE ROUSH: Ladies and Gentlemen of the
8 Jury, as I explained to you yesterday, I have now
9 granted the motion that Dr. Cabrera be qualified to
10 testify in the area of orthopedic surgery. This means
11 that he can give his testimony in the form of opinions
12 as long as the opinions are within his field of
13 specialty, orthopedic surgery.

14 In evaluating his testimony, you should
15 focus on the basis for his opinion, the manner by
16 which he arrived at his opinions, and the underlying
17 facts and data from which he relied in order to reach
18 his opinions.

19 Go ahead, Mr. Axelson.

20 MR. AXELSON: Thank you, Judge.

21 - - -

22 (The reading into the record continued.)

First Deposition of Ruben D. Cabrera, M.D. - Direct

1

- - -

2

BY MR. AXELSON:

3

Q. Dr. Cabrera, I am going to ask you a

4

series of questions having to do with your treatment

5

of the plaintiff in this case, Allen Algernon

6

Clark.

7

A. Yes.

8

Q. When did you first see Mr. Clark?

9

A. 7-15-93.

10

Q. All right. And would you tell us, please,

11

how many occasions you have treated Mr. Clark or have

12

seen him as a patient?

13

A. Well, let me see.

14

Q. Approximately?

15

A. Let's see, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,

16

11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,

17

approximately 25 times.

18

Q. And the last time that you saw him?

19

A. Was on December the 22, 1993.

20

Q. So all of these 25 times would have been

21

between July and December of 1993?

22

A. Correct.

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First Deposition of Ruben D. Cabrera, M.D. - Direct

1 Q. Did you take a history from Mr. Clark on
2 the first occasions that you saw him?

3 A. Yes, I did, yes.

4 Q. What was his complaint at that time?

5 A. He told me he had a torn Achilles tendon.

6 Q. And did he give you any explanation as to
7 how this had occurred?

8 A. Chasing a robbery suspect. Now, this is
9 what he wrote here.

10 Q. I understand.

11 A. The rest is my own notes.

12 Q. Did he tell you how the injury occurred?

13 A. Let me see. Sudden close of a door, I
14 wrote this. Because this is -- sometimes a patient
15 doesn't give a good history, so we ask them and I
16 write my own notes.

17 Q. And these are your notes based on what he
18 told you?

19 A. My notes and his notes. So patient
20 explained how the accident occurred is chasing
21 robbery suspect. And then I wrote what I got from
22 him, sudden close of a door while chasing a robber at

1 the Springfield Mall.

2 Q. Did he tell you when this --

3 A. Right leg --

4 Q. I am sorry.

5 A. -- was caught in the door.

6 Q. Right leg was caught --

7 A. In the door.

8 Q. -- in the door. Did he tell you when this
9 injury occurred?

10 A. Yes, it happened on 4-18-93.

11 Q. That would be April 18th of 1993?

12 A. Correct.

13 Q. Did you make an examination of Mr. Clark
14 at that time?

15 A. Right.

16 Q. And what did your physical examination
17 disclose?

18 A. Physical examination demonstrated a well
19 developed pleasant male who is not in acute
20 distress. Examination of the left calf showed that
21 there is severe atrophy of the calf muscles.
22 Examination showed that there is a gap in the lower

1 part of the Achilles tendon approximately two inches
2 above its insertion, in the calcaneus. Calcaneus is
3 the heel bone. Compression of the calf muscle on the
4 right elicits no plantar flexion as opposed to the
5 opposite side, where there is a normal response.

6 In other words, we put the patient face
7 down and the calf of the good side and where the
8 tendon is in fact there is plantar flexion.

9 Q. That means the foot moves?

10 A. Moves downward.

11 Q. Moves downward?

12 A. Yes. And when there is a rupture, the
13 foot doesn't move down. This is a very very specific
14 test.

15 Q. All right. Now, when you performed this
16 test on Mr. Clark, you did this on his right leg and
17 there was no plantar flexion?

18 A. Right.

19 Q. Did you do the same test on his left leg?

20 A. Yes.

21 Q. And why would you test the left leg?

22 A. Just to see if he had a good motion there.

1 Q. Was there good motion on the left side?

2 A. On the left side, yes.

3 Q. Now, Dr. Cabrera, unless I am mistaken and
4 I may well be, I believe that earlier the very first
5 thing or first time you described his injury, you
6 described it as being on the left side?

7 A. Right Achilles tendon.

8 Q. Just so we are clear, it's his right
9 Achilles tendon he was complaining about?

10 A. Right. And here is a diagram and he
11 indicated the right.

12 Q. And that is where you found the problem?

13 A. Right. And my diagnosis originally was
14 rupture Achilles tendon on the right, three months
15 old.

16 Q. Now, do you have the benefit of any
17 specialized examinations?

18 A. Yes, he had an MRI.

19 Q. When was the MRI performed?

20 A. The MRI was performed on 6-10-93.

21 Q. And that was before he came to see you?

22 A. Yes. Now, let me see. They don't say --

1 yes, Dr. Andrew Smith ordered an MRI.

2 Q. Yes. All right. Now, does that
3 specialized examination, the MRI, does that confirm
4 the diagnosis that you reached?

5 A. That is right.

6 Q. All right. Did you reach a diagnosis?

7 A. Yes.

8 Q. And what was your diagnosis that you
9 reached -- strike that. Did you reach a diagnosis on
10 July the 15th of 1993?

11 A. Yes, the day I saw him, yes.

12 Q. And what was that diagnosis?

13 A. The diagnosis was ruptured Achilles tendon
14 on the right, three months old.

15 Q. Did you recommend to him any treatment for
16 this injury?

17 A. Yes, I recommended surgery.

18 Q. Did he have the surgery?

19 A. Yes, he did.

20 Q. When did he have the surgery?

21 A. Let me see. He had the surgery 7-21-93.

22 Q. That would be the 21st of July?

1 A. Yes.

2 Q. Six days after you first saw him?

3 A. Right.

4 Q. Dr. Cabrera, you yourself performed that
5 surgery, did you not?

6 A. Correct.

7 Q. And what was the surgical procedure that
8 you performed?

9 A. Well, we did a repair of the right
10 Achilles tendon using the Lindholm technique.

11 Q. And just briefly would you explain what
12 the Lindholm technique is?

13 A. Okay. We used sutures inside the tendon
14 from the proximal part of the distal part with a 14
15 plantar flexion. And then we took two flaps from the
16 upper part of the tendon, the proximal end of the
17 tendon, and draw it out down with a reinforcing
18 suture.

19 - - -

20 JUDGE ROUSH: Excuse me for interrupting,
21 but I think you misread the second line of that. And
22 maybe if we had a doctor on the Jury, he might have

1 probably spotted that. But you said, "From the
2 proximal part of the distal part," and it says,
3 "proximal part to the distal part."

4 MR. KOERNER: Excuse me.

5 JUDGE ROUSH: Why don't you go ahead and
6 reread the whole answer?

7 MR. KOERNER: "Okay. We used sutures
8 inside the tendon from the proximal part to the distal
9 part with a 14 plantar flexion. And then we took two
10 flaps from the upper part of the tendon, the proximal
11 end of the tendon, and draw it out down with a
12 reinforcing suture."

13 - - -

14 (The reading into the record continued.)

15 - - -

16 BY MR. AXELSON:

17 Q. Dr. Cabrera, you have referred to a Frank
18 tear or rupture of the Achilles tendon?

19 A. Right.

20 Q. Is there a simple way of putting that?

21 A. Complete rupture.

22 Q. It was completely torn?

1 A. Completely torn, right.

2 Q. It was two?

3 A. No continuity at all.

4 Q. It was in two separate pieces?

5 A. Two separate pieces, right.

6 Q. And your surgical approach was to rejoin
7 those pieces?

8 A. To approximate the tendon, so there would
9 not be any gap. Because if there is a gap, there is
10 a lot of scar tissue, which is a very poor substitute
11 for a tendon. So we tried to bring the ends close to
12 each other by putting sutures around here and here,
13 that means suture in the proximal and distal part and
14 then after that I did the flaps.

15 Q. Dr. Cabrera, returning to your initial
16 diagnosis of Mr. Clark's condition, do you have an
17 opinion based on a reasonable degree of certainty as
18 to what caused this frank tear of the Achilles
19 tendon?

20 A. Yes, when the door closed.

21 Q. Now, how would that have caused the
22 injury?

1 A. Well, I would say he had the foot probably
2 in dorsi flexion.

3 Q. And what is dorsi flexion?

4 A. It is like when the foot is brought up; it
5 is brought up like approximating the foot over the
6 kneecap. That is --

7 Q. The end of the foot would be lifted
8 towards the kneecap?

9 A. Would be lifted, yes.

10 Q. And what effect does that have on the
11 Achilles tendon?

12 A. That would have affected the tension.

13 Q. And then what --

14 A. And then the door hitting that, it could
15 have caused the rupture.

16 Q. And that is your opinion within a
17 reasonable degree of medical certainty?

18 A. Yes.

19 Q. All right. Following the surgery, what
20 treatment was rendered to Mr. Clark?

21 A. He was placed in a short leg cast with a
22 foot in plantar flexion.

1 Q. And plantar flexion as opposed to dorsi
2 flexion, is it not?

3 A. Yes.

4 Q. Plantar flexion is with the toes downward
5 away from the kneecap?

6 A. Yes. This eases the tension at the level
7 of the sutures.

8 Q. How long was he in the short leg cast?

9 A. Well, let me see. How long was he in the
10 cast? I think that when I did the surgery the second
11 time, he was still in the cast.

12 Q. All right. Now, you are referring to a
13 second surgery, what is the second surgery?

14 A. The second surgery, the second surgery
15 consisted of a debridement. Debridement is cutting
16 away tissues that are not healthy. He developed a
17 small area, I would say about one centimeter by one
18 centimeter, in the inside of the leg at the level of
19 the repaired tendon. It drained and we tried to see
20 if it would close and it never closed. So when we
21 saw that the wound was not going to close
22 spontaneously, we decided to do surgery, because the

1 tendon had been exposed to the outside and there was
2 a possibility it would get badly infected. So we
3 decided to take him to surgery, enlarge the opening,
4 expose the tendon to see the part that looked
5 suspicious of infection or being exposed to the
6 outside. And we removed that area and closed the
7 wound.

8 Q. And when did that occur?

9 A. The second?

10 Q. My recollection, doctor, is that it was in
11 October; is that fairly accurate?

12 A. Yes, it was 10-20-93.

13 Q. October 20th of 1993?

14 A. Right.

15 Q. Now, doctor, let's return to his first
16 surgery for just a second. How long was he in the
17 hospital at that time?

18 A. He was there for a day.

19 Q. And was --

20 A. No, the 7-23 -- yes, one day, one day
21 after surgery.

22 Q. And was released and then subsequently

1 brought back into the hospital?

2 A. When he had the second surgery.

3 Q. Was he released in July and subsequently
4 brought back into the hospital?

5 A. Yes.

6 Q. And why was that?

7 A. Because he had a drainage of the wound.

8 Q. No, I am referring to July.

9 A. July.

10 Q. Was he released from the hospital in July
11 and then subsequently brought back in the hospital in
12 July?

13 A. No.

14 Q. Would you refer to your records again,
15 doctor, I believe he spent more than --

16 A. Let me see. Let me read it to you. This
17 patient was discharged on 7-22-93, one day after
18 surgery. He had been receiving I.V. antibiotics and
19 a pack for relief of pain. This patient was to be
20 discharged on 7-22-93; however, he had a fever all
21 morning and at the time of discharge, naturally we
22 cancelled his discharge, ordered a chest x-ray, et

1 cetera. And then on the 23rd he could not go home.

2 And he was discharged on 7-24.

3 Q. Okay. Did you --

4 A. Because he had elevation of temperature.

5 Q. Were you able to determine what was the
6 cause of the elevation in temperature?

7 A. No. And then, yes, and then he had to be
8 admitted again on 7-24.

9 Q. And why was he readmitted he on 7-24?

10 A. Because of temperature elevation.

11 Q. Still having a high temperature?

12 A. Right.

13 Q. All right. Dr. Cabrera, when was he
14 released from the hospital after being readmitted on
15 July 24?

16 A. When was he released?

17 Q. Yes.

18 A. Let's see. Yes, 7-27-93. 7-27.

19 Q. So that would be July the 27th?

20 A. Right.

21 Q. Now, just so we are clear on this, he was
22 originally operated on in the hospital on what date?

1 A. 7-21.

2 Q. And then he was finally released from the
3 hospital?

4 A. 7-27.

5 Q. 7-27. And then seen again in the hospital
6 on October the 20th; that is the second surgery?

7 A. Yes, but we followed him in the office.

8 Q. That was an outpatient surgery?

9 A. As an outpatient.

10 Q. So he was not actually hospitalized at
11 that time?

12 A. Right. We saw him in our office.

13 Q. Now, Dr. Cabrera. What treatment was
14 prescribed for him after the second operation in
15 October?

16 A. Well, he was given a cast. He received
17 antibiotics; elevation of the leg with complete bed
18 rest.

19 Q. Did he have a brace or any --

20 A. He had a short leg cast and after we
21 removed the cast, we applied a brace to prevent dorsi
22 flexion of the foot.

1 Q. Was there anything special about this
2 brace other than it prevented dorsi flexion or,
3 excuse me, the foot coming up?

4 A. Well, it was the main function. We wanted
5 to have the sutures under no tension at all.

6 Q. And so how did you achieve that?

7 A. By having an elevation of the heel and a
8 brace.

9 Q. And does he continue -- or is he supposed
10 to continue wearing that brace at the present time?

11 A. Well, I haven't seen Mr. Clark. He phoned
12 the other day and I said I wanted to see him.

13 Q. Do you have an opinion as to whether or
14 not he has any permanent impairment as a result of
15 the tendon, the damage to the tendon?

16 A. Yes. He has an impairment. He is not
17 allowed to engage in sports, running, jogging and
18 because of the chances of having another rupture. So
19 that is an impairment of his life.

20 Q. Do you have an opinion, doctor, to a
21 reasonable medical certainty, as to the degree of
22 impairment that Mr. Clark has as a result of the

1 injury to his lower extremity?

2 A. In my letter of March the 7th, 1994,
3 addressed to Mr. Axelson, and in paragraph number 4,
4 I said quote, Mr. Clark has a permanent injury to his
5 lower extremity. The foot is 80 percent of the leg.
6 Impairment of the foot caused by limitation of motion
7 and weakness in plantar flexion with impaired gait is
8 70 percent of the foot.

9 Q. The impaired gate is 70 percent of the
10 foot. I am sorry, caused by limitation of motion and
11 weakness in plantar flexion with impaired gait is 70
12 percent of the foot?

13 A. Yes.

14 Q. And that is the opinion you expressed to
15 me in March?

16 A. March the 7th of 1994.

17 Q. Is that the opinion you continue to have
18 today?

19 A. I haven't seen him, but I would say this
20 would be very reasonable.

21 Q. You haven't seen anything to change your
22 opinion as it is expressed there?

1 A. No.

2 Q. Dr. Cabrera, is it your opinion to a
3 reasonable medical certainty that the surgery and
4 treatment that were provided to Mr. Clark were
5 necessitated by the injury to his Achilles tendon in
6 his right leg?

7 A. That is correct.

8 Q. Dr. Cabrera, I have here a number of
9 bills, this first one is from Fairfax Orthopedic
10 Clinic, and that is the organization that you were
11 previously associated with?

12 A. Yes.

13 Q. And you were associated with that
14 organization during the time period you were treating
15 Mr. Clark?

16 A. That is right.

17 Q. Are those charges reasonable and necessary
18 for the treatment of Mr. Clark?

19 A. They are, yes.

20 Q. Dr. Cabrera, referring to the bill that I
21 handed you, which we'll have marked as Plaintiffs
22 Exhibit 1, were those charges reasonable and

1 necessary for the treatment of Mr. Clark's Achilles
2 tendon?

3 A. They were, yes.

4 Q. And associated with your charges there
5 would have been hospital charges at Fair Oaks
6 Hospital in July and October of 1993?

7 A. Yes.

8 Q. Now, referring to the billings I have
9 handed you which -- let's mark them as Plaintiffs
10 Exhibit 2.

11 Q. Dr. Cabrera, you had the opportunity to
12 review these bills which were from July of 1993 from
13 Fair Oaks Hospital?

14 A. Yes.

15 Q. And are they, in your opinion to a
16 reasonable medical certainty, necessary and
17 reasonable for the treatment of Allen Clark's
18 injuries?

19 A. They were, yes.

20 Q. Dr. Cabrera, you did, in fact, treat
21 Mr. Clark at Fair Oaks Hospital in October of 1993,
22 October the 20th specifically?

1 A. Yes.

2 Q. And there would have been a bill from the
3 hospital for the services that were provided by the
4 hospital as opposed to the services that you
5 provided. Right?

6 A. Right.

7 Q. And that bill would have been
8 necessitated --

9 A. Yes.

10 Q. -- by Mr. Clark's treatment --

11 A. Right.

12 Q. -- to a reasonable medical certainty?

13 A. Yes.

14 MR. AXELSON: Your objection is noted.

15 Q. Dr. Cabrera, I have here another bill from
16 Radiology Imaging Associates. I would ask you to
17 take a look at that bill.

18 A. Yes.

19 Q. Now, that refers to an MRI that was taken
20 on July 10th of 1993, does it not?

21 A. 5-10-93.

22 Q. I believe that is 6-10, is it not?

1 A. Oh, 6-10.

2 Q. 1993?

3 A. Yes.

4 Q. Is that a reasonable charge for the
5 service of providing an MRI of the right ankle?

6 A. Yes, fine.

7 Q. And assuming that bill applies to
8 Mr. Clark, would it have been necessitated by the
9 injury which he received?

10 A. Yes, right, correct.

11 Q. To a reasonable medical certainty?

12 A. Right.

13 Q. Could we have this marked as Number 3,
14 please.

15 Q. And, Dr. Cabrera, assuming there is no
16 rerupture of Mr. Clark's Achilles tendon, will he
17 need any medical treatment in the future?

18 A. No, but he will have to be very careful
19 with his activities.

20 Q. Have you placed any limitations on his
21 activities as a result of his Achilles -- right
22 Achilles tendon?

1 A. Yes, he is not supposed to engage in
2 sports, not to go uphill. I had a patient who
3 ruptured an Achilles tendon just going uphill, and
4 just be careful.

5 Q. What activities have the potential for
6 causing rerupture of the Achilles tendon?

7 A. Sport activities, basketball.

8 Q. What do these activities have in common?
9 What do they do to his foot?

10 A. Well, they may cause another rupture with
11 him, because it is weak.

12 Q. Because of the extension of the Achilles
13 tendon?

14 A. Hyperextension, yes. Anything that would
15 cause hyperextension could cause that to happen.

16 Q. Doctor, I don't believe I asked you this,
17 you are licensed in the state of Virginia, are you
18 not?

19 A. Oh, yes.

20 MR. AXELSON: I am sorry. All right. I
21 have no further questions at this time. Thank you,
22 Dr. Cabrera.

1 THE WITNESS: You are very welcome.

2 BY MR. SCHROEDER:

3 Q. Good afternoon, Dr. Cabrera.

4 A. Good afternoon.

5 Q. Allen Clark told you that he had this
6 accident on April 18th?

7 A. Yes. April 18, '93.

8 Q. Are you aware that he did not see a doctor
9 until April 29th?

10 A. Well, he saw a doctor in the emergency
11 room.

12 Q. Right.

13 A. I don't know what day, the same day.

14 Q. I don't think your records reflect it,
15 doctor, but I think the other evidence in the case
16 indicates that he did not see an emergency room
17 doctor until April 29th?

18 A. April 29th.

19 Q. Okay. Were you also aware, doctor, that
20 Mr. Clark was referred at that time or was diagnosed
21 at that time with an ankle sprain?

22 A. Yes.

1 Q. Is that, can you answer yes or no?

2 A. Yes, I think he was.

3 Q. Okay. And that that was a misdiagnosis?

4 A. Yes.

5 Q. Doctor, were you aware that at that time
6 the emergency room physician recommended to Mr. Clark
7 that he see an orthopedist, and that Mr. Clark did
8 not go see an orthopedist?

9 A. Right.

10 Q. And were you aware that --

11 MR. AXELSON: I am sorry, what was your
12 answer?

13 THE WITNESS: Yes.

14 BY MR. SCHROEDER:

15 Q. And were you aware that rather than go see
16 an orthopedist, Mr. Clark went to see an attorney,
17 and the attorney recommended that he go see a
18 chiropractor?

19 A. No, I was not aware of that.

20 Q. Did you understand that Mr. Clark did
21 eventually go see a chiropractic?

22 A. Yes.

1 Q. And that he was treated by the
2 chiropractic for several weeks before getting the
3 MRI?

4 A. Yes. I know he was treated by a
5 chiropractic, I don't know for how long.

6 Q. He didn't see you until July 15?

7 A. July 15th.

8 Q. All of these events that occurred prior
9 to, from the time of the accident until he finally
10 came and saw you, all of these, you know, acted to
11 delay treatment of the Achilles tendon, the rupture
12 of the Achilles tendon, do they not?

13 A. Delay?

14 Q. Yes.

15 A. Yes.

16 Q. And all of them had an adverse effect on
17 the treatment of the Achilles tendon, did they not?

18 A. Well, I think we got a good result, so
19 what I said before, this could have made a surgical
20 procedure more difficult, but the end result was a
21 good one.

22 Q. But, as you told Mr. Clark yourself, prior

1 to and after the surgery, his chances of having a
2 better result were lessened because of the delay?

3 A. That is right.

4 Q. Isn't that true?

5 A. Yes.

6 Q. Doctor, there is two, actually there are
7 three types of treatment that can be prescribed for
8 ruptured Achilles tendons according to medical
9 literature, and just your general understanding of
10 the profession. Those three types are the
11 conservative type of treatment, which entails putting
12 a cast on the leg and holding the foot in a downward
13 pointing position?

14 A. Plantar flexion.

15 Q. Plantar flexion for several weeks?

16 A. Yes.

17 Q. And that is the conservative type of
18 treatment; there is no surgery; there is no opening
19 up of the skin?

20 The second type would be the subcutaneous
21 treatment, which is surgery, where you actually go in
22 and sew together the two ends of the tendon and

1 sometimes you will take a flap down or two flaps down
2 and use that to further secure the gap.

3 And then there is percutaneous treatment,
4 which is where you use some pins and some threads and
5 you sort of jam the two ends together and hold them
6 there for a while and use that in conjunction with
7 the cast. Are those the three types of treatment as
8 you understand --

9 Q. That are available?

10 A. Yes.

11 Q. And there has been a number of studies
12 done as to the effectiveness of each type of
13 treatment, haven't there been?

14 A. Yes.

15 Q. And there is disagreement among different
16 doctors about the advantages and disadvantages of
17 each type of treatment; isn't that correct?

18 A. Yes.

19 Q. But isn't it also correct that the
20 conservative type of treatment is never recommended
21 when the injury is more than a month old?

22 A. Yes. I would never use it in a patient

1 that has had the injury for a long time.

2 Q. No one recommends that, that they use
3 conservative treatment after the injury has existed
4 for over a month; isn't that correct?

5 A. Correct.

6 Q. So the fact that there was a delay of
7 close to three months, and whether it was two and a
8 half months or three months doesn't matter, that
9 delay completely ruled out any chance for Mr. Clark
10 to have conservative treatment?

11 A. Yes. But even if it had been a fresh
12 rupture, I would recommend to have the procedure
13 performed.

14 Q. I understand that you recommend surgery
15 all the time, doctor, we will discuss that in a
16 minute. It also ruled out, the fact that there was a
17 delay of two and a half to three months, it also
18 ruled out any opportunity to do percutaneous
19 treatment?

20 A. Yes.

21 Q. Because again, the doctors who prescribe
22 percutaneous treatment never do it when the injury is

1 more than a month old there as well. And the reason
2 they can't do it is because scar tissue develops at
3 the end of each piece of tendon after a period of
4 time and they won't naturally join together after
5 that tissue is formed and sort of healed over itself,
6 isn't that the mechanism that prevents that type of
7 treatment after a delay?

8 A. Correct.

9 Q. Now, with the conservative treatment, the
10 cast type treatment, that is -- there is no risk of
11 infection because you haven't opened up skin.
12 Correct?

13 A. Correct.

14 Q. And in the medical literature, which even
15 you consider authoritative, it is always noted with
16 surgical repair that there is a risk of infection,
17 and that is one of the draw backs to doing surgical
18 repair versus conservative repair?

19 A. Correct.

20 Q. I guess I will repeat my question. Do you
21 consider the following publications to be
22 authoritative in the field of orthopedics, and

1 specifically with regard to treatment of Achilles
2 tendon injuries, the first being the Journal of Bone
3 and Joint Surgery; do you consider that to be
4 authoritative?

5 A. Yes. But let me tell you, when an article
6 is written in a journal with a speech that an
7 orthopedic surgeon has, it doesn't mean that that is
8 the word of the Lord. It means the article is
9 written by one or several doctors, and that is their
10 particular opinion. It doesn't mean that because
11 they are published in the Journal of Bone and Joint
12 Surgery, that is the law of the land, whatever they
13 say. Because in the next issue you may see advocates
14 for conservative treatment or surgical treatment.
15 So --

16 Q. Doctor, isn't it a fact that in the
17 literature regarding Achilles tendon injuries and
18 maybe from your own experience, doctor, that when a
19 person suffers a rupture, the moment they suffer the
20 rupture, they often describe it as being, feels like
21 they have been kicked or shot in the ankle?

22 A. Yes.

1 Q. But it is a sudden hard feeling, isn't it?

2 A. Right.

3 Q. Isn't it also a fact that the majority of
4 Achilles tendon ruptures occur with men between the
5 ages of 30 and 50?

6 A. Yes.

7 Q. Two-thirds of all Achilles tendon ruptures
8 there was no prior symptoms of ankle trouble; isn't
9 that correct?

10 A. That is right. The majority of my
11 patients never have any trouble.

12 Q. I am sorry, conservative treatment versus
13 surgical treatment. Conservative treatment is much
14 less expensive, is it not?

15 - - -

16 JUDGE ROUSH: I am sorry, but what page are
17 you on?

18 MR. SCHROEDER: 48.

19 - - -

20 (The reading into the record continued.)

21 - - -

22 A. I don't know. You get a bad result from a

1 conservative treatment, you will have the expense of
2 treating that and then probably the patient may
3 require surgery. So it is more expensive. The less
4 expensive treatment for a ruptured Achilles tendon is
5 the treatment that gives the patient the best
6 result. In other words, if I say okay I am going to
7 spend \$700 being conservative but the patient is not
8 going to get a good result; versus, I am going to
9 spend \$6,000 and the patient is going to get an
10 excellent result. We don't think about money. We
11 think what is the best for the patient.

12 Q. I understand that, doctor. In
13 conservative treatment, all that they do though is
14 put on a cast?

15 A. Yes.

16 Q. And the patient goes home and many weeks
17 later the cast is removed and then the patient is
18 usually fitted with a heel lift and sometimes a
19 brace; isn't that correct?

20 A. Yes.

21 Q. And there is no real danger of infection
22 because there has been no opening of the skin?

1 A. No.

2 Q. And it is almost -- it is strictly an out
3 patient thing once the cast is put on, isn't it?

4 A. Yes.

5 Q. Now, there have been a number of studies
6 done about comparing the benefits and the
7 disadvantages of conservative treatment versus
8 surgical treatment; isn't that correct?

9 A. Yes.

10 Q. And some doctors say conservative
11 treatment is better and some doctors say surgical
12 treatment is better?

13 A. Yes.

14 Q. And you say that surgical treatment is
15 better?

16 A. Yes.

17 Q. Isn't it a fact that the most recent
18 studies, at least in the American Journal of Sports
19 Medicine, say that conservative treatment is an
20 acceptable alternative, even among the doctors who
21 recommend surgical treatment?

22 A. An alternative. But I think that a young

1 person like Mr. Clark, I would give him all the
2 benefit of treatment that is more logical and
3 supposed to give him a good result. Because for me
4 the flaps that are turned down help to reinforce the
5 suture. And that is very important.

6 Q. Well, Mr. Clark didn't have a choice once
7 he had waited three months. He had to get surgical
8 treatment, conservative treatment was ruled out then?

9 A. Yes, it was out. I would never do it.

10 Q. But you would admit though that had he
11 gone to a doctor immediately after this accident, he
12 could have had conservative treatment, some doctors
13 would have recommended conservative treatment, would
14 they have not?

15 A. Yes, you can have an opinion about
16 everything.

17 Q. Doctor, you indicated to Mr. Axelson that
18 I guess your primary concern about Mr. Clark's
19 condition now -- you haven't seen Mr. Clark since
20 December?

21 A. Right.

22 Q. And you asked -- you indicated that it

1 would be helpful to your opinion if you had an
2 opportunity to see him?

3 A. I would like to see him.

4 Q. See him more recently?

5 A. Yes.

6 Q. Okay. But you indicated to Mr. Axelson
7 that your major concern about Mr. Clark was that he
8 may experience a rerupture?

9 A. Right.

10 Q. A second rupture because his tendon has
11 been weakened --

12 A. Right.

13 Q. -- because of the injury and all that has
14 followed?

15 A. Right.

16 Q. What statistically, according to the
17 published studies, what are the chances of a
18 rerupture after surgery?

19 A. Well, Mr. Clark reruptured a tendon, it
20 would be 100 percent.

21 Q. I know if it actually happens that it is
22 100 percent. But what are the chances, at least

1 statistically, that he will have a rerupture?

2 MR. AXELSON: If you know.

3 THE WITNESS: I cannot cite figures, but
4 I say it is a very good possibility.

5 BY MR. SCHROEDER:

6 Q. Well, what do you mean by a very good
7 possibility?

8 A. Yes.

9 Q. Is it more likely than not?

10 A. It is more likely if he engages in a sport
11 or something. There is a chance that he may have
12 it. Even if he doesn't, it is a possibility that he
13 may have a rupture because he missed a step in church
14 or something like that.

15 Q. It is less than a 10 percent chance
16 statistically, though, isn't it?

17 A. All depends what he does.

18 Q. I imagine if he wants to rupture it he
19 can. But if he engages in normal activity?

20 A. It is not likely, but it is a very good
21 possibility, just like cigarette smoking and cancer
22 of the lung.

1 Q. Well, do you consider a five percent
2 possibility a good possibility?

3 A. No, I would say no.

4 Q. Well, isn't it true that at least in 1993,
5 in an article written in the American Journal of
6 Sports Medicine, their statistical study of patients
7 who had Achilles tendon ruptures only 5 percent who
8 had surgical treatment, 5.4 percent, suffered a
9 rerupture?

10 A. Who had surgical treatment?

11 Q. Yes.

12 A. I don't know.

13 Q. Do you have any reason to doubt that?

14 A. No, I would say that this is more common.
15 I would say maybe 10 or 15 percent. Depends on the
16 individual, et cetera. Now, if you take an athlete
17 who continues doing the same type of sport, the
18 incident might be higher. If you take a non, who
19 doesn't engage in a sport or anything violent,
20 probably the incidence could be one to two percent.
21 So the patient population has a lot to do with that.

22 Q. Well Mr. Clark doesn't play professional

1 sports or anything, does he?

2 A. No.

3 Q. And you have instructed him not to engage
4 in sports, haven't you?

5 A. Right.

6 Q. So that the fact that assuming he obeys
7 your medical directions, that indicates that it is
8 unlikely that he will have a rerupture, does it?

9 A. It is unlikely, but it is a possibility.

10 Q. Okay.

11 A. And it is there all the time.

12 Q. Now, in September of 1993 you instructed
13 Mr. Clark to get a brace and to wear it, didn't you?

14 A. Yes.

15 Q. And he had the brace by October and when
16 he came to see you on October 7th he wasn't wearing
17 it, was he?

18 A. I gave him hell, yes.

19 Q. But the wearing of the brace is essential
20 to a good recovery, isn't it?

21 A. Yes.

22 Q. Okay.

1 A. But right now if he is doing okay, he is
2 not going to need it.

3 Q. Now, doctor, let's talk a little bit about
4 how the accident happened. Now, I believe you
5 testified when Mr. Axelson was asking you questions
6 that you believed that the ruptured Achilles tendon
7 was caused by the door closing on Mr. Clark's foot?

8 A. Yes, it is possibility.

9 Q. That is a possibility.

10 A. It's a blunt trauma. It is called a blunt
11 trauma.

12 Q. But you are not aware of anything in the
13 literature or your prior experience of an instance
14 where an Achilles tendon rupture was caused by an
15 impact or trauma, other than someone taking a knife
16 and cutting it or it being cut by a machine or
17 something?

18 A. I say medically it is very possible that
19 he would rupture the tendon when the door hit him.
20 Now, did he have a foot in hyperextension? It is a
21 possibility. Was the foot in plantar flexion and the
22 back caused the rupture? It is possible.

1 Q. The only reason that you -- that you have
2 expressed the opinion though that this door closing
3 on Mr. Clark's foot may have caused this injury is
4 based on what Mr. Clark told you about how it
5 happened; isn't that right?

6 A. Yes, right.

7 Q. And you are not aware of what any of the
8 other witnesses in this case have said about how this
9 accident happened?

10 A. I have no idea.

11 Q. In the literature, there is no -- I mean I
12 have asked you this three times and you have already
13 told me, but there is no description of any of these
14 ruptures being caused by impact, is there?

15 MR. AXELSON: If you are aware.

16 THE WITNESS: I go by what is logical,
17 not what is in the literature. I am not going to
18 read 25 articles to see if it happens because a door
19 fell on it or a tire or something like that. I mean
20 for that for me what is important is the patient has
21 it or he doesn't have it.

22 BY MR. SCHROEDER:

1 Q. Okay.

2 A. And now I have to believe what my patient
3 tells me.

4 Even I would say not having the foot in
5 dorsi flexion, just blunt trauma could cause a
6 rupture. In other words, I wouldn't consider that
7 all the Achilles tendon rupture are caused by
8 hyperextension. I think that blunt trauma like
9 Mr. Clark is saying could have caused that.

10 Q. Did you see any evidence of blunt trauma
11 in your examination of Mr. Clark's ankle?

12 A. Well, three months later, I think it would
13 be very unlikely I would find anything. And even --

14 Q. Are you aware of any mention of any
15 objective finding of blunt trauma in any of the
16 medical records Mr. Clark has?

17 A. I didn't find any. I saw him three months
18 later. So if he had a bruise, I don't know.

19 - - -

20 MR. AXELSON: Your Honor, at this point
21 there was an objection to the next question. May we
22 approach the bench?

1 JUDGE ROUSH: Yes, sir.

2 - - -

3 (Discussion at sidebar as follows)

4 - - -

5 MR. SCHROEDER: It started -- it's on the
6 end of page 61.

7 MR. AXELSON: Line 22 on page 61.

8 JUDGE ROUSH: Okay.

9 MR. SCHROEDER: My objection is to the form
10 of the question.

11 JUDGE ROUSH: All right. What is the
12 standard in Virginia if this is not a reasonable
13 degree of medical certainty?

14 MR. SCHROEDER: The opinion that he makes
15 is that this is to a reasonable degree of medical
16 certainty. It has not been revealed this out to a --
17 it is kind of your opposite of that. I don't think
18 there is any law that says we have to rule this out to
19 a degree of medical certainty.

20 JUDGE ROUSH: What is your position,
21 Mr. Schroeder?

22 MR. SCHROEDER: He is going to testify that

1 it's possible, it tore because of the blunt trauma.
2 And I think that he is testifying that one is
3 reasonably certain that it was blunt trauma, then I
4 should be able to ask if you are reasonably sure that
5 it wasn't the hyperextension.

6 If he can give the opinion on one, he
7 should be able to give an opinion on another.

8 JUDGE ROUSH: This is just a variation of
9 that. Mr. Axelson?

10 MR. AXELSON: I don't have any problem with
11 him asking that question.

12 MR. SCHROEDER: Well, there is no
13 objection, then. It's the same thing.

14 JUDGE ROUSH: Let me take a look at that.

15 MR. AXELSON: But that is not the way that
16 the question reads. And I think that he does --
17 excuse me.

18 JUDGE ROUSH: You know, all of these are
19 questions that go on and on. That's not the standard
20 expert testimony.

21 MR. SCHROEDER: That's the point I --

22 JUDGE ROUSH: He is the expert, he is not

1 the finder of fact.

2 MR. SCHROEDER: I understand that.

3 JUDGE ROUSH: He is the expert, he has to
4 give his opinion as to a reasonable degree of medical
5 certainty.

6 I don't have any objection to the Jury
7 hearing this -- that could be one or the other. It's
8 a sort of anything is possible kind of answer. But
9 your answer is on page 64, more likely than not.

10 I'm sustaining his objection. Why don't I
11 send the Jury out while we finish this?

12 - - -

13 (Conclusion of discussion at sidebar.)

14 - - -

15 JUDGE ROUSH: Ladies and Gentlemen, we are
16 going to take a recess right now while we resolve some
17 objections that arose during the deposition of the
18 Doctor and we will get back to you just as soon as we
19 can.

20 - - -

21 (Jury escorted from the Courtroom at 11:01
22 o'clock a.m.)

1

- - -

2

JUDGE ROUSH: Mr. Koerner, you are so

3

believable as a doctor, I was going to ask you to

4

explain one of the medical terms.

5

MR. KOERNER: I was going to send you a

6

bill.

7

JUDGE ROUSH: All right, we are on page --

8

MR. AXELSON: 61 is where the question that

9

I object to begins; line 22, Your Honor.

10

JUDGE ROUSH: All right.

11

MR. SCHROEDER: Your Honor, may I make a

12

suggestion as to how to rephrase the question?

13

JUDGE ROUSH: Sure.

14

MR. SCHROEDER: How about if I ask how

15

certain are you that this accident was not caused by

16

hyperextension.

17

JUDGE ROUSH: On page 62?

18

MR. SCHROEDER: 61 and 62.

19

JUDGE ROUSH: "How certain are you that

20

this accident was not caused by hypertension?"

21

MR. SCHROEDER: Hyperextension, correct.

22

JUDGE ROUSH: I am getting hypertension.

First Deposition of Ruben D. Cabrera, M.D. - Cross

360

1 MR. SCHROEDER: I am, too.

2 JUDGE ROUSH: Answer: "I cannot be sure, I
3 cannot say." And then, we --

4 MR. AXELSON: "How certain are you that
5 this accident was not caused by hyperextension?"

6 Is that the question you offer?

7 MR. SCHROEDER: Yes.

8 MR. AXELSON: All right. I can live with
9 that.

10 JUDGE ROUSH: All right, I will write that
11 in.

12 MR. SCHROEDER: And we exclude his "yes,"
13 interrupting the middle of the question.

14 MR. AXELSON: Okay, that's fine.

15 MR. SCHROEDER: And then there is this --
16 the one on 62, line 11 --

17 JUDGE ROUSH: Wait a minute, you are
18 getting ahead of me.

19 Okay. And then his answer would go to line
20 6, "I cannot be sure, I cannot say?"

21 MR. AXELSON: That's fine.

22 JUDGE ROUSH: All right. We will not read

1 Mr. Axelson's objection in. Did you want to read the
2 question on line 11?

3 MR. SCHROEDER: Yes, and you have an
4 objection to that?

5 MR. AXELSON: Same thing. I think that if
6 we cut it off to a reasonable degree of medical
7 certainty, then we can go to his answer at 63.

8 MR. SCHROEDER: Stop at "injury." That's
9 fine with me.

10 JUDGE ROUSH: All right. And we will go to
11 63, his answer of "I don't know, I wasn't there,
12 et cetera, et cetera." All right.

13 MR. SCHROEDER: Then I think that my
14 question at line 16, he objects to as well.

15 JUDGE ROUSH: Yes, I would sustain the
16 objections, more likely than not.

17 So, line 16 on page 63, sustain the
18 objection to that question.

19 MR. SCHROEDER: Should I just ask it if --

20 JUDGE ROUSH: Why don't we combine the
21 answer 63, line 14, with the answer right into 9, on
22 line -- page 64, make it one answer?

1 MR. AXELSON: That's fine.

2 JUDGE ROUSH: So he would say, "I don't, I
3 don't, I don't have any doubt. I think that it is
4 very possible -- it is possible that the door could
5 have caused it, it could be a combination, et cetera,
6 et cetera."

7 MR. SCHROEDER: Okay.

8 MR. AXELSON: I don't believe that I had
9 any more objections.

10 JUDGE ROUSH: All right.

11 MR. AXELSON: I think this comes very close
12 to winding up Dr. Cabrera's first deposition. As long
13 as the Jury is out, does the Court want to address the
14 second deposition, as well?

15 JUDGE ROUSH: Might as well. So, after
16 this he saw Mr. Clark again and then he had a second
17 deposition?

18 MR. AXELSON: That's correct.

19 JUDGE ROUSH: And this was noticed by
20 Mr. Schroeder?

21 MR. SCHROEDER: Yes, Your Honor.

22 JUDGE ROUSH: Okay. Why didn't you move to

1 cross that deposition of Mr. Schroeder since it was
2 the second part of the --

3 MR. SCHROEDER: I figured that it was an
4 objection we could raise now. It was 2 weeks before
5 trial. I could not have set a motion on -- given the
6 rules regarding providing at least 2 weeks of notice.

7 And I figured that the only way that it
8 would be proper to address is to go ahead and take the
9 deposition so that you would have it in front of you
10 to judge what was there and then consider the
11 objections at that time.

12 JUDGE ROUSH: You don't object to the whole
13 thing, the fact that he examined the Plaintiff and --

14 MR. SCHROEDER: I object to that and I
15 strongly object to him trying to correct his testimony
16 in the first deposition. There are 2 parts of this,
17 the second deposition. One is where he updated his
18 report and then the other where he corrects his
19 deposition. And that is where he reads out of the
20 book, which you pointed out the code section. He
21 didn't give me 30 day's notice of the fact that he was
22 going to read out of the treatise. I think that part

1 would be excluded, anyhow.

2 JUDGE ROUSH: Well, I sustain the objection
3 to reading out of the treatise as direct testimony.

4 As far as evaluating the Plaintiff, even as long as he
5 hasn't changed his opinions, if you further inform
6 existing opinions, I think that that's all right.

7 If he has changed his opinion, I understand
8 that he has moved the disability --

9 MR. AXELSON: He has moved it lower, I
10 believe it has affected the lower part. But other
11 than that, he hasn't changed his opinions.

12 MR. SCHROEDER: I don't think that's a
13 change, but he says, "I would like to see him again,"
14 of what we have heard today. And I think now that he
15 has seen him again, he is able to follow up on it.

16 So, it is not really a change. It is
17 nothing that he anticipated.

18 JUDGE ROUSH: All right. Well, then, I
19 overrule the objection to that. I hope there is no
20 problem in delineating that.

21 But I do sustain the objection to him
22 reading out of the treatise.

1 MR. AXELSON: That's fine, I have no
2 problem with that, Your Honor.

3 Your Honor, actually there are 3 parts of
4 the deposition. The third part we went into the
5 medical bills again, and I asked him about the
6 reasonableness and the necessity of the same bills
7 which were introduced in the first deposition.

8 However, this time I identified them by
9 their correct numbers that we have in court here
10 today. And if Mr. Schroeder has some response to
11 that, that he wants them excluded -- I think that it
12 makes it more clear for the Jury.

13 JUDGE ROUSH: I'm confused. You want to
14 read that part or --

15 MR. AXELSON: I want to read that part
16 because it makes the exhibit number consistent with
17 what we are using today.

18 MR. SCHROEDER: I think that we don't have
19 to read it. I don't have any objection to the
20 identity of these exhibits. We can just stipulate
21 that the exhibits that were shown to Dr. Cabrera in
22 his first deposition are exhibits numbered, whatever,

1 in his exhibit book.

2 MR. AXELSON: That is one additional
3 exhibit that we didn't have at that time that I did go
4 into questioning about.

5 JUDGE ROUSH: You can do whatever you want
6 to.

7 MR. AXELSON: Let me see if we can work
8 something out.

9 JUDGE ROUSH: All right.

10 MR. AXELSON: I want to offer a certain
11 list of exhibits to the Jury. I want to make a motion
12 to have them admitted now. If you wish to continue
13 your objection or any objection to them coming in, you
14 may do so, in which case I will have to read this.

15 On the other hand, if you don't have any
16 objections to those exhibits coming in at this point,
17 we don't need to read the rest of it.

18 JUDGE ROUSH: What we could just do is for
19 you to stop -- move in the exhibits, and represent
20 that exhibit 25, 26, and 27 are the same exhibits that
21 the Doctor identified in his deposition and we could
22 rule on it at that point.

1 MR. AXELSON: I would be happy to do that.

2 MR. SCHROEDER: That's fine with me. I
3 have the same objection, I don't think they are
4 reasonable and necessary.

5 MR. AXELSON: But the Doctor has, in fact,
6 already testified to that.

7 JUDGE ROUSH: I will make you wait with
8 baited breath on my ruling to what the point of action
9 will be.

10 Speaking of stipulations, how about
11 Mr. Clark's inseam?

12 MR. AXELSON: 31 inches.

13 JUDGE ROUSH: I will tell the Jury that
14 when they come back.

15 MR. AXELSON: Your Honor, while we are on
16 break, I have here the original second deposition,
17 which I will hand up to the Court.

18 JUDGE ROUSH: Do you think that we could
19 finish both depositions by 11:30?

20 MR. AXELSON: Oh, yes.

21 JUDGE ROUSH: All right. Let's bring the
22 Jury back and we will finish with Dr. Cabrera and then

1 we will take the morning recess.

2 Mr. Koerner, I think that you are doing a
3 great job with these medical terms.

4 - - -

5 (Jury returned to the Courtroom at 11:09
6 o'clock a.m.)

7 - - -

8 JUDGE ROUSH: Welcome back, Ladies and
9 Gentlemen of the Jury.

10 During your break, we were able to work out
11 the objections to Dr. Cabrera's deposition. Also I
12 wanted to tell you -- you might remember that
13 yesterday some questions came up about how long
14 Mr. Clark's leg was. And after court yesterday, the
15 parties measured and they both now agreed that his
16 inseam is 31 inches long, all right? So, you are to
17 take that as a given.

18 Go ahead, Mr. Schroeder.

19 MR. SCHROEDER: Page 62.

20 JUDGE ROUSH: Bottom of 61? The revised
21 question.

22 - - -

1 (The reading into the record continued.)

2 - - -

3 Q. How certain are you that this accident was
4 not caused by hyperextension?

5 A. I cannot be sure. I cannot say.

6 Q. Have you ruled out hyperextension as the
7 cause of Mr. Clark's injury?

8 A. No, I don't know, I was not there. Even
9 if I had been there, I probably wouldn't have seen
10 it. He has pants and he has shoes and he has socks.
11 So -- and everything is so fast that it is
12 impossible. So I would say it could have been caused
13 by hyperextension alone. It could be caused by bone
14 trauma alone. It could be caused by a combination of
15 hyperextension and blunt trauma.

16 Q. So today when you earlier told Mr. Axelson
17 that you believed to a reasonable degree of medical
18 certainty that this accident was caused by the door
19 hitting the ankle, you have a lot of doubt about
20 that, don't you?

21 A. I don't. I don't. I don't have any
22 doubt. I think it is very possible.

1 It is possible that the
2 door alone caused it. It could be a combination,
3 most likely a combination, hyperextension plus the
4 door hitting the tendon.

5 Q. Have you ever heard, seen or read about
6 any rupture of an Achilles tendon, any subcutaneous
7 rupture of an Achilles tendon occurring solely
8 because of impact or trauma?

9 A. It is very very possible.

10 Q. Have you ever heard it or seen it or read
11 about it?

12 A. Yes. Mr. Clark.

13 Q. Other than Mr. Clark?

14 A. Each injury, as I said, is different in
15 all the cases.

16 Q. Have you ever referred a patient with a
17 leg or ankle injury to go to a chiropractor?

18 A. Never. No.

19 MR. SCHROEDER: I don't have anything
20 further.

21 BY MR. AXELSON:

22 Q. Dr. Cabrera will the conservative approach

1 that Mr. Schroeder has described close up the ends of
2 a ruptured Achilles tendon?

3 A. I don't know, we don't see it, but I doubt
4 it very much. Because we have to pull those tendons
5 down to get it closed. There is pain and there is
6 muscle spasm and the end of tendons tend to
7 separate. So I am not very enthusiastic about
8 conservative treatment, especially in a person who is
9 34 years of age. You tell me about a 75 years old
10 lady, I would say okay, let's do a conservative
11 treatment. Because if she loses the push that is
12 required when you are walking, it is not going to
13 affect her life. But in a guy 34 years of age, yes,
14 I would try to provide him with the best treatment
15 that I think is compatible with a good result.

16 MR. AXELSON: Thank you, doctor.

17 BY MR. SCHROEDER:

18 Q. Is there a significant statistical
19 difference -- a statistically significant difference
20 between the results regarding strength, endurance and
21 lengthening between conservative treatment and
22 surgical treatment?

1 A. Well, what I have read in that, surgical
2 treatment gives the best chances of a good result.
3 Now, there are dangers, as you said, of operative
4 treatment. Among them, infection, infection.

5 Q. That doesn't answer my question.

6 A. Well, repeat your question.

7 Q. The question was, is there a statistically
8 significant difference in terms of strength,
9 endurance and lengthening of the tendon?

10 A. I don't know.

11 Q. Between conservative and surgical?

12 A. I can talk about my own experience. I can
13 talk about what is here in the Bible, where they
14 describe it better, and they describe the surgical
15 treatment with the Lindholm technique, which is the
16 one I use. So I have experience with that technique,
17 and I will say the chances in any patient are better
18 with a surgical treatment provided they don't have
19 any complications like infection and so on.

20 Q. Okay. Thank you.

21 A. You are welcome.

22 BY MR. AXELSON:

1 Q. Dr. Cabrera, just so the record is clear,
2 when you refer to the Bible you were referring on a
3 text here on your desk, were you not?

4 A. Yes.

5 Q. Campbell's Operative Orthopedics?

6 A. But Campbell doesn't say the only
7 treatment that you have to do is conservative or --.

8 Q. I understand the only thing --

9 A. And you make your own decisions.

10 Q. The only thing I wanted it clear was that
11 you were referring to a text book and not to the
12 Bible itself?

13 A. No, it's a textbook.

14 MR. AXELSON: All right. Thank you
15 Dr. Cabrera.

16 - - -

17 JUDGE ROUSH: I'm glad that you asked that
18 question, because I had the same question. I didn't
19 know that the Bible had anything to do with an
20 Achilles tendon.

21 All right. Now we are reading from the
22 next deposition?

1 MR. AXELSON: Yes.

2 JUDGE ROUSH: Ladies and Gentlemen, the
3 deposition of Dr. Cabrera continued on another day.
4 There was another deposition taken on August 4, and
5 now we are going to read from that deposition.

6 MR. AXELSON: Your Honor, at this point I
7 would move into evidence Plaintiff's Exhibits -- I'm
8 going to have to take a look at them, here.

9 Plaintiff's Exhibit 42B, 43D, 43E, 44C.
10 Which are respectively --

11 JUDGE ROUSH: Would you give me those
12 numbers again?

13 MR. AXELSON: I will, Judge. 42B, which is
14 Dr. Cabrera's bill; 43D, which is the first Fair Oaks
15 Hospital bill for July 21 through 24 of 1993; 43E,
16 which is the Fair Oaks anesthesia bill for the
17 anesthetist on July 21 of 1993; and 44C, which is the
18 Fair Oaks Hospital bill for the 24th through the 27th
19 of July.

20 And these were exhibits that were shown to
21 Dr. Cabrera and in the course of that original
22 deposition.

1 JUDGE ROUSH: All right. Any objection,
2 Mr. Schroeder?

3 MR. SCHROEDER: Yes, Your Honor. On the
4 grounds that I stated earlier this morning, that they
5 were neither reasonable or necessary.

6 JUDGE ROUSH: Well, I believe there is some
7 testimony on that point.

8 The one thing is that I don't recall
9 testimony about the anesthesia bill. Did he identify
10 that bill? I certainly remember his bills and the
11 Fair Oaks bills, but I don't remember that I recall
12 the anesthesia bill.

13 Is that the only basis that you object to,
14 is just the reasonableness of it that you question?

15 MR. SCHROEDER: Well, he hasn't provided
16 any testimony or whether or not he thought that
17 particular bill was reasonable or necessary, then it
18 would not be reasonable or necessary.

19 JUDGE ROUSH: But did you recall that?

20 MR. SCHROEDER: I don't recall them talking
21 about the anesthesia bill. But there was so many
22 bills, it is difficult for me to say from my own

1 recollection.

2 MR. AXELSON: Your Honor, I believe that
3 you are correct. There was none. I covered that in
4 the second deposition.

5 JUDGE ROUSH: Well, I will admit 42B, 43D
6 and 44C over the Defendants' objection. We will
7 withhold 43E until later.

8 MR. AXELSON: All right, and now may I see
9 42B, please? I believe that he did -- no, that's not
10 it. That is the MRI bill, that's the one. 41 -- oh,
11 they have already been admitted, okay.

12 JUDGE ROUSH: I think they were admitted in
13 Mr. Clark's testimony.

14 MR. AXELSON: All right. Page 5.

15 JUDGE ROUSH: All right, I'm with you.

16 - - -

17 (The second deposition of Dr. Cabrera is
18 read in to the record.)

19 - - -

20 EXAMINATION CONDUCTED

21 BY MR. AXELSON:

22 Q Dr. Cabrera, we're back taking a deposition

1 from you again. Since the last deposition, have you
2 had an opportunity to see Mr. Clark again?

3 A Yes, I saw him on 8/2/94.

4 Q Would you tell us please the results of
5 your examination of Mr. Clark?

6 A Do you want me to read the report or do you
7 want me to --

8 Q Why don't you tell us what you observed and
9 you can refer to your notes, if necessary?

10 A What I observed is that, clinically, he has
11 obtained a fairly good result. The tendon is working;
12 it's intact, no adhesions within the skin and the
13 tendon. He has good plantar flexion. That means that
14 the gastrocnemius and soleus muscles are working. The
15 range of motion of the ankle where he had the cast
16 shows slight degrees of motion. The circulation was
17 intact, but what struck me was the tremendous atrophy
18 of his calf muscle and also his thigh.

19 Q And that would be on the right side?

20 A On the right side, yes, affected side. He
21 had no drainage. It made me very happy to see that
22 good result from the surgery, but, at the same time,

1 he has severe atrophy that is going to be probably
2 permanent. He might improve a little bit.

3 Q Were you able to place a numerical value on
4 his impairment?

5 A Yes. I rated him as having 40 percent, 40
6 percent loss of function of the entire extremity,
7 right lower extremity.

8 Q And that's to a reasonable medical
9 certainty?

10 A That's it.

11 Q And is that permanent impairment?

12 A Well, yes. I think that the atrophy that
13 he has and the weakness and also the fact that the
14 tendon is weak and it may rupture again is --
15 everything is taken into consideration.

16 Q Dr. Cabrera, I believe you had earlier
17 indicated during our prior deposition that he had some
18 limitations on his activities because of the damage to
19 his tendon.

20 A Well, he wasn't able to work for several
21 weeks.

22 Q I believe --

1 A Because he was in a cast.

2 Q I understand. Even after he was out of the
3 cast, you instructed him not to engage in certain
4 physical activities, did you not?

5 A Right. Right. Right.

6 Q Has that instruction been changed as a
7 result of your evaluation?

8 A Yes. In fact, I told him the last -- when
9 he was here on 8/2/94 that he could have the brace
10 removed from his shoe and not to use any more and just
11 to be careful, not to engage in any sport, running,
12 jogging or chasing --

13 Q So, he continues to have a limitation on
14 his activity?

15 A Yes.

16 Q Even though -- how much longer is he to
17 wear the brace?

18 A One month from the day I saw him, 8/2/94.

19 Q Dr. Cabrera, you treated Mr. Clark, the
20 plaintiff in this case, in Fair Oaks Hospital on
21 October the 20th of 1993, did you not?

22 A Correct.

1 Q I have here two bills which have been
2 marked as Plaintiff's Exhibits 45C and 45D, which are
3 the hospital records -- excuse me, the hospital bills
4 and the anesthesiologist bill from that surgery. I
5 would ask you to take a look at those.

6 The Fairfax Hospital bill and the Fair Oaks
7 Anesthesia Associates bill.

8 Now, Doctor, the question is: In your
9 opinion, is that bill reasonable and necessary for the
10 treatment of Mr. Clark's injuries?

11 A I think it was reasonable, yes.

12 Q And referring now to the anesthesiologist's
13 bill?

14 A Yes, I think it's reasonable.

15 Q Is it reasonable and necessary for --

16 A Oh, yes. Yes, it was necessary.

17 BY MR. SCHROEDER:

18 Q Doctor, you testified today about you found
19 atrophy?

20 A Yes.

21 Q In the calf and the thigh?

22 A Very severe atrophy.

1 Q After you had operated on Mr. Clark last
2 year, gave him -- you know, prescribed the brace, you
3 had told him to not engage in any sort of activities,
4 strenuous activities and not to subject his right leg
5 and ankle to any sort of significant stress; isn't
6 that correct?

7 A Right.

8 Q And isn't it true that atrophy is the
9 result of not using certain muscles? If you do not
10 use your right leg, it will atrophy, for example;
11 isn't that correct?

12 A Yes, right. And also the most significant
13 factor here is the brace -- and the cast. He was in a
14 cast for several weeks, I think about six or eight
15 weeks. The first time that he was in the cast and the
16 second time. So, it was a very extended period of
17 immobilization.

18 Q I just want to establish that atrophy is a
19 normal result from Achilles tendon rupture injuries.

20 A Right, and the repair.

21 Q There's nothing unusual about the fact that
22 there's been atrophy in this case?

1 A No.

2 Q Now, in your report that you prepared --
3 you prepared a report when you saw Mr. Clark on August
4 2nd, didn't you?

5 A Correct.

6 Q And in your report, you told him to not
7 engage in competitive sports such as basketball
8 because of the danger of re-rupture; isn't that
9 correct?

10 A Correct, yes.

11 Q You also prescribed exercises to see if he
12 can strengthen the entire right lower extremity --

13 A Right.

14 Q -- is that correct?

15 A Yeah.

16 Q What sort of exercises?

17 A Persistent exercises, lifting the leg up
18 straight and bending the leg.

19 Q Well, after he removes the brace, will he
20 be able to engage in jogging?

21 A He's taking a chance.

22 Q Well, he takes a chance when he gets out of

1 bed, doesn't he?

2 A No.

3 Q But will he be able to engage in jogging?

4 A Huh?

5 Q Will he be able to engage in jogging?

6 A Well, he's taking a chance. Physically, he
7 can, but he's taking a big chance. I have had two or
8 three of these ruptures; one of them a neighbor of
9 mine that I had to operate twice.

10 Q I do have one more, I'm sorry. Doctor,
11 what is the Homan's test?

12 A The Homan's test?

13 Q Yes.

14 A That test is to squeeze the leg, but it's
15 to try to see if the patient has a thrombophlebitis.

16 Q It's to detect deep venous thrombosis?

17 A I mean, you dorsi flex the foot to see if
18 the patient has thrombophlebitis.

19 Q How do you perform that test?

20 A The patient is on his back and you just
21 bring the foot up and that will cause pain in the
22 calf. It's totally different than the Thomsen's test.

1 Q I understand that, Doctor. But you extend
2 the leg of the patient and you hold him in the heel of
3 his foot and push his toes towards his knee, don't
4 you?

5 A Right.

6 BY MR. AXELSON:

7 Q Doctor, I believe that you've seen these
8 bills before and, just for the record, I'll read in
9 the markings on them, the exhibit numbers that are
10 marked on them. They're exhibits 41B, 42B, 43D and E
11 and 44C, and I'd ask that you take a look at those.

12 Now, 41B is a bill for \$972 for the MRI of
13 his lower right extremity?

14 A Right.

15 Q Was that bill reasonable and necessary for
16 the treatment of --

17 A Yes, it is.

18 Q -- Mr. Clark --

19 A Right.

20 Q -- for the ruptured Achilles tendon that
21 you also treated him for?

22 A Yeah.

1 Q All right. And exhibit 42B is the bill
2 from Fairfax Orthopedic Clinic, which I believe is
3 your bill, and the total of this is about \$4,000. And
4 I take it you would say that your bill is reasonable
5 and necessary for the treatment?

6 A Yes, I think so. We did a lot of work with
7 him.

8 Q Yes. All right. Turning to exhibit 43D,
9 this is for the surgical treatment and the
10 hospitalization between July 21st and July 24th, the
11 first time he was in the hospital. The total for this
12 is \$6,109. Is that reasonable and necessary for
13 treatment --

14 A It is.

15 Q -- of Mr. Clark's ruptured Achilles tendon?

16 A Yes, it is.

17 Q And 43E is a bill for \$915 from Fair Oaks
18 Anesthesia Associates for the anesthesia services
19 during his surgery on the 21st of October. Is it your
20 opinion, to a reasonable medical certainty, that that
21 bill is reasonable and necessary for the treatment of
22 Mr. Clark's ruptured Achilles tendon?

1 A It is.

2 Q All right. And referring to exhibit 44C,
3 which is for the hospitalization between the 21st and
4 the 24th of -- excuse me -- the 24th and the 27th of
5 July of 1993, is it your opinion, to a reasonable
6 medical certainty, that that bill is reasonable and
7 necessary for the treatment of Mr. Clark's ruptured
8 Achilles tendon?

9 A Correct.

10 Q Thank you.

11 MR. AXELSON: I would ask that these be
12 admitted into evidence. And if you would attach those
13 to the deposition, please.

14 - - -

15 JUDGE ROUSH: I think that everything that
16 you mentioned has been admitted except for 43E.

17 MR. AXELSON: Yes.

18 JUDGE ROUSH: Would you come to the bench
19 and confer with the clerk as to whether or not these
20 are the correct numbers?

21 - - -

22 (Counsel confers with clerk)

1 - - -

2 MR. AXELSON: All right. I showed the
3 Doctor 43D and E.

4 JUDGE ROUSH: Well, the copies that are
5 here, 43D --

6 MR. AXELSON: 43E is the Fair Oaks
7 Anesthesia Associates.

8 JUDGE ROUSH: And the date is 7-21-93.
9 That's the same one.

10 MR. AXELSON: That's the one I'm moving
11 into evidence at this time.

12 JUDGE ROUSH: Do you have any objection,
13 Mr. Schroeder?

14 MR. SCHROEDER: Just my objection that this
15 is not reasonable and necessary.

16 JUDGE ROUSH: I'm going to admit 43E over
17 the Defendants' objection. I think certainly the
18 Doctor has testified that it is and it's a question
19 for the Jury at that point.

20 So, 43E is admitted into evidence.

21 MR. AXELSON: Apparently, I did not ask the
22 Doctor about 45D, which is the Fair Oaks Anesthesia

1 Associates bill from October.

2 JUDGE ROUSH: I think that you did at one
3 point because I jotted it down.

4 MR. AXELSON: 45D?

5 JUDGE ROUSH: Yes. Is there any further
6 testimony from the Doctor that is going to be read?

7 MR. SCHROEDER: Just about 2 minutes.

8 JUDGE ROUSH: Why don't we defer these
9 issues on the exhibits, finish reading the parts and
10 then take our morning recess. Maybe during the recess
11 while the Jury gets a chance to take a break we will
12 try to work out the exhibits.

13 MR. SCHROEDER: Your Honor, there is an
14 objection regarding the remainder of the deposition
15 testimony.

16 - - -

17 (Discussion at sidebar as follows)

18 - - -

19 MR. AXELSON: If I haven't lost it.

20 MR. SCHROEDER: We are on page 21, line 17.
21 He objects to that question.

22 JUDGE ROUSH: And why do you object to that

1 question?

2 MR. AXELSON: Irrelevant, Your Honor.

3 Things that happen to most people are not necessarily
4 relevant to this case. Res inter alios acta.

5 JUDGE ROUSH: Now, you were taking me back
6 to high school physics, now you take me back to high
7 school Latin class. I have a very bad memory.

8 MR. AXELSON: Then I will drop back to
9 English.

10 JUDGE ROUSH: I am going to overrule the
11 objection. That that certain question is argument is
12 an issue that you can raise with the -- that part may
13 be, but that's all right.

14 - - -

15 (Conclusion of discussion at sidebar.)

16 - - -

17 MR. SCHROEDER: Page 21, line 11.

18 - - -

19 (The reading into the record continues.)

20 - - -

21 BY MR. SCHROEDER:

22 Q Doctor, isn't it true that running is a

1 very common cause of Achilles tendon ruptures?

2 A Yes, it is.

3 Q Achilles tendon ruptures are also very
4 common resulting -- as a result of sports activities?

5 A Correct.

6 Q And isn't it also true that the majority of
7 Achilles tendon injuries are caused solely by
8 hyperextension during running or sports?

9 A Right.

10 Q In your own personal experience and from
11 talking to other doctors, you're not aware of any
12 actual cases of an Achilles tendon rupture being
13 caused by an impact either partially or wholly?

14 A I don't recall any. But I
15 recall another case where a direct blunt trauma to the
16 leg caused a guy the inability to dorsi flex the foot.
17 It was strange to me, but he can do it. He was a big
18 chief from the fire department. And I said, well, I
19 have no other choice, I'm going to open him up. And
20 here he was, something had fallen on his leg and he
21 had cut the anterior tibial muscle completely. That
22 was a -- it wasn't an Achilles tendon. It was the

1 anterior tibial muscle.

2 Q Okay. Doctor, I understand that your
3 opinion in this case is that you're reasonably certain
4 that Mr. Clark suffered or ruptured his Achilles
5 tendon as a result of dual impact caused by the door
6 either alone or in conjunction with hyperextension of
7 the foot; is that correct?

8 A Right. Yes.

9 Q And the only reason you believe that the
10 impact had anything to do with it was because it
11 was -- it's logical that it happened that way and
12 because you have to believe what your patient tells
13 you?

14 A I have to believe what my patient tells me.
15 If a patient comes to me and say that he has a leg and
16 I don't believe him, I can get in trouble and so does
17 the patient.

18 Q Putting aside what your patient tells you,
19 can you tell me why it's more logical that the rupture
20 was caused by an impact that would be logical for the
21 rupture to be caused by running, especially when you
22 take into account that the majority of these types of

1 injuries are caused by running?

2 A Well, I think here there are
3 two mechanisms or two contributing factors, the
4 hyperextension and the blow caused by the door. Maybe
5 the door had not hit him, he might not have a ruptured
6 tendon.

7 Q Well, why is it more logical that the door
8 had anything to do with it than it would be --

9 A Well, it's the information the patient gave
10 me.

11 Q That's the reason that you believe it's
12 more logical is because what the patient has told you?

13 A Well, it's more logical, no. I think it's
14 just the mechanism has occurred there.

15 MR. SCHROEDER: I don't have anything
16 further.

17 MR. AXELSON: No further questions.

18 - - -

19 JUDGE ROUSH: Ladies and Gentlemen of the
20 Jury, we are being to take our morning recess right
21 now and we will resume in approximately 15 minutes.

22 - - -

1 (Jury escorted from the Courtroom at 11:34
2 o'clock a.m.)

3 - - -

4 JUDGE ROUSH: Mr. Axelson, you wanted to
5 renew your motion to --

6 MR. AXELSON: I wanted to renew my motion
7 to move in those exhibits.

8 JUDGE ROUSH: Tell me which ones, now,
9 exactly. I believe --

10 MR. AXELSON: I believe 41B is already in.

11 JUDGE ROUSH: Correct.

12 MR. AXELSON: 42B is Dr. Cabrera's bill.

13 JUDGE ROUSH: Correct, it is already in.

14 MR. AXELSON: 43D is the Fair Oaks Hospital
15 bill for July 21 and 24.

16 JUDGE ROUSH: It's already in.

17 JUDGE ROUSH: 43E is the Fair Oaks
18 Anesthesia Associates bill For July 21.

19 JUDGE ROUSH: In.

20 JUDGE ROUSH: 44C is the Fair Oaks Hospital
21 bill.

22 JUDGE ROUSH: It's in.

1 MR. AXELSON: And then it would be 44D, I
2 believe, which is the Fair Oaks Anesthesia Associates
3 bill. I believe it is right here. I'm sorry, 45D.

4 JUDGE ROUSH: 45D?

5 MR. AXELSON: Yes. That's probably not in
6 that group.

7 JUDGE ROUSH: And you are representing to
8 me that 45D of the Doctor's deposition is exactly the
9 same as this 45D that you are handing to me right now?

10 MR. AXELSON: I am, Your Honor.

11 JUDGE ROUSH: Do you have any objections to
12 that, Mr. Schroeder?

13 MR. SCHROEDER: Just the same one.

14 JUDGE ROUSH: All right. On page 10 and 11
15 of the August 4th deposition, the Doctor testifies
16 that the bill is reasonable and necessary. So, I will
17 admit 45D into evidence over the Defendants'
18 objection.

19 You had a motion?

20 MR. SCHROEDER: Yes, Your Honor. It
21 concerns Dr. Cabrera's testimony.

22 The Doctor has given a number of opinions

1 and one of which that I'm concerned about is the
2 opinion that he is certain to a reasonable degree of
3 medical certainty that this Achilles tendon rupture
4 was caused by the door hitting it. And the basis for
5 that opinion was simply that he thinks that it's
6 logical. And the only reason he said it was logical
7 was because he has to tell what Allan Clark tells him.

8 Therefore, his opinion is not --

9 JUDGE ROUSH: Let me stop you there,
10 because I could see where you were going in the
11 deposition with this.

12 Any time a client walks into your office
13 and tells you what happened, you basically are
14 inclined to believe them. And the doctor -- someone
15 comes to a doctor and says how does this happen and
16 you say that I was playing tennis and I tripped.

17 And that's what the doctor bases his
18 opinion on. It may or may not be true, but the doctor
19 has to assume certain facts in order to reach his
20 opinion.

21 Why does that make his opinions
22 inadmissible?

1 MR. SCHROEDER: He is being offered as an
2 expert in medicine. He is not the jury in this case.
3 He was not determining whether or not this door hit
4 Mr. Clark. He is determining medical issues.

5 It's not a medical issue whether or not
6 this door hit Mr. Clark. And his opinion is not based
7 on anything out of his experience, because he has had
8 no experience with impacts causing Achilles tendon
9 injuries. He admitted that.

10 He is not able to refer to any literature
11 that says impacts cause injury. And he has never
12 heard of it before.

13 JUDGE ROUSH: So, what is the nature of
14 your motion? Do you want to strike all or part of his
15 testimony?

16 MR. SCHROEDER: I want to strike his
17 opinion that he said that he thinks the reason the
18 Achilles tendon was ruptured was because the door hit
19 it.

20 JUDGE ROUSH: I think that is an issue for
21 argument for the Jury. You can certainly argue to the
22 Jury the basis versus the facts on which he relied,

1 those opinions were unjustified. But I think that it
2 meets the inadmissibility standards that he believes
3 that and it is within the field of his specialty and
4 he believes that to a reasonable degree of medical
5 certainty.

6 MR. SCHROEDER: Your Honor, I also want to
7 point out that I think it runs afoul of the common law
8 principle that he is testifying as to an ultimate
9 issue of fact. Now, I know that the Code has modified
10 that somewhat, but the common laws remains.

11 And all that he was doing there is becoming
12 a juror and deciding and expressing an opinion about
13 how this accident happened. It is not based on his
14 area of expertise.

15 JUDGE ROUSH: We are aware that the injury
16 was caused by the door hitting Mr. Clark is not the
17 ultimate issue. The ultimate issue was Springfield
18 Mall negligent in maintaining the door.

19 MR. SCHROEDER: I agree.

20 JUDGE ROUSH: He can certainly express an
21 opinion as to whether the door was properly maintained
22 or a properly operated door would have caused such an

1 injury.

2 MR. SCHROEDER: It is an ultimate issue on
3 causation, though. Even if this door was negligently
4 maintained; if it didn't cause this injury, there is
5 no liability. And that is an ultimate issue.

6 JUDGE ROUSH: Well, the doctors can't come
7 in and testify that injuries were caused by car
8 accidents, for example.

9 MR. SCHROEDER: If he had been able to say
10 that I saw medical evidence of blunt trauma, for
11 example, he would have a basis for his opinion. He
12 did not see that.

13 There is no medical basis for his opinion
14 other than he just assumes that it's logical --

15 JUDGE ROUSH: Based on the patient's
16 history, which doctors have to routinely rely on.

17 MR. SCHROEDER: He did not rely on the
18 patient's history. He said it is just because I think
19 it is logical and I believe what my patient tells me.

20 JUDGE ROUSH: The patient's history is what
21 the patient relates when the patient presents for
22 treatment.

1 MR. SCHROEDER: All right, then; it's just
2 a matter of him believing what he says and that has
3 nothing to do with medicine or his expertise.

4 JUDGE ROUSH: I think that I'm making all
5 of Mr. Axelson's arguments for him --

6 MR. AXELSON: You are doing fine, Judge,
7 and I certainly don't want to interrupt.

8 JUDGE ROUSH: Doctors have to, to a certain
9 extent, rely on what the patients tell them. Now, if
10 you want to attack Mr. Axelson's credibility, which I
11 take it that you are going to be doing with some other
12 witnesses, that's fine. And then you can argue to the
13 Jury that the Doctor was believing his patient and why
14 shouldn't he, but should you believe the patient?

15 And if the patient was not telling the
16 truth, then of course, the Doctor's opinions are based
17 on something that -- his opinions are totally suspect.

18 MR. SCHROEDER: It's just a fundamental
19 principle that a witness is not supposed to give an
20 opinion in the case unless he is qualified as an
21 expert in a particular field.

22 He has given an opinion in this case that

1 has nothing to do with his particular field. That is
2 the problem that I had with it.

3 JUDGE ROUSH: I do understand your
4 objection. I will overrule the objection.

5 We will take our morning recess and resume
6 in 15 minutes.

7 There are no 2 clocks in this courthouse
8 that agree with each other, but by that clock on the
9 back wall, it will be five minutes until twelve.

10 MR. AXELSON: And I must say that
11 Mr. Koerner did an excellent job as Dr. Cabrera.

12 JUDGE ROUSH: Mr. Koerner is going to send
13 me a medical bill.

14 - - -

15 (Recessed at 11:41 o'clock a.m.)

16 (Reconvened at 11:58 o'clock a.m.)

17 - - -

18 JUDGE ROUSH: Let me ask you, Mr. Axelson,
19 are you wrapping up your case?

20 MR. AXELSON: In as much as Dr. Smith could
21 be called a wrap up.

22 JUDGE ROUSH: And he is the last witness?

1 MR. AXELSON: Yes. He is my last witness.

2 JUDGE ROUSH: All right. Let's bring back
3 the Jury.

4 - - -

5 (Jury returned to the Courtroom at 11:59
6 o'clock a.m.)

7 - - -

8 JUDGE ROUSH: Welcome back, Ladies and
9 Gentlemen of the Jury.

10 Mr. Axelson, call your next witness.

11 MR. AXELSON: Dr. Smith.

12 - - -

13 L. ANDREW SMITH, C.D.,
14 having been first duly sworn by
15 clerk, a Notary Public
16 within and for the State of Virginia,
17 was examined and testified as
18 follows:

19 - - -

20 DIRECT EXAMINATION

21 BY MR. AXELSON:

22 Q. Would you please state your name?

1 A. Dr. Lee Andrew Smith.

2 Q. And Dr. Smith, you are a Doctor of
3 Chiropractic, are you not?

4 A. Yes, I am.

5 Q. And would you describe for us your
6 background and qualifications?

7 A. I did my undergraduate work at Northeastern
8 University at Boston in biology and exercise
9 physiology. I did my graduate work in Chiropractic
10 College West in Santa Rosa, California.

11 Q. And are you practicing in this area?

12 A. I have been practicing in this area for the
13 past 3 years.

14 Q. And where are your offices?

15 A. I have my offices in Springfield, Virginia.

16 Q. And have you been practicing there the
17 entire time of 3 years?

18 A. I have been there a year and a half.

19 MR. AXELSON: Your Honor, I would submit
20 that Dr. Smith is qualified as an expert in the field
21 of chiropractic.

22 JUDGE ROUSH: Did you want to voir dire

1 Dr. Smith on his qualifications?

2 MR. SCHROEDER: Not at this time, Your
3 Honor. But I'm not sure that Dr. Smith has been
4 identified as an expert witness in this case.

5 MR. AXELSON: I believe that he has.

6 JUDGE ROUSH: Well, let me take a look.

7 MR. AXELSON: Your Honor, in the answers to
8 interrogatories that I previously provided apparently
9 on --

10 JUDGE ROUSH: Well, sometimes the answers
11 to interrogatories doesn't need the experts to put
12 forth the status before the Court.

13 MR. AXELSON: Your Honor, if I may approach
14 the bench?

15 JUDGE ROUSH: Yes, sir.

16 - - -

17 (Discussion at sidebar as follows)

18 - - -

19 MR. AXELSON: This is the answer to
20 interrogatories that I identified Dr. Cabrera and
21 Dr. Smith as experts in the case.

22 JUDGE ROUSH: And did you file the notice

1 of designation requiring to --

2 MR. AXELSON: I don't believe I filed a
3 separate designation because I had answered
4 interrogatory.

5 THE COURT: Did you answer interrogatories
6 before or prior to trial?

7 MR. AXELSON: Yes, I did.

8 JUDGE ROUSH: Do you have an objection?

9 MR. SCHROEDER: Yes, it doesn't comply with
10 the requirements of the status -- he has to provide
11 all of the information required under 14 A.I., the
12 summary of the grounds of which we rely upon, that's
13 not in the answer.

14 JUDGE ROUSH: Let me see the answer.

15 MR. AXELSON: I believe that it is.

16 JUDGE ROUSH: Let me see the next page. We
17 have to say what the opinions are, not just that he
18 will testify to the prognosis. He will have to
19 identify the content.

20 MR. AXELSON: This is the first time that
21 Mr. Schroeder has raised an objection to this. Right
22 now is the first that I have heard of it.

1 MR. SCHROEDER: No, I didn't do it then. I
2 believe that my objection stands for itself.

3 MR. AXELSON: I believed that he was
4 listed.

5 MR. SCHROEDER: He was listed as a fact
6 witness, for all I know.

7 MR. AXELSON: He was noted as a fact and
8 expert witness.

9 JUDGE ROUSH: And what, you filed -- 15
10 days before trial?

11 MR. AXELSON: Well, 15 days before trial, I
12 listed my witnesses that were indicated, they were one
13 way or the other.

14 JUDGE ROUSH: Under rule 4, colon 1A,
15 that's in the status conference. I don't think that
16 the interrogatory answer did that. Is there some
17 other identification of the witnesses?

18 MR. AXELSON: His -- actually, there was a
19 supplemental answer to interrogatories at one point,
20 it didn't have anything to do with --

21 Judge, I would have to go through all of
22 the paperwork in this case to be able to respond to

1 that.

2 - - -

3 (Conclusion of discussion at sidebar.)

4 - - -

5 JUDGE ROUSH: Ladies and Gentlemen, we are
6 about to go take another brief recess. I appreciate
7 your continuing patience with us.

8 - - -

9 (Jury escorted from the Courtroom at 12:05
10 o'clock p.m.)

11 - - -

12 JUDGE ROUSH: I'm reading from rule 4,
13 colon 1, 4A, 1, little "I."

14 "A party may through interrogatories
15 require any other party to identify each person who
16 the other party expects to call as an expert witness
17 in trial. To state the subject matter on which the
18 expert is expected to testify and to state the
19 substance of the facts and opinions to which the
20 expert is expected to testify on the summary of the
21 grounds of each opinion."

22 That's what the designation is supposed to

1 contain.

2 MR. AXELSON: Judge, in addition I have
3 supplied Mr. Schroeder with Dr. Smith's records which
4 reflect his opinions in this case.

5 MR. SCHROEDER: Your Honor, those records
6 don't reflect any opinions.

7 MR. AXELSON: They certainly do. They
8 reflect his diagnosis, his treatment, the treatment
9 that he felt was necessary, the charges for those
10 treatments --

11 MR. SCHROEDER: There is nothing in those
12 records that whether or not those charges are
13 reasonable and necessary. That's the real problem
14 that have I with this. There is no question that he
15 is a fact witness on what he did. And that is all
16 that I expect him to testify to. Especially given
17 what Dr. Cabrera had said about chiropractics in his
18 own testimony.

19 I did not expect him to call Dr. Smith as
20 an expert witness after I heard that and the fact that
21 he wasn't identified.

22 JUDGE ROUSH: You don't dispute that he

1 could testify as to the facts of his treatment?

2 MR. SCHROEDER: Absolutely not, Your Honor.
3 He just can't give an opinion.

4 MR. AXELSON: He can't give an opinion as
5 to what?

6 JUDGE ROUSH: To anything.

7 MR. AXELSON: Your Honor, I have clearly
8 identified Dr. Smith. I clearly said he is an expert
9 witness, listed him as one of my expert witnesses. I
10 have supplied the records and bills to Mr. Schroeder.

11 Now, those records and bills reflect
12 Dr. Smith's opinion as to the diagnosis, the physical
13 exam, the condition of Mr. Smith -- excuse me,
14 Mr. Clark -- and they reflect also the treatment that
15 Mr. Smith gave to Mr. Clark.

16 I think they also reflect an underlying
17 opinion that those things were reasonable and
18 necessary for Mr. Clark. What other purpose could
19 they have? Dr. Smith is giving this man some kind of
20 treatment and say, "Well, I'm going to bill him for
21 it, but it wasn't really reasonable and necessary?"

22 It is the only conclusion that you could

1 possibly draw. Mr. Schroeder is not surprised at any
2 of this.

3 JUDGE ROUSH: Well, the problem is we have
4 a statute that says identification of experts must
5 comply with all information required under rule 4,
6 colon, 1, 4A.I. And I don't think that your -- and
7 Mr. Schroeder concedes that he can testify to the
8 facts, but once you venture into opinions, I don't
9 think that you have adequately identified the opinions
10 ahead of time so that Mr. Schroeder could read them.

11 MR. AXELSON: Your Honor, I am having
12 trouble understanding where I could have given more
13 information that would have identified more
14 specifically what Dr. Smith's opinions are.

15 He has performed a service. He has billed
16 the patient for it. Clearly he has an opinion about
17 the necessity of that service, clearly he has an
18 opinion about the reasonableness of that service.

19 Now, that is just absolutely crystal clear
20 from the fact that he has billed this man, that he has
21 provided a service, that he has made a diagnosis. And
22 all of that is in the records that was provided to

1 Mr. Schroeder in addition to the information that was
2 provided in the answers to interrogatories.

3 JUDGE ROUSH: Let me see your answers to
4 interrogatories again.

5 MR. AXELSON: Judge, he was --

6 JUDGE ROUSH: Yes, sir?

7 MR. AXELSON: He was also provided with the
8 material in the exhibits -- I think it is 40.

9 JUDGE ROUSH: Was Dr. Smith deposed prior
10 to the trial?

11 MR. AXELSON: No.

12 JUDGE ROUSH: Well, it says that he is
13 expected to testify as to his opinion on the
14 Plaintiff's prognosis. How is Mr. Schroeder to know
15 what his opinion is on the prognosis? Where has that
16 been identified what the prognosis is? Good, bad,
17 permanent, not permanent?

18 MR. AXELSON: I think that might be
19 correct, that I might not be able to ask him about
20 prognosis. But Dr. Smith is not going to express an
21 opinion about the necessity of future treatment. I am
22 not going to ask him about that.

1 JUDGE ROUSH: You are not going to ask him
2 about his prognosis?

3 MR. AXELSON: Not beyond December when he
4 last treated him. The last time he treated him was
5 October, I am sorry. He is not going to express an
6 opinion about future damages or anything like that.

7 Your Honor, I would submit, also, that the
8 Defendant has listed everything that Dr. Smith
9 provided as exhibits in this case.

10 MR. SCHROEDER: That's not true, I have not
11 listed the bills, nor specifically --

12 MR. AXELSON: Well, not the bills, but the
13 treatment application, the treatment record.

14 MR. SCHROEDER: Those are documents that
15 Mr. Clark filled out, for the most part, which are
16 based on Mr. Clark's statements to Dr. Smith and his
17 co-workers.

18 MR. AXELSON: It's 40A, 40B, and 40C,
19 that's it right there. It is a multi-page --

20 Your Honor, these are the exhibits, the
21 same exhibits, that the defense has listed.

22 JUDGE ROUSH: As far as the treatment?

1 MR. AXELSON: Yes.

2 JUDGE ROUSH: There is no dispute about the
3 treatment. I guess really the only question is the
4 reasonableness of his own bills; is that right?

5 MR. AXELSON: If I understand what
6 Mr. Schroeder is objecting to, I think that's the only
7 thing. Maybe I'm mistaken.

8 MR. SCHROEDER: You are mistaken. He says
9 in his interrogatory answer that he expects an opinion
10 on the proximate relationship between the injuries and
11 the treatment. Now, I have not seen a summary grounds
12 for that opinion. I haven't see the facts that he is
13 going to base that on, I haven't seen anything about
14 that. I think that ought to be excluded, too.

15 It is only that and the prognosis which is
16 even identified in this answer. He has not identified
17 the reasonableness of the medical bills in this answer
18 as something that he is going to testify. I didn't
19 even know that was going to be offered as an opinion.

20 MR. AXELSON: Your Honor, that's in the
21 medical record, the statements given to Mr. Clark to
22 the Doctor.

18 MR. SCHROEDER: Your Honor, I would not
19 know the medical basis for that opinion. There is
20 certainly nothing in there to say that he has some
21 medical basis for saying impacts can cause this sort
22 of injury. That's the same problem that I had with

1 Dr. Cabrera.

2 JUDGE ROUSH: Well, wasn't it Dr. Cabrera
3 who diagnosed the ruptured tendon?

4 MR. AXELSON: Actually, it was Dr. Smith.

5 JUDGE ROUSH: After seeing the MRI?

6 MR. AXELSON: Yes.

7 JUDGE ROUSH: And then sent over to
8 Dr. Cabrera?

9 MR. AXELSON: That's correct, which is
10 reflected in the medical record.

11 MR. SCHROEDER: Your Honor, I don't have a
12 problem with him testifying about what he did or what
13 he diagnosed. I have a problem with him testifying as
14 to his opinion.

15 MR. AXELSON: Well, his diagnosis is an
16 opinion.

17 MR. SCHROEDER: No, his diagnosis is a
18 fact. He has already stated that he had a second
19 degree sprain. And that's a fact.

20 JUDGE ROUSH: He had an MRI, and then the
21 MRI showed a ruptured Achilles tendon and then they
22 sent him on to another doctor.

1 MR. SCHROEDER: Those are just facts.

2 JUDGE ROUSH: I'm going to allow the Doctor
3 to testify about the facts of his treatment. There is
4 no question whether you could designate treating
5 physicians who are not going to go around -- just the
6 fact, now, in terms of what their treatment was as an
7 expert. He can do that.

8 As far as the medical bills; I think this
9 is a closed question, but I am going to say that the
10 medical bills were disclosed during discovery. It is
11 not a surprise that he would testify as to the
12 reasonableness of his medical bills.

13 What I am not going to allow him to testify
14 to today is other opinions other than the facts of his
15 treatment and his bills and whether he thinks the
16 bills are reasonable. And that where I'm going to
17 draw the line.

18 MR. AXELSON: Bills reasonable and
19 necessary? That's the standard, Judge.

20 JUDGE ROUSH: Right, that's what I meant.

21 MR. SCHROEDER: There is nothing in this
22 interrogatory answer that says he is going to testify

1 about the reasonableness and necessary bills. He
2 asked Dr. Cabrera a hundred questions about that. And
3 I was under the impression that Dr. Cabrera was going
4 to talk about that. Dr. Cabrera has already said that
5 it is not reasonable to enforce chiropractic services.

6 JUDGE ROUSH: He said that he wouldn't send
7 somebody to a chiropractor.

8 MR. SCHROEDER: Well, that's obviously his
9 opinion and his opinion is that it would not be
10 necessary. I think that's a fair inference.

11 JUDGE ROUSH: He is an orthopedist. And he
12 is saying that an orthopedist -- I am not going to
13 send somebody to a chiropractor. That is what he
14 saying. That would be like saying as a lawyer I am
15 not going to have a paralegal do an incorporation, I'm
16 going to do it myself.

17 I think that is what he said. I don't
18 think he said it was unreasonable; he would not do it.
19 I don't think that you are asking him if it is
20 unreasonable to send someone to a chiropractor.

21 MR. SCHROEDER: All right. In the back of
22 the bills that were provided to me, it only shows

1 maybe what his opinions is. It doesn't show the
2 summary of the grounds or the opinions or the facts to
3 back it up.

4 JUDGE ROUSH: I understand. I'm trying to
5 balance the interests here or the status compliance
6 orders that we are using now, the extensions and
7 modifications and order pending a -- after balancing
8 the prejudice to one party and the unfairness to the
9 other. And in the balancing act that I'm trying to do
10 now, I don't think that in all fairness that it is a
11 surprise to anybody that the reasonableness and
12 necessity of the chiropractor bills were going to be
13 an issue in this case.

14 And so I think it is a little bit of a trap
15 that we are aware of. Although I have to say I do
16 feel that the Plaintiff is down here and I realize
17 that the Plaintiff has a non-suit and in the interest
18 in judicial economy as well, even though this is the
19 2nd day of the trial, that I don't think it's a
20 surprise and I don't think it is any prejudice to the
21 Plaintiff. He is suing the Defendant in this case, so
22 I will allow him to testify as to the reasonableness

1 of the bills.

2 But I do think that in terms of -- if he
3 knows anything about other than the facts of what he
4 did and where he sent the Plaintiff, when he gets into
5 medical opinions or chiropractic opinions beyond that,
6 then he has not been adequately -- I'm going to
7 sustain an objection for crossing the line and
8 offering opinions on it.

9 All right?

10 MR. SCHROEDER: Could I just note my
11 exception to the rule?

12 JUDGE ROUSH: All right. And you probably
13 want -- I know that you are unhappy with me.

14 MR. AXELSON: That's correct, but there is
15 one question that I intend to ask Dr. Smith and I
16 would like to ask --

17 JUDGE ROUSH: Well, I'm not going to give
18 any advisory opinions. Let's bring the Jury back.

19 MR. AXELSON: Judge, one second, please.
20 Judge, I am running the risk here of asking a question
21 that the Court is going to feel runs afoul of its
22 ruling. And I want the Court to be aware that I have

1 tried to avoid that in letting the Court know what the
2 question was ahead of time.

3 JUDGE ROUSH: I have a continual problem --
4 it is very difficult for me to rule upon objections to
5 questions when I haven't heard the question before and
6 the question after in the context of the testimony.

7 But I think that I have made it clear that
8 just the facts of his treatment, what he did with the
9 Plaintiff, the facts of the treatment, he ordered the
10 MRI, he got back the MRI and it showed a ruptured
11 Achilles tendon and he sent him on to an orthopedist.

12 And then the bill that he rendered for the
13 services and the treatment that he did. But not
14 opinions, prognosis, or that type of thing.

15 MR. AXELSON: I appreciate the Court's
16 instructions. I want the Court to be aware that I
17 will attempt to abide by them. I am not trying to be
18 contemptuous.

19 JUDGE ROUSH: If you have a problem with
20 that, I am sure that Mr. Schroeder will speak up and I
21 will rule on it at the time.

22 MR. SCHROEDER: I would appreciate it if

1 you would sort of give me a heads up so that we can
2 prevent the witness from answering it if there is that
3 problem.

4 JUDGE ROUSH: Maybe I'm holding both of you
5 responsible for working as a team and practicing in
6 the Court which is instead of trying the cases in
7 order to put on the witness -- and then they ask me
8 for a series of advisory opinions. This is where I am
9 going to deal with it now. I just feel that the trial
10 runs more smoothly and I make better rulings if I make
11 the rulings during the trial.

12 It's no horrible crime to have an objection
13 sustained during the course of a trial. And I would
14 ask the witness if you would pause a second or two
15 before you answer the question to give Mr. Schroeder a
16 chance to jump up if he has an objection.

17 MR. AXELSON: That's fine, Judge.

18 JUDGE ROUSH: Okay. I recently had a five
19 day trial where I spent 3 days giving an advisory
20 opinion and 1 day trying the case and I'm sure that
21 you are suffering as a result of that, to tell you the
22 truth.

1

- - -

2

(Jury returned to the Courtroom at 12:20

3

o'clock p.m.)

4

- - -

5

JUDGE ROUSH: Welcome back, Ladies and

6

Gentlemen, I appreciate your patience.

7

Go ahead, Mr. Axelson.

8

MR. AXELSON: There are a couple of

9

exhibits that I will need. These 3, yes.

10

MR. AXELSON: Judge, I hate to do this, but

11

could we approach the bench again?

12

JUDGE ROUSH: Yes.

13

- - -

14

(Discussion at sidebar as follows)

15

- - -

16

MR. AXELSON: I have made a motion earlier

17

to have the Doctor qualify that there has been a

18

ruling as far as the Jury is concerned on that.

19

JUDGE ROUSH: Well, there should be no need

20

to qualify them as an expert -- so that motion is

21

denied.

22

- - -

1 (Conclusion of discussion at sidebar.)

2 - - -

3 BY MR. AXELSON:

4 Q. Dr. Smith, did you treat the Plaintiff,
5 Allan Clark?

6 A. Yes, I did.

7 Q. When was the first occasion that you saw
8 him?

9 A. 5-6-93.

10 Q. That would be May the 6th of 1993?

11 A. Yes, I did.

12 Q. Did he complete any paperwork at your
13 office at that time?

14 A. Yes, he did.

15 Q. And I show what has been marked as
16 Plaintiff's --

17 JUDGE ROUSH: I would ask to you lean
18 forward in the microphone so we can hear you better.

19 BY MR. AXELSON:

20 Q. -- 40A; is this a treatment application
21 that Mr. Smith -- I am sorry, I'm getting Smith and
22 Clark confused -- that Mr. Clark completed in your

1 office on the first day that he saw you?

2 A. Yes, sir, it is.

3 Q. And it was originally dated May 7, and it
4 appears to have been corrected to May 6.

5 A. Yes.

6 Q. Was the first date that he saw you May 6th?

7 A. Yes, it was.

8 Q. Did he give you a description of how he had
9 been injured?

10 A. Yes, he did.

11 Q. And is that description contained on the
12 treatment application here?

13 A. Yes, in a very brief form.

14 MR. AXELSON: Your Honor, I will move that
15 exhibit number 40A be moved into evidence at this
16 time.

17 JUDGE ROUSH: Any objections?

18 MR. SCHROEDER: No, Your Honor.

19 JUDGE ROUSH: Exhibit 40A did you say?

20 MR. AXELSON: 40A. It may already have
21 been admitted.

22 JUDGE ROUSH: And it is admitted again.

1 BY MR. AXELSON:

2 Q. Now, did you perform a physical examination
3 of Mr. Clark at that time?

4 A. Yes, I did.

5 Q. And what did your physical examination
6 disclose?

7 A. Sprain strain injuries to the cervical and
8 lumbar spine and secondary strain on the Achilles
9 tendon.

10 Q. Now, what are the cervical and lumbar
11 spines?

12 A. The cervical is the neck from the base of
13 the skull to the top of the shoulders. The lumbar
14 spine are the last 5 vertebrae from the bottom of your
15 ribs to the top of your crest right above your
16 buttocks.

17 Q. Did you observe any other injuries other
18 than the strain and sprain that you have testified to?

19 A. He had some scrapes and bruises that were
20 consistent with his fall that he told me about. I did
21 not make a big mention of those because I was more
22 concerned about his muscular skeletal complaints.

1 Q. Did you perform any tests on him?

2 A. I did a radiological exam; 5 cervical
3 X-rays, I believe; and 2 or 3 lumbar X-rays -- 2
4 lumbar X-rays and 7 cervical X-rays -- and I took one
5 ankle X-ray that I took it for my own benefit.

6 Q. And after performing these tests, did you
7 perform any physical tests on Mr. Clark?

8 A. The physical exam in itself is a test of
9 neurological and orthopedic tests where I'm moving the
10 patient, feeling the patient, palpating for muscle
11 spasm and fixation movement in the spinal column and
12 in the extremities.

13 Q. Did you perform any tests on his lower
14 right leg?

15 A. Yes, I did.

16 Q. What tests did you perform on his lower
17 right leg?

18 A. I performed a test called a Simon's test.
19 In my notes I wrote down Homan's test, but I did
20 write -- I would like to tell you the difference
21 between those.

22 The Homan's test is an orthopedic test for

1 thrombophlebitis, which is swelling in the calf. It
2 was my mistake. It is supposed to be a Simon's test.
3 But what I did, I performed Simon's test. I had the
4 patient lying face down, I squeezed the calf muscle to
5 check if there was a full rupture of the Achilles
6 tendon.

7 When you squeeze on the calf muscle, the
8 foot should plantar flex. And his plantar flexed a
9 little bit so I knew that the tendon was indeed intact
10 and I clarified that next to Homan's test, because I
11 wasn't sure if it was Homan's or not.

12 Q. And this is on your notes of the physical
13 exam?

14 A. Yes, sir, on the back of the yellow page.

15 Q. That is your notes that were made on the
16 6th of May?

17 A. Yes.

18 Q. And the second page of them that you have
19 just been referring to reflects a Homan's test tendon
20 intact?

21 A. Yes.

22 MR. AXELSON: Your Honor, I would move the

1 introduction of Plaintiff's exhibit 40B into evidence
2 at this time.

3 JUDGE ROUSH: Okay. Is there any
4 objection?

5 MR. SCHROEDER: No, ma'am.

6 JUDGE ROUSH: 40B is admitted without
7 objection.

8 BY MR. AXELSON:

9 Q. Now, did you then begin to treat Mr. Clark?

10 A. Yes, I did.

11 Q. And for how long a period did you treatment
12 him?

13 A. I treated him intensely for the first --
14 about the first month and a half and then on a lighter
15 treatment program just to keep his muscular skeletal
16 problems quieted down while he was walking around on
17 the crutches and the cane for another period of 4 or 5
18 months.

19 Q. What sort of treatment did you provide for
20 Mr. Clark?

21 A. The treatment that I provide is
22 chiropractic care which is moving the vertebrae of the

1 spinal column because the muscles that are attached
2 from vertebra to vertebra, when in a sprain strain
3 injury, tighten up. And like any time you have
4 injured a point or joint in the body, the muscles will
5 guard and grab around the area.

6 That happened in his ankle and in his
7 cervicle and lumbar spine.

8 Q. Did you have an occasion to treat his lower
9 right leg?

10 A. Yes, I did.

11 Q. What sort of treatment did you provide for
12 that area of his body?

13 A. The work that I did down there, and that's
14 what most of my work is, is miofacial work. That is
15 soft tissue work. It's not massage, it is deep
16 compressive therapy to trigger points in the
17 musculature which allow the muscle to relax.

18 When Allan presented to me, it was 2 weeks
19 after the injury. And the miofacial response, or the
20 muscle response, around the joint was a grabbing of --
21 can I show on my leg?

22 JUDGE ROUSH: Yes.

1 THE WITNESS: On the front of the calf, we
2 have anterior tibial muscle and on the back we have a
3 calf muscle, which is made up of the soleus and
4 gastrocnemius. They work in like a pulley system
5 around what is called the calcaneus, which is the heel
6 bone.

7 Because of the sprain to the ankle and the
8 strain to the Achilles tendon, these muscles grabbed
9 and shortened in order to protect it; just like if you
10 fall rollerblading and you hit your elbow, you are not
11 going to be able to move your arm. The biceps
12 contract, your triceps contract and there is
13 inflammation. It is the body's way of casting it.

14 That is what happened to Allan's ankle.
15 The thing that I did not mention before is when he
16 first presented -- and it's viewable on the X-ray --
17 that is palpable knot of about 3 centimeters. And I
18 noted that the day that he first came in, above the
19 insertion of the Achilles tendon to the calcaneus.
20 That's what I considered to be a partial tear, or a
21 frank tear.

22 I didn't know if it was half way through or

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1 three quarters of the way through; I knew that there
2 was a good tear in there, but it was not a full
3 rupture. Because of the Simon's test and because of
4 some of the muscular strength that he had in it and
5 also a positive deep tendon reflex, I knew that it was
6 intact. So I went ahead and instead of casting it
7 right away or doing something like that, I gave the
8 body a chance to heal.

9 But the first 6 to 8 weeks after an injury,
10 you have a regeneration phase. This Achilles tendon
11 is made of collagen. And the bodies response is
12 swelling and an infiltration of collagen fibers to go
13 in there and lie down to heal the area.

14 BY MR. AXELSON:

15 Q. Did you treat him throughout the month of
16 May for this injury to his right leg?

17 A. Yes, I did.

18 Q. In addition to the other treatments that
19 you provided?

20 A. Yes, I did.

21 Q. Did there come a time --

22 A. May I?

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1 Q. Certainly.

2 A. The treatment that I was doing then was to
3 release the miofacial tightening and the cramping that
4 was causing him not to be able to move his foot to see
5 if we could get some movement around that bone, around
6 the calcaneus. If you don't have motion, there is not
7 going to be any healing. There is going to be
8 healing, but it's going to be a haphazard weak scar
9 that later on is going to cause returns.

10 My whole thing as a chiropractor and as a
11 miofacial worker is to get the body in a position to
12 form a strong scar so that later on the patient is not
13 going to have problems. I do that in all of my
14 whiplash cases and anything else.

15 Q. Were you able to get any movement in that
16 particular joint?

17 A. I was. After about a week or a week and a
18 half of care, he was actually able to dorsi flex the
19 foot some which means that he could actually stretch
20 the calf muscle and he could also plantar flex the
21 foot a slight bit. At one point he could toe off a
22 little bit, but not that much when he is using his

1 crutches in gait. The toe off is when you put more
2 pressure on the front of the foot.

3 Q. Did there come a time when you concluded
4 that this approach was not going to work?

5 A. About a month into it. Like I said, the
6 regeneration phase is 6 to 8 weeks, so I felt that
7 that was appropriate to go ahead and treat it through
8 that because there was not a full rupture.

9 And he came in one day and there was more
10 swelling, there was increased ectomose -- which is
11 black and blue -- right behind in back of the calf
12 muscle and the back of the Achilles tendon. At that
13 point I said, we have down our best, let's check this
14 out on an MRI.

15 Q. And did you recommend that he have an MRI
16 at that time?

17 A. Yes, I did.

18 Q. And was an MRI performed?

19 A. That was performed.

20 Q. And that diagnosed?

21 A. A frank tear, which is -- and I think there
22 has been some confusion about what we have been

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1 calling rupture and tear. This is a frank tear,
2 (indicating) which can be any percentage through the
3 muscle and this (indicating) is a full rupture.

4 He had a frank tear at 3 or 3 and a half
5 centimeters, I believe, I am referring to the MRI
6 report -- 2 and a half to 3 proximal to the insertion
7 of the posterior tube of the Achilles tendon.

8 Q. And that's the same place where you had
9 felt the nodule?

10 A. Exactly.

11 Q. You continued to treat him for his neck and
12 back?

13 A. Yes, because of his altered biomechanics is
14 called altered angular thorokinetics, which is just he
15 was walking funny because he was on crutches and he
16 was on a cane. There is compensation that happens
17 throughout the body -- may I stand up?

18 JUDGE ROUSH: Yes.

19 THE WITNESS: If he is walking with a right
20 limp, he is going to have to use what is called a
21 quadritis muscle which attaches from the bottom ribs
22 to the top of your crest, right here, and hike it up

1 (indicating) so that he can bear weight on the
2 opposite leg. This locks the joint on the left hand
3 side so that there is compensation all of the way up.
4 Muscles pull this way and that way to keep your head
5 up and horizontal to the earth.

6 BY MR. AXELSON:

7 Q. And you continued to treat him for those
8 kinds of things even though his right ankle was being
9 dealt with elsewhere?

10 A. Yes.

11 Q. And your treatment continued through
12 October, I believe?

13 A. 27th.

14 Q. Now, Dr. Smith, you -- let's see 40D,
15 please. I have here a document which has been marked
16 Plaintiff's exhibit 40D.

17 Would you take a look at those, please?

18 A. These are my bills for treatment.

19 Q. And on the first 2 pages is there a summary
20 of the total of those bills?

21 A. Yes, there is.

22 Q. And were those bills reasonable and

1 necessary for the treatment of Mr. Clark?

2 A. Absolutely.

3 MR. SCHROEDER: Your Honor, I just want to
4 note my objection because he has not qualified him as
5 an expert witness.

6 JUDGE ROUSH: Yes, sir.

7 MR. AXELSON: Your Honor, we move the
8 introduction of the bills in evidence at this time.

9 JUDGE ROUSH: Other than your continuing
10 objection, do you have any other objections to this
11 exhibit?

12 MR. SCHROEDER: None other than that
13 objection.

14 JUDGE ROUSH: I will note the objection and
15 Plaintiff's Exhibit number 40D is admitted into
16 evidence.

17 BY MR. AXELSON:

18 Q. Now, Dr. Smith, after Mr. Clark explained
19 to you how he had been injured, did you make a visit
20 to Springfield Mall?

21 A. Yes, I did. I go there often on my lunch
22 hour.

1 Q. And did you go and see the door that
2 Mr. Clark had described to you?

3 A. Yes, I did.

4 Q. And did you examine that door?

5 A. Yes, I did.

6 Q. Would you please tell the Members of the
7 Jury what you did in examining the door and what you
8 observed?

9 Well, first of all, let me ask you when was
10 that examination? When did you go and see the door?

11 A. It was about 2 days after he first came in
12 as a patient.

13 Q. So that would be approximately May the 8th?

14 A. Yes.

15 Q. What did you see?

16 A. I met Allan at his place of work, he showed
17 me where the guy had run and where he had followed and
18 took me over to the door. And he said this is the
19 door and he said push it open and I pushed it open and
20 it went open really easy, but it was real heavy; and
21 sprung and came right back at me.

22 There was no slowing down or stopping in

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1 either direction, like which is normal, because I went
2 to the second door --

3 MR. SCHROEDER: I object.

4 JUDGE ROUSH: Pay attention to what is
5 normal and what is not.

6 BY MR. AXELSON:

7 Q. Did you try any other of the other doors in
8 that same bank of doors?

9 A. Yes, I did. I went to the door right next
10 to it and I pushed it, using it as a control. It
11 slowed on the opening and it slowed on the closing.

12 Q. Now, I would like to show you a set of
13 photographs, 1 through 13. 1A will be fine. Let me
14 see this one right here.

15 I would ask you to take a look at that
16 photograph which is admitted as Plaintiff's Exhibit

17 1A. Does that show the door that you pushed?

18 A. Yes.

19 Q. And the door next to it would be
20 immediately to the right of the other door that you
21 tried?

22 A. Yes.

1 Q. All right, thank you.

2 MR. AXELSON: That's all of the questions
3 that is I have -- one second, Your Honor?

4 JUDGE ROUSH: All right.

5 BY MR. AXELSON:

6 Q. Dr. Smith, do you perform orthopedic
7 surgery?

8 A. No, I do not.

9 Q. Why did you send Mr. Clark to see on
10 orthopedist?

11 A. Because he needed orthopedic surgery.

12 MR. AXELSON: Nothing further.

13 JUDGE ROUSH: Cross examination?

14 CROSS EXAMINATION

15 BY MR. SCHROEDER:

16 Q. Good afternoon, Dr. Smith.

17 A. Good afternoon.

18 Q. Allan Clark did not have a complete rupture
19 when he came to see you?

20 A. No, he did not. He never did.

21 Q. And could you show the Jury again what you
22 think a frank tear means?

- 1 A. A frank tear is like that. (Indicating)
- 2 Q. You are saying it is not --
- 3 A. It is true tear in the tendon itself.
- 4 Q. But it is not a complete rupture?
- 5 A. No, absolutely not.
- 6 Q. Were you aware that Mr. Clark's
- 7 orthopedist, Dr. Ruben Cabrera, says that a frank tear
- 8 is a complete rupture?
- 9 A. He is incorrect.
- 10 Q. Have you had orthopedic training?
- 11 A. Yes, I have.
- 12 Q. Have you had 39 years of experience as an
- 13 orthopedist?
- 14 A. No, I have not.
- 15 Q. You mentioned that you performed a Simon's
- 16 test on Allan Clark. Is that the same as a Thomsen's
- 17 calf squeeze test?
- 18 A. Yes, it is. They are done a little bit
- 19 different. The Thomsen's can be done with the patient
- 20 prone with the knee flexed at 90 degrees. Simon's is
- 21 done with the patient lying flat.
- 22 Q. And your finding as a result of doing that

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1 test was that his tendon was intact?

2 A. There was something left holding it on,
3 definitely.

4 Q. Now, how was it that Allan Clark got
5 referred to your office?

6 A. I believe that he came in from a lawyer
7 from Gross and Wexel.

8 Q. Has Gross and Wexel referred previous cases
9 to your office?

10 A. No, they have not and none since.

11 Q. And did your office -- who is D. D.
12 Fairweather?

13 A. She was an office manager and she was in
14 charge of insurance a long time ago when I first
15 opened.

16 Q. And she was in charge of making sure that
17 you got paid?

18 A. Yes, partially, yes. Rescheduling of
19 patients.

20 Q. And you took out a lien on Mr. Gross's law
21 firm on the proceeds of the lawsuit, didn't you?

22 A. Yes, that's normal procedure to make sure

1 that I get paid.

2 Q. And if he doesn't win this lawsuit, you
3 won't get paid any proceeds for this lawsuit?

4 A. Allan has a bill with me.

5 Q. Has he paid you?

6 A. No.

7 Q. Now, I understand that his ankle got better
8 after one week, he could dorsi flex?

9 A. It didn't get better in terms of back to
10 normal. He got better as far as there was more motion
11 because I was doing the work to loosen up the
12 musculature.

13 Q. Would you take a look at -- do you have
14 exhibit 40C there in front of you, the chart?

15 A. I have the chart itself.

16 Q. Whose handwriting is that?

17 A. All of it's mine except for the name in the
18 top left hand corner.

19 Q. And Allan Clark would come into your office
20 and you would examine him and talk to him and you
21 would write down, essentially --

22 A. What was going on, anything new.

1 Q. What you felt was important?

2 A. Absolutely.

3 Q. And on May 13th, you wrote down his ankle
4 is better?

5 A. True. Better as compared to the day
6 before.

7 Q. That's what you wrote down, "ankle better?"

8 A. Right.

9 Q. Now, before May 13th, the only thing you
10 said about the ankle was, "Right Achilles second
11 degree sprain?"

12 A. Yes, that's incorrect. If I say Achilles,
13 I am talking about a strain.

14 Q. It says "sprain?"

15 A. It says strain. You can't sprain an
16 Achilles.

17 Q. The injury after May 14th, I guess it is
18 part to May 14th, it says "leg feeling better."

19 A. Yes.

20 Q. That's what you reported?

21 A. Yes, diverticulitis coming from the lower
22 lumbar spine going all the way down the leg. That was

1 shown to diminish because of the work that I was
2 doing.

3 Q. And entry number 9, "walking better?"

4 A. Yes.

5 JUDGE ROUSH: I hate to interrupt, you have
6 to say yes or no for the purpose of the Court
7 Reporter.

8 THE WITNESS: Sorry.

9 BY MR. SCHROEDER:

10 Q. Then, on May 19th, you have in big capital
11 letters with 2 exclamation marks, "Can dorsi flex?"

12 A. True.

13 Q. And you are referring to what he can do
14 with his foot, correct?

15 A. Yes, that he can actually make it go up
16 some.

17 Q. Lift his toe towards his knee?

18 A. So that there can be resistance put against
19 the calf muscle at that joint.

20 Q. And then on May 27th, I believe, it says
21 "stripped calf?" What does that mean?

22 A. Strip means a miofacial technique where you

1 take cream and you dig your thumbs deep into
2 musculature to break up the adhesions that are
3 happening because of the muscle pulling up and
4 shortening because of the process I talked about, the
5 guarding of the joint.

6 Q. So, that's just treatment that you
7 provided?

8 A. Yes.

9 Q. Then on June 4th, you have a little star
10 down at the bottom of that entry. It's the only entry
11 where you have a star.

12 A. Right.

13 Q. And it says that "pain in right calf feels
14 worse?"

15 A. Yes.

16 Q. And then in June 8th, you have
17 "exacerbated, swollen" in capital letters. And then
18 the next one is "up for MRI?"

19 A. Well, the reason that it is written prior
20 is because it is "pain in right calf feels worse,
21 exacerbated." Those 4 lines that go from "pain in
22 right calf," those words to the last word on line 20,

1 "discoloration;" that's all written at one sitting.

2 Q. The discoloration is the entry for June
3 11th, isn't it?

4 A. Discoloration goes from the star -- all of
5 the way back to the star, that's one entry.

6 Q. You have dates up at the top here, don't
7 you?

8 A. Yes, for the boxes down here.

9 Q. And this box for June 11th goes down and it
10 says "swollen, more discoloration."

11 A. "Swollen, more discoloration."

12 Q. So, it wasn't until June 11th that you made
13 that note?

14 A. No, sir, I made it on 17, which was 6-4-93.

15 Q. Even though it is under the June 11th date?

16 A. That's true.

17 Q. Would it be fair to say that --

18 A. I had a large entry to write. I had to
19 write it somewhere. I know these kind of notes -- but
20 this is proper, in my opinion.

21 Q. Doctor, would it be fair to say that there
22 is nothing -- there is no complaint about pain,

1 discoloration, or swelling of the ankle written in
2 this summary prior to June 4th?

3 A. True, because he had been set up for MRI,
4 there was not much worth talking about it until we
5 found out there was more going on.

6 Q. But it wasn't until those complaints were
7 made that you decided for him to go have an MRI?

8 A. True. It is acceptable to work on a
9 patient using motion, like I said, trying to cause a
10 healthy scar to form with tensile strength as the
11 collagen later on is happening. And if there is any
12 sign or symptom which suggests that the condition is
13 worsening, that's when you have to look to
14 rehabilitation programs and maybe make a change.

15 Q. From what you could tell from your
16 examination, his Achilles tendon ruptured completely
17 sometime between May 6th and June 4th, didn't it?

18 A. That's incorrect.

19 Q. When was it --

20 A. That is incorrect, it was never fully
21 ruptured --

22 JUDGE ROUSH: One at a time, please.

1 THE WITNESS: I am sorry. On MRI, it
2 doesn't talk anything about full rupture.

3 BY MR. SCHROEDER:

4 Q. Are you aware that Dr. Cabrera said that it
5 was --

6 A. You said that before, and I told you that's
7 incorrect. When you talk about disks, there is
8 prolapse and there is protrusion. People that have a
9 herniated or talk about slipped -- all of those words,
10 there is 2 words that you use.

11 With this, there is either going to be a
12 partial tear or it is going to be a partial tear, a
13 frank tear is a little bit more than a full rupture.
14 If it's just a frank tear, it's still intact.

15 MR. SCHROEDER: Thank you.

16 JUDGE ROUSH: Any redirect?

17 MR. AXELSON: No, thank you.

18 JUDGE ROUSH: Thank you very much,
19 Dr. Smith.

20 Is Dr. Smith subject to recall.

21 MR. AXELSON: We have no further need for
22 him to be recalled.

1 THE WITNESS: Would you care to see the
2 X-rays?

3 MR. AXELSON: We did not offer him.

4 JUDGE ROUSH: You are excused or you may
5 remain in the courtroom; whichever you prefer.

6 THE WITNESS: Thank you.

7 MR. AXELSON: Your Honor, I appear to have
8 walked off with one of the exhibits that was given to
9 the Court. I don't believe it has been admitted. I
10 have the original there.

11 Your Honor, we have no further evidence,
12 the Plaintiff rests.

13 JUDGE ROUSH: All right. Does a motion
14 need to be brought up then?

15 MR. AXELSON: Yes, Your Honor.

16 JUDGE ROUSH: Ladies and Gentlemen, if you
17 will excuse us, we are going to take up some motions
18 and we will get back to you as soon as we can. If we
19 run into lunch time, we will excuse you to go to
20 lunch.

21 - - -

22 (Jury escorted from the Courtroom at 12:44

1 o'clock p.m.)

2

3 MR. SCHROEDER: Judge, did you happen to
4 get the original trial brief that I filed with the
5 clerk?

6 JUDGE ROUSH: No.

7 MR. SCHROEDER: This is my only copy, but I
8 can do without it.

9 I have a motion to strike, several grounds
10 for it. On the first ground for the motion is that
11 there is absolutely no evidence whatsoever to indicate
12 that Allan Clark was an invitee at the time that he
13 engaged in the chase of this robber.

14 Now, he was an invitee when he was working
15 at Elegant Nails and standing there and engaging in
16 normal and expected activities. But the law says that
17 when you use the premises in a manner that exceeds the
18 scope of your actual or implied invitation, you become
19 a trespasser as far as the law is concerned. And the
20 duty owed to a trespasser is very different than the
21 duty owed to an invitee.

22 Now, Mr. Clark -- just to talk about

1 whether or not he has an invitee -- he has testified
2 that he wasn't an employee of the Mall, he testified
3 that he wasn't an employee of Roy Rogers, and the only
4 reason -- it is apparent he was at the Mall that day
5 was to be working. And I think that's all the
6 invitation extended to him was for him to come there
7 and work or if he wanted to shop, he could shop. If
8 he wanted to walk around the Mall, then he could do
9 that.

10 But, there is no evidence whatsoever to
11 indicate that it was expected or intended that he
12 voluntarily join in a pursuit in progress of someone
13 who has robbed another store. And I think that he is
14 exceeding the scope of the invitation when he does
15 that.

16 JUDGE ROUSH: So, the Good Samaritan turns
17 into a trespasser?

18 MR. SCHROEDER: That's correct, Your Honor.
19 And the Good Samaritan doctrine, as I have discussed
20 later in this brief, it really only applies to
21 situations where you are saving someone's life or
22 protecting a person from danger. The Court

1 specifically discussed what you do in situations where
2 a person engages in dangerous behavior in order to
3 preserve nothing but property. And there the Court
4 says it is completely different, that there is no
5 excuse for that sort of activity.

6 If you are negligent engaging in that
7 activity, then you are contributorily negligent as a
8 matter of law. That is my second argument. Let me
9 finish my --

10 JUDGE ROUSH: Well, what if he runs out of
11 the door and is shot by the robber and then sues
12 Springfield Mall? I might buy your argument more, but
13 all he is doing is running through a door or exiting
14 through the door. Other than the fact that he was
15 pursuing a robber, I'm sure that when people are
16 shopping, people sometimes run out that door to catch
17 a bus at the bus stop. He was doing a normal activity
18 that people do, I'm sure.

19 MR. SCHROEDER: No, he is not. Because a
20 person that's running out of a shop to catch a bus,
21 that is theoretically something that could be
22 expected; that people are going to be late for things

1 and they need to rush out.

2 It could not be expected, though, in all
3 reasonableness that a person will voluntarily join in
4 the pursuit of a criminal that has stolen property
5 only that has nothing to do with the Plaintiff.

6 JUDGE ROUSH: But other than the fact that
7 what he was running after, whether it was a bus or a
8 robber, he was doing relatively normal activity of
9 exiting the door in the shopping mall, was he not?

10 MR. SCHROEDER: No, he wasn't. Running
11 through a shopping mall and running through a set of
12 swinging doors is not a normal activity. The law says
13 that a definition of an invitee is someone whose
14 presence on the premises is for the common interest
15 and mutual advantage of both parties.

16 The only interest present when Mr. Clark
17 took off after this robber, there was no interest for
18 the Mall in him doing that. It wasn't their money
19 that was being stolen. They don't receive any benefit
20 for that. It was purely voluntary on his part for
21 purely personal reasons. They may have been the best
22 reasons in the world and maybe we should compliment

1 him on that, but those same reasons take him outside
2 the scope of his invitation.

3 JUDGE ROUSH: Wouldn't the Mall have some
4 benefit in the robber being caught?

5 MR. SCHROEDER: I don't see what. There is
6 no financial benefit in it. It's Roy Rogers that
7 receives the benefit.

8 JUDGE ROUSH: Would it be comforting to
9 tenants in the Mall that -- Springfield Mall is
10 located next to a Metro stop, for example -- it may
11 not be an inside space or people might not want to go
12 shopping if people can rob them and then hop on the
13 Metro and escape.

14 MR. SCHROEDER: That's why that the Mall
15 has security forces, that's why we have police. I
16 think that what is expected of Mall patrons and
17 workers of tenants of the Mall is that they report
18 criminal activity, not that they engage in self-help
19 or help for the benefit for another person.

20 It is what can be reasonably expected, what
21 is the implied scope of this invitation. And I think
22 that he fails on that point and he fails on the common

1 interest and mutual advantage of both parties point,
2 as well.

3 There is a case that I have cited in my
4 brief that is a very good example, the Petty John and
5 Sons case versus Basham. In that case, there was a
6 structure around a building, a scaffolding. And one
7 of the workers used the scaffolding in a manner that
8 was not expected or intended.

9 Instead of going from the scaffolding into
10 the building through a door that was for that purpose,
11 he climbed up on top of the scaffolding and tried to
12 go into the window, I believe, and he got injured
13 during that.

14 The Court ruled that he was an invitee
15 while he was working on the premises and using the
16 scaffolding in its intended manner. When he used the
17 scaffolding to get into the building in a manner that
18 was not expected or intended, he became a trespasser.
19 And that's exactly analogous to what has happened
20 here. He did not have to do this at all.

21 It's even worse here. This was a purely
22 voluntary act on his part. And it certainly wasn't

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1 necessary because there was already other people
2 chasing this thief by any view of it. It's just
3 something that he took on completely on himself
4 without the consent of the Mall, implied or explicit,
5 and without the expectation of the Mall.

6 I think at that point he became a
7 trespasser as far as the law is concerned. In which
8 case, the duty of the Mall changes towards him. It's
9 no longer a duty just to provide ordinary care under
10 the circumstances, it's a duty to avoid willful and
11 wanton acts that would cause injury.

12 And there is not a scintilla of evidence
13 and there is certainly no argument to suggest that
14 anything the Mall did in this case was willful or
15 wanton. There was no actual knowledge of defect
16 involving a closer in this case. No one has testified
17 to that fact.

18 Now, there has been some testimony that
19 arguably could be construed as saying, "Well, they
20 should have had constructive knowledge of that." But
21 there was no evidence to indicate that -- or arguments
22 to indicate that -- the Mall was willful or wanton

1 with regard this door.

2 If that's the case, then they haven't made
3 out a liability case because there has been no duty
4 that has been violated, under these circumstance.

5 The second argument I have is that his
6 contributory negligence is a matter of law. Now,
7 there is no Virginia case on this issue. The issue is
8 whether or not a person who engages in a risky venture
9 to rescue property only is contributorily negligent.
10 And there are several out of state cases that I have
11 cited in my brief and I have brought copies that state
12 that when you do this, you are contributorily
13 negligent as a matter of law and recovery is barred.

14 JUDGE ROUSH: Well, the Virginia Supreme
15 Court is certainly very hostile to finding
16 contributory negligence as a matter of law in other
17 contexts, don't you think?

18 MR. SCHROEDER: I don't think so, there is
19 quite a few good opinions out there involving
20 contributory negligence, especially in cases --

21 JUDGE ROUSH: As a matter of law? When the
22 trial judge finds it a matter of law rather than the

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1 attention of the Jury?

2 MR. SCHROEDER: In the cases where the
3 defects are open and obvious, I think the Supreme
4 Court has issued some very strong opinions on that.

5 JUDGE ROUSH: Well, I found there is one in
6 the matter of law and all of my fellow judges are
7 waiting for me to get reversed.

8 MR. SCHROEDER: I believe that the granting
9 of motion to strike is not common day procedure. It
10 shouldn't be, but in this instance, it is clear, it is
11 the type of case that calls for it.

12 JUDGE ROUSH: All right, and have you a
13 third argument?

14 MR. SCHROEDER: The third argument is there
15 is no evidence of negligence. This whole case is
16 built around the fact that an accident happened.
17 Allan Clark didn't see the door hit him, he says he
18 felt it. His own doctor admits -- first of all, there
19 is a conflict between these doctors of whether or not
20 there is even a rupture of the tendon.

21 They can't agree on what a frank tear is,
22 they can't agree on whether or not the tendon was

1 JUDGE ROUSH: Well, he looks back and sees
2 his right foot wedged between the door that he opened
3 and the adjoining door jam. He can sense that his
4 foot was not caught in the door?

5 MR. SCHROEDER: I would say that that's the
6 aftermath of him falling. That's not necessarily what
7 caused the accident.

8 But even so, put that aside, Your Honor,
9 even if you think there is a question of fact about
10 that, consider this. His own experts said that the
11 equipment used on this door was within industry
12 standards, was within legal standards; the combination
13 of the ROTON hinge with the Kawneer Husky closer was
14 within these standards. There was nothing wrong with
15 the use, per se, of that equipment.

16 I also asked him whether or not he had an
17 opinion as to whether or not the maintenance on this
18 door was bad or not up to standard. I asked him two
19 very similar questions and he agree with me that he
20 was not expressing an opinion on that. So, the
21 equipment was fine and the maintenance was fine.

22 How could we -- what is it that we have

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1 done wrong at that point? What is it that we should
2 be held responsible for under those conditions? We
3 used the right kind of equipment and we did the right
4 kind of maintenance.

5 All that Allan Funk testified to was that
6 he felt that the closer was not operating properly
7 because this accident occurred. He doesn't see how
8 this accident could have occurred if the closer had
9 been operating properly. So, he is just basing that
10 one opinion on the fact that this accident happened.

11 There was no testimony to show that this
12 door was not operating properly under normal use
13 conditions. This was an abnormal use. And without
14 that sort of evidence, how can we be charged with a
15 duty to have prevented and even known about or should
16 have known about this alleged defect in this door?
17 There wasn't any evidence that there was a defect
18 other than the fact that this evidence happened.

19 JUDGE ROUSH: How about Dr. Smith's
20 testimony that when he examined the door, there was
21 actually no resistance, it was a heavy door, it opened
22 with no resistance and then sprang back. And then the

1 postman's testimony that he avoided that door because
2 it was closing too quickly.

3 Isn't that sufficient evidence for the Jury
4 to decide whether this door was dangerous?

5 MR. SCHROEDER: Neither one of those
6 witnesses said that the door closed too quickly.
7 Neither one of those witnesses said how fast the door
8 closed under normal use. They just generally
9 described what happened when they used the door.

10 The postman did not express an opinion on
11 speed of the door. He said it wouldn't open all of
12 the way, something we don't dispute. We agree, it
13 only opens to 75 or 80 degrees. And the reason that
14 he did not use it, as he testified on cross
15 examination, is because he was carrying big bags and
16 he needs as much space as is possible to get through
17 the door.

18 And moreover, he didn't report it to the
19 Mall. He didn't think it was serious enough to report
20 to the Mall. So if it is not serious enough for him
21 to report, then why should we be charged with
22 constructive knowledge of the problem?

1 And Dr. Smith saw it on May 8th. This is
2 two weeks after the accident. Their own pictures and
3 their testimony, Allan Clark's testimony, was that
4 when he went to take pictures on April 29th, there
5 were maintenance men up by that door. There was work
6 done on that door. That's the only inference that you
7 can raise from that and so there was a change in
8 condition of that door.

9 So, I think that Dr. Smith's testimony
10 about how that door operated has nothing to do with
11 how that door operated on April 25th.

12 JUDGE ROUSH: All right, let me hear from
13 Mr. Axelson.

14 Mr. Axelson, what evidence is there that
15 the Mall knew that this door was not operating in
16 compliance --

17 MR. AXELSON: There is no evidence -- well,
18 there is some evidence of actual knowledge. We have
19 Mr. Robinson's note that was made March 10 that the
20 door was not latching properly. Now, I think that a
21 reasonable inference that could be drawn from that is
22 that there was a problem with the closer because it is

1 the closer that gets the door all the way back up to
2 the latching --

3 JUDGE ROUSH: It was also his testimony
4 that the hinge was replaced after that in response to
5 that.

6 MR. AXELSON: That's correct.

7 JUDGE ROUSH: So, that's not the same
8 condition that existed on the day of the accident.

9 MR. AXELSON: That's correct, but there is
10 no testimony that the latching was addressed. The
11 hinge is a separate mechanism from the closer. And if
12 the door is failing to latch properly, I think that's
13 one piece of evidence that the Mall actually had
14 actual knowledge that there was a problem with the
15 closer, or should have had actual knowledge.

16 If you walk up there and say, "Hey, this
17 door isn't going all of the way closed," then someone
18 who knows something about doors would say that there
19 was a problem with the closer, not necessarily the
20 hinge. Now, their response to that was to replace the
21 hinge or that is what was done after that.

22 But there is no evidence whatsoever that

1 anything was ever done to address the closer. That
2 deals with actual knowledge.

3 JUDGE ROUSH: Doesn't there need to be some
4 evidence that the Mall had knowledge of this, but
5 basically the hydraulics of this door were shot?

6 MR. AXELSON: I think there is plenty of
7 evidence that could establish that the Mall had
8 constructive knowledge of that as opposed to actual
9 knowledge.

10 JUDGE ROUSH: And what evidence is that?

11 MR. AXELSON: The constructive knowledge
12 can be simply in length of time during which the Mall
13 should have observed this.

14 Now, if we have a postman who is coming in
15 and out that day every day and he observes that there
16 is a problem with the door, that's certainly -- and he
17 says that has been that way for weeks -- that's
18 certainly something on which a Jury could base the
19 decision that the Mall had ample opportunity to see
20 this.

21 JUDGE ROUSH: Excuse me. Kathy, would you
22 mind sending the Jury to lunch and ask them to report

1 back at 2:15 and admonish them not to discuss the case
2 with anyone?

3 Thank you. Go ahead, Mr. Axelson.

4 MR. AXELSON: I think that satisfies the
5 requirement of constructive knowledge, that there is a
6 defect, that it existed for a sufficient period of
7 time under which the Mall could have, in the exercise
8 of reasonable care, determined the defect and done
9 something about it.

10 Now, the testimony is that it could have
11 been that way for a matter of weeks. Mr. Johnson had
12 testified that the door would spring back on you.
13 That is the same problem that has been identified by
14 everyone else.

15 Mr. Schroeder makes a wonderful argument
16 here, which I am certainly going to borrow and use to
17 the Jury, that Dr. Smith saw the door after
18 maintenance had been performed on it. I think that is
19 marvelous that I am going to be able to say to the
20 Jury that their maintenance puts the door in the
21 condition that Dr. Smith saw it in.

22 So, the fact of the matter is they had

1 ample opportunity to do something about this and they
2 failed to do it.

3 JUDGE ROUSH: I'm going to deny the motion
4 to strike. I think at this point there is sufficient
5 prima facie evidence on the Plaintiff's case to go
6 forward. As you know, in the Brown versus Kulazakas
7 case that the trial judge is not supposed to grant a
8 motion to strike unless there is no possible theory
9 under which the Plaintiff can recover. And I just
10 think in this case there is sufficient evidence to go
11 forward and put the Defendant to it's test.

12 So I'm going to deny the motion to strike.
13 I would ask that we resume at 2:15 from lunch.

14 MR. AXELSON: Thank you very much.

15 MR. SCHROEDER: Please note my objection.

16 JUDGE ROUSH: Oh, yes, of course.

17 - - -

18 (Recessed at 1:03 o'clock p.m.)

19 (Reconvened at 2:13 o'clock p.m.)

20 - - -

21 JUDGE ROUSH: Please admit the Jury.

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BY MR. AXELSON:

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Q. Dr. Gordon, I want you to assume that an

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individual is in a position in which he has his foot

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in dorsi flexion. And I want you to further to

11

assume, I believe it is your testimony that extension

12

of the Achilles tendon is the mechanism that causes

13

rupture.

14

Is that correct?

15

A. The stretching -- extreme dorsi flexion is

16

stretching it.

17

Q. Now, is it not so that if one has the foot

18

in dorsi flexion and the tendon in hyperextension,

19

then, and then one puts pressure on the Achilles

20

tendon, does that not cause additional extension of

21

the Achilles tendon?

22

A. Not a direct blow to it. If you had a

1 direct blow that somehow --

2 Q. My question was not a direct blow, Doctor.

3 A. I'm sorry. Anything would make it further
4 dorsi flex and more can put more stress on it, sure.

5 Q. Is it not possible that an external
6 physical force could cause further physical extension
7 of the Achilles tendon?

8 A. Well, a lot of things could do it. If you
9 fell forward and made you further dorsi flex your
10 ankle, that -- but the question before that I thought
11 you were asking a second ago was could a direct blow
12 to the Achilles cause a rupture and my answer to that
13 is no.

14 But any kind of an injury that could cause
15 you to further hyperextend the foot, i.e., stretch the
16 Achilles tendon more than it wants to be and more that
17 it can sustain, it obviously can have an effect on
18 causing a rupture or contribute to it, sure.

19 Q. Let me see if I understand you, Doctor. In
20 other words, if I have my foot in dorsi flexion --

21 A. You are talking about your --

22 Q. My right foot and I am hyperextending my

1 Achilles tendon --

2 A. Stretching.

3 Q. -- Stretching my Achilles tendon and then
4 there was an event that caused me to further
5 hyperextend my Achilles tendon?

6 A. If there was an event that made you do
7 that, sure. But what you just did with your foot
8 didn't do that.

9 Q. I'm asking a hypothetical, Doctor. I am
10 just illustrating.

11 A. The way you illustrated, it may have done
12 that. But as I already said, any type of injury that
13 would cause you to bend your foot back further, would
14 produce the stress on the Achilles --

15 Q. Suppose it was a blow to your ankle that
16 caused you to further dorsi flex your foot?

17 A. Anything that would make you further dorsi
18 flex your foot past the level that it is used to dorsi
19 flex can contribute to a rupture of an Achilles
20 tendon.

21 Q. So, in other words, if my foot is in dorsi
22 flexion and it gets hit and as a result of it being

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1 hit, I further extend my foot, my Achilles tendon;
2 that could cause a rupture.

3 Correct?

4 A. You could get hit on the head and that
5 could cause you to fall in such a way as to
6 hyperextend your foot which could contribute to a
7 rupture of an Achilles tendon.

8 Q. Correct me if I am wrong, Doctor, but the
9 yes or no answer to the question that I just asked you
10 is yes?

11 A. Anything --

12 Q. And that would include a blow?

13 A. Any blow to any part of your body could
14 cause trauma in such a way to make you hyperextend
15 your ankle to make you rupture or more likely to
16 rupture your Achilles tendon.

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1 JUDGE ROUSH: Yes, sir. Granted.

2 MR. SCHROEDER: Can I borrow that large
3 exhibit on the wall?

4 JUDGE ROUSH: Mr. Schroeder, which exhibit
5 is that that you are showing the witness?

6 MR. SCHROEDER: Plaintiff's Exhibit Number
7 27.

8 JUDGE ROUSH: All right.

9 - - -

10 ALLAN CLARK,
11 having been previously sworn,
12 testified as follows:

13 - - -

14 DIRECT EXAMINATION

15 BY MR. SCHROEDER:

16 Q. When you were working in the Mall in April
17 of 1993, were you aware that there are signs posted
18 about what sort of behavior is appropriate and
19 inappropriate in the Mall?

20 A. No, I'm not.

21 Q. You didn't read those signs?

22 A. I never saw one posted and I had been in

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1 the Mall for over 4 years.

2 Q. Now, I want to ask you a few questions
3 about the accident again.

4 When you -- did you see -- you saw
5 Mr. Hamilton, the thief, running out the door, didn't
6 you?

7 A. Yes, I did.

8 Q. You saw him running out of the door?

9 A. Yes.

10 Q. And were you running -- you were running
11 after him at that point, were you?

12 A. I was in pursuit.

13 Q. And your purpose in running after him was
14 to catch up with him and stop him.

15 That is correct, isn't it?

16 A. Basically my reason for pursuing him was to
17 help detain him with the others, not to catch him
18 myself because he was twice my size. And being a
19 hairdresser I knew that any harm to my legs or arms
20 can put me out of business and I cannot afford not to
21 work.

22 Q. Were you trying to catch up with him or

1 not, Mr. Clark?

2 A. I was trying to assist the others.

3 Q. Mr. Clark, he was running away from the
4 others, wasn't he?

5 A. Yes.

6 Q. And to assist the others, you would have to
7 catch up with the others, too; wouldn't you?

8 A. I was going to be there with the others and
9 help detain him, along with -- we had already called
10 911 and the police car did respond out in the parking
11 lot. And that was where he was apprehended.

12 Q. Mr. Clark, it would be fair so say, would
13 it not, that Mr. Hamilton, the thief, was trying to
14 put as much distance as possible as soon as possible
15 between him and the people that was pursuing him?

16 A. That would be fair to say.

17 Q. And if you were to be able to catch up with
18 him, you would have to run faster than he was running;
19 isn't that correct?

20 A. I was not trying to catch him myself.

21 Q. If you were to catch up with him, you would
22 have to run faster than him?

1 A. If I were to catch up with him, I would
2 have.

3 Q. But you just said that you were not running
4 after him to catch up with him; you were just sort of
5 lolly-gagging along back there?

6 A. I was not lolly-gagging along, I was going
7 to assist.

8 Q. Okay. And you weren't going to assist them
9 50 yards away from him, you are going to assist them
10 where he was, weren't you?

11 A. He would have had to slow down in the
12 parking lot because of traffic.

13 Q. Now Mr. Clark, you testified, I believe
14 yesterday, that you saw Mr. Hamilton, the thief,
15 moving from right to left when he got outside.

16 Is that correct?

17 A. Basically, he went out of the right hand
18 side of the double doors right here (indicating) and
19 then he went to the parking lot.

20 Q. So he was moving sort of out and left?

21 A. Yes.

22 Q. And the reason you went out the left door,

1 one of the reasons that you went out of the left door,
2 was to save the time so you could catch up with him.

3 Correct?

4 A. Correct.

5 Q. So, you ran from here to there.

6 (Indicating)

7 A. Well, I was coming kind of towards the
8 middle because you can't see the front door until you
9 get right to the last (indicating) door. And then I
10 went out the double doors.

11 Q. Okay. Now, you were running as fast as you
12 could to catch up with him, weren't you?

13 A. No.

14 Q. You weren't trying that hard to catch up
15 with him?

16 A. I couldn't run as fast as I could because I
17 had on a new pair of Timberland boot shoes and you
18 can't run fast in those.

19 Q. You were running as fast as you could
20 wearing those shoes, weren't you?

21 A. No.

22 Q. So, you weren't trying as fast as you

1 could?

2 A. I was running, but I was not running as
3 fast as I could.

4 Q. You were running pretty fast, though, were
5 you? You weren't jogging, were you?

6 A. A little faster than a jog.

7 Q. Well, Mr. Hamilton was running much faster
8 than a jog, wasn't he?

9 A. Mr. Hamilton couldn't have been running
10 much faster than a jog because he was a very heavy
11 person.

12 Q. How quickly did you get from here
13 (indicating) to the door?

14 A. I can't tell you.

15 Q. You have no idea how long it took you?

16 A. No, I don't.

17 Q. But you do have an idea of how long it took
18 you to get through the door until the door closed back
19 on you; don't you?

20 A. I know that it was very quickly.

21 Q. But you can't say with any sort of
22 certainty how long that was, can you?

1 A. No, not with any certainty. All I know is
2 before I could get my foot out the door closed on my
3 leg.

4 Q. Now, you are not an employee at
5 Springfield -- you were not an employee of Springfield
6 Mall at this time, were you?

7 A. Yes, I was.

8 Q. Of Springfield Mall?

9 A. I was an employee in Springfield Mall.

10 Q. I asked you "of" Springfield Mall.

11 A. I think they are one and the same.

12 Q. You work for Elegant Nails. That was your
13 employer, wasn't it?

14 A. Right.

15 Q. You did not get a check every 2 weeks from
16 Franconia Associates or Fisher Group, did you?

17 A. No, I did not.

18 Q. You got paid by Elegant Nails who is a
19 tenant in the Mall, didn't you?

20 A. Yes.

21 Q. And you weren't a member of the security
22 force of the Mall, were you?

1 A. No, I was not.

2 Q. And you are not a member of the police
3 force, are you?

4 A. No, I'm not.

5 Q. So, you took it upon yourself to stop
6 Mr. Hamilton, to run through the Mall and catch up
7 with Mr. Hamilton; didn't you?

8 A. No. If I was asked for help, I just out
9 of -- I didn't even think about it. Somebody said --
10 I have been in the Mall for 4 years, I know
11 Mr. Schubring for about 4 years.

12 I was standing and not really paying
13 attention; all of a sudden he made eye contact with
14 me. He said, "Stop that guy, he just robbed us." So,
15 I just started --

16 Q. Mr. Schubring is not an employee of the
17 Mall, he is an employee of the Roy Rogers, isn't he?

18 A. Yes, he is.

19 Q. Okay. So no one from the Mall or no one
20 from Franconia Associates or the Fisher Group, Inc.,
21 no security officer asked you to take off after
22 Mr. Hamilton; did they?

1 A. No, but if I saw somebody in the parking
2 lot beating you over the head and you said "Help," I
3 would do it.

4 Q. This isn't a situation involving someone's
5 life being in danger, was it? It was the situation of
6 a robber --

7 A. If they were robbing --

8 Q. Let me finish my question, Mr. Clark. It
9 was a situation of a robber who had stolen nothing by
10 cash. He did not have a hostage with him; did he?

11 A. No, he did not. The way that I was raised,
12 I just acted automatically. I didn't even think about
13 it.

14 Q. Did you change direction when you went
15 through the door?

16 A. No, I did not. Well, yes I did. What do
17 you mean by changing directions?

18 Q. Right to left? Left to right?

19 A. When I went through the door, I approached
20 the door, I pushed the door and went towards my right
21 to go out of the door at an angle.

22 Q. I thought Mr. Hamilton was running to the

1 left. Why were you angling out to the right at that
2 point?

3 A. To get out of the door.

4 Q. Why couldn't you go straight through the
5 door?

6 A. Because if you go straight through the
7 door, you have less time before the door comes back.
8 I wanted to push the door out of my way and get out of
9 the door as quickly as possible.

10 Q. So, you knew how this door operated?

11 A. No, I had never been through that door
12 before.

13 Q. Then how did you know you had less time
14 than --

15 A. That's just common sense when you go
16 through a door.

17 Q. Oh, you should use common sense when you
18 are going through a door?

19 A. No, I said that just is using common sense.

20 Q. Okay --

21 MR. AXELSON: Your Honor, Mr. Schroeder is
22 arguing with the witness --

1 JUDGE ROUSH: I sustain the objection.

2 Mr. Schroeder, I want to lower your temperature about
3 30 degrees and ask the questions in a conversational
4 tone.

5 MR. SCHROEDER: Yes, Your Honor.

6 BY MR. SCHROEDER:

7 Q. Mr. Clark, is it possible that you planted
8 your right foot behind the right hand side door?

9 A. No.

10 Q. That's absolutely impossible?

11 A. That's absolutely impossible. When I
12 looked back, my ankle was still in the door.

13 Q. How far -- you planted your right foot at
14 the threshold of the door, didn't you? Of the left
15 door?

16 A. I'm not exactly sure how it happened. All
17 I know is that I was running, I went through the door,
18 I pushed the door out of the way, I am laying on the
19 ground, and I look back to see what happened, and the
20 door is beating against my foot like that (indicating)
21 and my foot is in the shop and my body is outside of
22 the shop.

1 Q. You didn't see the door hit your foot until
2 after you were on the ground; did you?

3 A. That's right. My intention was to run out
4 into the parking lot. I wasn't paying attention to
5 the door when I pushed it out of my way.

6 Q. The only thing that was on your mind at
7 that time was getting Mr. Hamilton; wasn't it?

8 A. Was helping, as I stated before.

9 MR. SCHROEDER: Nothing further.

10 JUDGE ROUSH: Any cross examination?

11 MR. AXELSON: No, Your Honor.

12 JUDGE ROUSH: Thank you very much,
13 Mr. Clark. You may step down and join your Counsel.

14 Mr. Schroeder, call your next witness,
15 please.

16 MR. SCHROEDER: Can I have your indulgence
17 for just one moment?

18 JUDGE ROUSH: Yes, sir. Take your time.

19 MR. SCHROEDER: I call Mr. Gerald Robinson.

20 JUDGE ROUSH: Mr. Robinson, I would like to
21 remind you that you, also, are still under oath from
22 yesterday. I'm not sure how long the oath continues,

1 but I think that one day or two won't be any trouble.

2 - - -

3 GERALD ROBINSON,
4 having been previously sworn,
5 testified as follow,

6 - - -

7 DIRECT EXAMINATION

8 BY MR. SCHROEDER:

9 Q. Good afternoon, Mr. Robinson.

10 A. Good afternoon.

11 Q. What is your position at the Springfield
12 Mall?

13 A. Currently, I am the general manager.

14 Q. And who are you employed by?

15 A. I am employed by The Fisher Reese
16 Associates, previously Fisher Group, Inc., who is the
17 management company managing the Springfield Mall for
18 the Franconia Associates.

19 Q. And in April of 1993, what was your
20 position at the Mall?

21 A. I was the director of operations.

22 Q. Are you still director of operations?

1 A. No, I am doing parts of that job plus the
2 general manager's job right now.

3 Q. Would you tell the Jury a little bit about
4 your experience and educational background?

5 A. I graduated in 1966 with an engineering
6 degree from the university where I did post-graduate
7 work --

8 MR. AXELSON: Objection, Your Honor.
9 Relevance?

10 JUDGE ROUSH: Is he being submitted as an
11 expert witness?

12 MR. SCHROEDER: No, he is not being
13 submitted as expert witness, Your Honor. But I think
14 it is relevant because we are going to get into
15 testimony about his examination of the doors.

16 JUDGE ROUSH: If he is going to express
17 opinions, he should have been designated as an expert.

18 MR. SCHROEDER: He is not going to express
19 opinions. He is going to express what he did, he is
20 not going to draw any conclusions from it, Your Honor.

21 I just want the Jury to be aware that here
22 is a person who is doing this that knows what they are

1 doing.

2 JUDGE ROUSH: There is no disagreement that
3 he has an engineering background?

4 MR. AXELSON: I was not aware that he had,
5 I don't know what the relevance of it is.

6 If he is going to express an expert
7 opinion, than it would be relevant. If he is not
8 going to express an expert opinion, then it's not
9 relevant.

10 JUDGE ROUSH: I take it that it just stems
11 from the fact of his position that he was the general
12 manager of a large regional shopping mall.

13 MR. SCHROEDER: Very well, Your Honor.

14 JUDGE ROUSH: All right, I sustain the
15 objection.

16 BY MR. SCHROEDER:

17 Q. Mr. Robinson, are there rules posted around
18 the Mall concerning conduct?

19 A. Yes.

20 Q. And what do those rules say?

21 MR. AXELSON: Objection, Your Honor.
22 Again, relevance?

1 JUDGE ROUSH: I overrule the objection.

2 THE WITNESS: The rules are -- a number
3 that we have posted at each entrance and we have had
4 them there about a year after I was hired.

5 BY MR. SCHROEDER:

6 Q. When were you hired?

7 A. February of 1989. Basically because of
8 some of the problems that we had with teenagers in the
9 Mall. We had a sign posted at each entrance, at least
10 one at each entrance, and I don't -- I think there was
11 just one at entrance 3 that we have been discussing;
12 but 2 at some of the other main entrances such as 1
13 and 2. But the sign -- I have it here and I can read
14 it or --

15 Q. No, that's okay. Generally, summarize what
16 the sign says?

17 A. It talks about those things that are
18 prohibited in the Mall, such as congregating in the
19 common area, alcoholic beverages outside the food
20 court, vandalism of Mall property, running or
21 horseplay, skateboarding, solicitation, et cetera.

22 There is about 10 different items.

1 Q. And how big of a sign is this?

2 A. This big. (Indicating)

3 Q. Now, does the Mall have a security force?

4 A. Yes, we do.

5 Q. And what is the policy of the security
6 force in dealing with criminal incidents?

7 A. With criminal incidents we are to basically
8 stay at a distance from the criminal so as to not
9 jeopardize any of the Mall patrons. In the case of
10 shoplifting, we are to just to keep an eye on the
11 individual so he is not able to get rid of the
12 merchandise.

13 But as far as any strong-arm robbery, we
14 keep our distance so that, again, not to create an
15 incident in the Mall that would put customers at risk.

16 Q. And what sort of incidents would put a
17 customer at risk?

18 A. A burglary, something where any type of a
19 weapon was involved. Possibly any chase through the
20 Mall we would not permit our security officers to do.

21 Q. What are they supposed to do when there is
22 an actual criminal running through the Mall?

1 A. Normally, contact Fairfax County Police.
2 We have 2 officers that are assigned to the Mall
3 permanently.

4 Q. Mr. Robinson, how often in the Spring of
5 1993 did you walk around the Mall as part of preparing
6 your operations bulletin?

7 A. At least daily, sometimes 2 and 3 times a
8 day, as administrative workload permitted.

9 Q. And what would you do as you went around
10 the Mall in preparing this bulletin?

11 A. I talked into a tape recorder. I would
12 look at everything possible from floor tile being
13 cracked, light bulbs being out, the operation of the
14 doors, if there was any graffiti in the Mall; anything
15 that could cause a liability to the Mall.

16 Q. And have you recently reviewed the
17 operations bulletins that you made in late 1992 and
18 early 1993?

19 A. Yes.

20 Q. And what, if anything, in the bulletin have
21 you found that concerns the doors at entrance number 3
22 prior to April 25th, 1993?

1 A. The one incident that we talked about
2 yesterday was the incident with respect to the draft
3 and a complaint that was coming from the folks at Taco
4 Laredo.

5 Q. What, if anything, did that complaint have
6 to do with the closing speed of the door?

7 A. It had nothing to do with the closing speed
8 of the door. It was just that the door was not
9 closing all of the way. After it had closed, it
10 stayed open about 2 inches.

11 This was in the Winter time and as a
12 result, we were getting a tremendous chill through
13 there and the restaurant has a side that is open and
14 the customers, according to the management, were
15 complaining.

16 Q. What did you do in response to those
17 complaints?

18 A. I went down and personally checked the
19 operation of the door and what they said was, in fact,
20 true. It was not closing. I looked at the door, I
21 did not see any physical problem with the door at that
22 time. I asked my chief of maintenance, who at that

1 time was Jim Arrington, to look at the door.

2 Q. And were you aware of what was done with
3 the door after you asked Mr. Arrington to --

4 A. No, I did not. I did not go down and
5 check; he indicated to me that he had fixed the door.
6 It wasn't until, in fact, the accident that I realized
7 that we really had a ROTON hinge on the door.

8 Q. The ROTON hinge was put on the door in
9 order to correct this problem?

10 A. That, and it could be in combination with
11 the closer. I don't know exactly what work was done.

12 Q. Who else checks the doors at the Mall,
13 other than yourself?

14 A. I check the doors, like I said, daily.
15 Security checks them daily because they have to lock
16 them every night and open them every morning. Plus
17 once a week we do what we call an "outside door check"
18 with security and they go and test every function
19 possible that they can with the door.

20 Maintenance folks go by at least twice a
21 week and unless the doors are locked down or we are
22 having some problem and check them out physically;

1 they remove covers, check closing speed, and adjust
2 them as necessary.

3 Q. What is the procedure that was in place in
4 April of 1993 for when security, for example,
5 discovered that there might have been a problem with
6 the door. What would they do in that --

7 A. They would immediately lock the door down.
8 And we have signs that we put on the door that said,
9 "door broken." We would have an arrow to show you
10 which direction with which to use the door.

11 That was used and depending on whatever the
12 problem was, it was such that if a closer was broken,
13 if there was a hinge broken, glass or anything to
14 prevent the public from using those doors and possibly
15 causing injury.

16 Q. Now, if the maintenance people, during
17 their inspections of the door; what was the procedure
18 in place of April of 1993 to report any problems that
19 they encountered?

20 A. If they encountered any problem, they would
21 fix it immediately. If it was beyond repair, they
22 would notify either myself or my chief of security so

1 that we would be sure that signs would be posted on
2 the door.

3 Q. When you prepared your operations bulletin,
4 did you distribute it to anyone?

5 A. Yes, it was distributed to all of my
6 department heads, which included my chief of
7 maintenance, my chief of security, housekeeping and
8 engineering; along with anyone else that was on the
9 list that had some item.

10 Q. So, any time anyone, yourself, security, or
11 maintenance saw a problem with the door, at least one
12 other department was notified about that.

13 Is that correct?

14 A. That's correct.

15 Q. Other than the Taco Laredo complaint about
16 the draftiness of the door; prior to April 25th, were
17 there any other complaints about the door?

18 A. None that I am aware of.

19 Q. And if there had been a complaint, under
20 the normal procedures in place at that time, would you
21 have been made aware of it?

22 A. Absolutely.

1 Q. In your 5 years at the Mall, has anyone
2 ever made a complaint about doors closing too fast?

3 MR. AXELSON: Objection, Your Honor. Pure
4 hearsay.

5 JUDGE ROUSH: He asked of prior complaints?
6 Approach the bench.

7 - - -

8 (Discussion at sidebar as follows)

9 - - -

10 JUDGE ROUSH: What does the absence of
11 prior complaints have to do with hearsay?

12 MR. AXELSON: It's also relevance, Your
13 Honor. There is no proof that there was anything
14 wrong with the door on this day.

15 MR. SCHROEDER: It goes to constructive
16 knowledge, I think. Whether he has constructive
17 knowledge of these doors.

18 JUDGE ROUSH: That's an issue in this case,
19 is it not?

20 MR. AXELSON: But whether or not someone
21 else has made a report to them, that doesn't prove
22 anything. If there had been a report, that would have

1 proved anything.

2 JUDGE ROUSH: I am going to overrule the
3 objection.

4 - - -

5 (Conclusion of discussion at sidebar.)

6 - - -

7 BY MR. SCHROEDER:

8 Q. Mr. Robinson, has anyone in your 5 years at
9 the Mall ever made a complaint about the doors closing
10 too fast?

11 A. Other than this incident here, no, sir.

12 MR. SCHROEDER: That's all I have -- oh, I
13 do have one more.

14 BY MR. SCHROEDER:

15 Q. The doors in entrance number 3, prior to
16 April 25th, 1993, how wide are those doors?

17 A. 36 inches wide.

18 MR. SCHROEDER: Thank you.

19 JUDGE ROUSH: Mr. Axelson, cross
20 examination?

21 MR. AXELSON: Yes, Your Honor. May we
22 approach the bench?

1 JUDGE ROUSH: Yes, sir.

2 - - -

3 (Discussion at sidebar as follows)

4 - - -

5 MR. AXELSON: Your Honor, Mr. Schroeder has
6 now gone into the reason that I objected to the
7 photographs that was closed to me -- 14 through 26.
8 The reason that he has objected to them was the door
9 broken sign.

10 At this point, I think that he has opened
11 the door and I should be allowed to use those
12 photographs since he has opened the door on this
13 issue.

14 MR. SCHROEDER: That wasn't the issue, the
15 issue was this -- was all this post-accident stuff.

16 JUDGE ROUSH: But repairs after the
17 accident can be introduced to rebut the evidence that
18 the door was safe at the time of the accident.

19 MR. AXELSON: Yes, it can under the
20 statute.

21 MR. SCHROEDER: It's more limited than
22 that. The situations which we are saying at that

1000 628-1312

1 particular time there was nothing wrong with the door
2 and then we change that particular thing. That is not
3 what was testified to, I don't think.

4 JUDGE ROUSH: Well, has he testified that
5 there was?

6 MR. SCHROEDER: That was in place or that
7 there was nothing wrong. He just testified about what
8 he observed and saw.

9 JUDGE ROUSH: He has testified that the
10 door was working fine and there were no problems with
11 it. That is even if the problem they had was a
12 latching problem. I think that that is probably
13 rebuttal.

14 - - -

15 (Conclusion of discussion at sidebar.)

16 - - -

17 BY MR. AXELSON:

18 Q. Mr. Robinson, may I see exhibits 14 through
19 26, please?

20 I show you a group of photos which have
21 been marked as Plaintiff's Exhibits 14 through 26. I
22 would ask that you take a look at those photographs,

1 please?

2 A. Yes, sir.

3 Q. Now, assuming that the Jury were to find
4 that those photographs were, in fact, taken on May 4th
5 of 1993, would it be safe to assume that on that date
6 the signage that you have referred to, "door broken,"
7 was posted on that door?

8 A. Yes.

9 Q. Do you have any independent knowledge as to
10 whether or not that sign, "door broken," was posted on
11 the particular door that Mr. Clark is alleging injured
12 him on May 4 of 1993?

13 A. Only by virtue of this photograph.

14 Q. You have no reason to doubt that particular
15 photograph was taken on May 4th of 1993?

16 A. I assume that because of the date-time
17 group, we use the same type of camera when we have
18 photographs taken for events in the Mall.

19 So that being the case, if it was set
20 properly, I would say yes.

21 Q. So, you would assume based what is on the
22 face of the picture that it was, in fact, taken May

1 4th, 1993?

2 A. Yes.

3 Q. And you have no knowledge of anything that
4 indicates that it was not taken on that date?

5 A. No, I do not.

6 MR. AXELSON: My I see Plaintiff's Exhibit
7 number 33, please?

8 BY MR. AXELSON:

9 Q. Now, you were in the courtroom prior to
10 this and heard Dr. Smith's testimony that he was over
11 to visit the door and look at it on or about May 8th
12 of 1993?

13 A. Yes.

14 Q. And his testimony, as you recall it, was
15 that he was able to open the door and try on that
16 particular day; is that correct?

17 A. Yes.

18 Q. You have nothing, no knowledge or no
19 evidence, that indicates that that was not the date on
20 which he was there and tried the door, do you?

21 A. I'm sorry, could you repeat the question.

22 Q. You don't have any evidence that he was not

1 there on May 8 of 1993?

2 A. No, I do not.

3 Q. I show you a document that has been marked
4 as Plaintiff's Exhibit Number 33 and ask you to take a
5 look at it.

6 Are you familiar with that document?

7 MR. SCHROEDER: Your Honor, may we
8 approach?

9 JUDGE ROUSH: Yes, sir.

10 - - -

11 (Discussion at sidebar as follows)

12 - - -

13 MR. SCHROEDER: This is exhibit 33. If you
14 look at the paragraph next to the sketch, that's what
15 we are about to go into. All of these speak about
16 post-accident repairs. If I want -- you have already
17 made your ruling about this, but this didn't -- this
18 is not open court.

19 JUDGE ROUSH: I think this is going too
20 far.

21 MR. AXELSON: Your Honor, that's scantily
22 the same thing. He said that there was nothing wrong

1 with the door.

2 JUDGE ROUSH: He said that the posted
3 signs -- I don't know what you were, but saying that
4 it was still broken and that it was still broken
5 and -- that's post-accident repair. The intent we
6 want to encourage Mr. Robinson would discourage him --

7 MR. AXELSON: Your Honor, the following 2
8 paragraphs further do. He has testified as to the
9 daily reviewings that his people were making.

10 JUDGE ROUSH: This is post-accident,
11 though.

12 MR. AXELSON: But it has nothing to do with
13 repairs.

14 JUDGE ROUSH: I sustain the objection. As
15 far as he can --

16 MR. AXELSON: Your Honor, let me see if I
17 can refer you to the right paragraph. He has
18 testified that all of the doors like this -- check
19 on -- I don't think they were doing that on a daily
20 basis.

21 He just testified that they were doing that
22 on a daily basis. And I think that I'm entitled to

1 impeach him on that statement.

2 MR. SCHROEDER: I would ask that they
3 were -- that phrase was false?

4 MR. AXELSON: This shows clearly that he
5 wasn't doing --

6 JUDGE ROUSH: What time was this?

7 MR. AXELSON: May 10th.

8 JUDGE ROUSH: So, you are saying that he
9 was talking about the next 2 weeks?

10 MR. SCHROEDER: I think that impeached --

11 MR. SCHROEDER: That purpose is even to a
12 question when --

13 JUDGE ROUSH: All right. I will allow you
14 to impeach him on that, but stay away from the --

15 MR. AXELSON: I will, Your Honor.

16 - - -

17 (Conclusion of discussion at sidebar.)

18 - - -

19 JUDGE ROUSH: Let's take about a 15 minute
20 break and resume about 3:45 p.m.

21 - - -

22 (Jury escorted from the Courtroom at 3:29

1 o'clock p.m.)

2 - - -

3 (Recessed at 3:29 o'clock p.m.)

4 (Reconvened at 3:49 o'clock p.m.)

5 - - -

6 JUDGE ROUSH: All right, let's bring the
7 Jury back.

8 - - -

9 (Jury returned to the Courtroom at 3:50
10 o'clock p.m.)

11 - - -

12 JUDGE ROUSH: Ladies and Gentlemen, we
13 started about talking about the building that's going
14 on up on the fourth floor of the courtrooms and
15 everybody has got some suggestions as to how to
16 improve the physical plant here. Escalators to the
17 fourth floor would help to alleviate the wait for the
18 elevators, for sure.

19 All right, let's resume with the cross
20 examination.

21 BY MR. AXELSON:

22 Q. Mr. Robinson, I believe that you testified

1 on direct examination, did you not, that there is a
2 security check daily on the doors?

3 A. Yes, I did.

4 Q. Now, referring to Plaintiff's Exhibit
5 Number 33. This is an operations bulletin that you
6 yourself prepared, is it not?

7 A. It is.

8 Q. I would like to direct your attention to
9 the second page, the 4th and 5th paragraphs down on
10 the second page. The 4th paragraph is a reference to
11 exterior doors in entrance one; is it not?

12 A. The 4th paragraph?

13 Q. I did say 4th paragraph; it was the 5th
14 paragraph that I'm interested in.

15 A. Yes.

16 Q. It's a reference to exterior doors at
17 entrance 1 with ROTON hinges; correct?

18 A. That's correct.

19 Q. And then the following paragraph reads as
20 follows; "On the doors like this, we need to go around
21 first thing in the morning and check on all of these.
22 I don't think that we are doing that on a daily

1 basis."

2 Is that correct?

3 A. Yes.

4 Q. Those are your words, are they not?

5 A. They are.

6 Q. Is that in reference to the daily security
7 check?

8 A. No, it's not.

9 Q. This is in reference to a maintenance
10 check?

11 A. What I had asked was maintenance in times
12 security posts a notice on the door if the door is
13 broken, like you have had in some of your exhibits
14 here, that maintenance work on those first thing in
15 the morning, around 6:00, so these are repaired before
16 the public arrives at 10:00.

17 Q. Is it your testimony that the exterior
18 doors at the entrance were on that date closed and had
19 the sign posted on them?

20 A. Yes, sir?

21 Q. You believe they did?

22 A. Yes.

1 Q. Do you have any record that indicates that?

2 A. No.

3 Q. As a matter of fact, the Mall has no
4 maintenance records whatsoever, do they?

5 A. Other than what is on my wall, that's
6 correct.

7 Q. So, there is no way of going back and
8 verifying what the problems were and what work was
9 done to correct anything?

10 A. That's correct.

11 Q. Now, you would be familiar with the
12 entrance 3, would you?

13 A. Yes.

14 Q. And there is a bus stop immediately outside
15 that entrance?

16 A. Yes, there is.

17 Q. And have you been down there on occasions,
18 I am certain, when people have been hurrying to catch
19 the bus?

20 A. Yes, I have.

21 Q. And you have seen people running through
22 those doors, haven't you?

- 1 A. Running through the doors? No, I haven't.
- 2 Q. Hurrying to catch the bus?
- 3 A. Yes.
- 4 Q. And they have used all 4 of the doors that
- 5 are there?
- 6 A. Yes, I'm sure that they did.
- 7 Q. And you recognize that as being absolutely
- 8 normal for people visiting the Mall?
- 9 A. What? Using the doors?
- 10 Q. Hurrying to catch the bus.
- 11 A. Hurrying, yes.
- 12 Q. You don't arrest them for running in the
- 13 Mall, do you?
- 14 A. No. If anybody is caught running in the
- 15 Mall we ask them to walk. If they refuse and continue
- 16 to run, we ask them to leave the property.
- 17 Q. Did you have a conversation with Mr. Clark
- 18 on the morning of April 29, 1993?
- 19 A. Are you referring to the -- at the doors?
- 20 Q. No, I am referring to the telephone
- 21 conversation.
- 22 A. I don't recollect any telephone

1 conversation with Mr. Clark.

2 Q. Do you recall any occasion on which he
3 asked you whether or not the Mall was going to take
4 care of his injuries?

5 A. That was -- happened at the doors is my
6 understanding.

7 Q. And do you recall your response?

8 A. Basically, I --

9 Q. I just said do you recall your response?

10 A. In general terms, yes, but specific words,
11 no.

12 Q. Did you tell him "sue me?"

13 A. No. Not in those specific words, no.

14 Q. In general terms did you tell him that?

15 A. No.

16 Q. Did you tell him the Mall was not going to
17 do anything for him?

18 A. I said that the Mall -- we didn't feel that
19 the Mall was liable for this and I would not be paying
20 his medical bills.

21 Q. Were you aware that maintenance was having
22 to work to tighten the bolts on the doors prior to

1 April 25th?

2 A. Generally, yes. As to what specific door,
3 I knew that maintenance went around and check all of
4 the doors, all of the ROTON hinges, all of the
5 closers, bolts twice a week.

6 Q. Were you aware that maintenance was having
7 to tighten the bolts on the ROTON hinges on a regular
8 basis -- on a fairly regular basis?

9 A. No, I would say that I was not aware of
10 exactly what they were doing. I knew they were
11 maintaining the doors.

12 MR. SCHROEDER: I object to the question.
13 There was no evidence to indicate that that was the
14 case.

15 MR. AXELSON: It is cross examination and I
16 am asking if it was, in fact, the case.

17 JUDGE ROUSH: I overrule the objection.

18 BY MR. AXELSON:

19 Q. You were aware that maintenance was having
20 to do something -- was visiting the doors on a regular
21 basis. Is that what you are saying?

22 A. Yes, that's preventative maintenance.

1 Q. And were you aware of what this
2 preventative maintenance consisted of?

3 A. In it's entirety, no. If they found
4 problems, they were to fix the problems.

5 Q. Were you aware of any difference in the
6 preventative maintenance that was being given to the
7 doors with the ROTON hinges as opposed to the
8 non-ROTON hinges?

9 A. No.

10 Q. You were not aware of any difference in
11 that preventative maintenance?

12 A. Well, obviously, the difference is there in
13 the sense that what they had to do with the hinge
14 which you would not do with a offset pivot hinge.

15 Q. I am sorry, I don't understand your answer.

16 A. In other words, if you had to tighten it,
17 there is no screw to tighten an offset pivot hinge.
18 So, obviously, the maintenance was different.

19 The through bolt is what I'm referring to.

20 Q. Yes, I understand what you are referring
21 to. There are bolts which hold the offset pivot
22 hinges on the doors, are there not?

1 On the door frames?

2 A. I'm not sure.

3 Q. At any rate, you are not aware of any
4 difference in the treatment that maintenance was
5 giving to the ROTON hinges as opposed to the non-ROTON
6 hinges?

7 A. No, it was standard practice to go and just
8 do routine preventative maintenance on all of the
9 doors twice a week.

10 Q. And that would have been Monday and
11 Wednesday, would it not?

12 A. I think it was --

13 Q. Monday and Friday?

14 A. Right.

15 Q. All right. Friday would have been the 30th
16 of April; would it not?

17 A. Yes.

18 Q. The 29th of April is the date those
19 pictures were taken; is that not correct?

20 A. That's what it shows on the photographs,
21 yes.

22 Q. And the maintenance people are shown in

1 those photographs, are they not?

2 A. Yes.

3 Q. The 29th would have been on a Thursday; is
4 it not?

5 A. Yes.

6 Q. That's not the normal maintenance day; is
7 it?

8 A. No, so more than likely, I --

9 Q. I haven't asked you more than that,
10 Mr. Robinson.

11 MR. AXELSON: No further questions.

12 JUDGE ROUSH: Any redirect?

13 MR. SCHROEDER: Just a few, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. SCHROEDER:

16 Q. Mr. Robinson, you have people that work
17 under you in administration as operations director?

18 A. Yes.

19 Q. And, in fact, you are not aware of every
20 single thing that every employee in the Mall is doing
21 at any one time, are you?

22 A. No.



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20 Q. Mr. Sporkin, your testimony is that the
21 ANSI standard, the national standard, the American
22 National Standards Institute, that applies to this

1 door is that it has got to take 3 to 6 seconds to
2 close.

3 Correct?

4 A. That's correct.

5 Q. Therefore, if this Jury believes that this
6 door took less than 3 seconds to close, that door
7 would not have been within the standard that you feel
8 should be applied to it?

9 A. I would feel that, yes.

10 Q. And therefore, if this Jury believes that
11 door closed in 1 second or less, this Jury should also
12 believe that door was not within the standards.

13 Correct?

14 A. Basically, what you are saying.

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10 I do have one other question; would you put
11 that back up there, please? Can you adjust that so
12 that there is no closing control, no latching control,
13 and no back check?

14 A. Can I control it? Sure.

15 Q. Can you take all of those 3 functions out
16 of it?

17 A. Most probably, I don't know. It's an older
18 version, but we can try it. There is one thing built
19 in here that we cannot stop. And that is this size
20 door closer on this door is not appropriate. But what
21 is important, based on the ANSI approvals --

22 Q. Now, Mr. Sporkin, have you removed the back

1 check on that door?

2 A. Pardon me?

3 Q. Have you taken the back check completely
4 out of that?

5 A. Not completely, but as close enough as you
6 can exercise it, because back check would --

7 Q. I want you to take it out completely. And
8 I want you to take the closing control out and the
9 latching control out.

10 A. All of the fluid will come out after that.

11 Q. So, you have taken out as much as you can?

12 A. Basically.

13 Q. All right. Now, would you flip that open
14 please?

15 A. Now, I have reached (indicating) the end of
16 the stroke --

17 Q. Now, let go of it.

18 A. I will in a moment, sir. I just want to
19 show you that the stop here, the positive stop
20 location on it, is fixed. I can't go beyond that,
21 unless I practically leave it right off.

22 Now, (indicating) that is barely one

1 second, that is based on your assumption before.

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1 JUDGE ROUSH: Ladies and Gentlemen of the
2 Jury, we are now going to adjourn for the evening. We
3 will resume tomorrow morning at 10:00.

4 Is there any possibility that we won't
5 finish if we start at 10:00 tomorrow?

6 MR. SCHROEDER: I have got one more live
7 witness that should not take more than an hour with
8 everything and then about a 15 minute deposition
9 testimony.

10 JUDGE ROUSH: All right. It sounds like we
11 will be finished tomorrow.

12 Ladies and Gentlemen, we will back in this
13 courtroom at 10:00 tomorrow. Everything that I said
14 yesterday goes for tonight as well. Please don't
15 discuss the case or visit Springfield Mall or do any
16 independent reading on any of the issues that we have
17 been discussing in the last 2 days.

18 Thanks again, and we will see you tomorrow.

19 - - -

20 (Jury escorted from the Courtroom at 5:00
21 o'clock p.m.)

22 - - -

1 (Hearing recessed at 5:00 o'clock p.m.
2 until 10:00 o'clock a.m. tomorrow, August 18, 1994.)

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1 I, RANDY T. SANDEFER, COURT REPORTER AND
2 NOTARY PUBLIC, THE OFFICER BEFORE WHOM THE FOREGOING
3 HEARING WAS TAKEN, DO HEREBY CERTIFY THAT THE
4 WITNESSES WHOSE TESTIMONY APPEARS IN THE FOREGOING
5 TRANSCRIPT WERE DULY SWORN; THAT THE TESTIMONY OF SAID
6 WITNESSES WAS TAKEN BY ME IN STENOTYPY AND THEREAFTER
7 REDUCED TO PRINT UNDER MY DIRECTION; THAT SAID
8 TRANSCRIPT IS A TRUE RECORD OF THE TESTIMONY GIVEN BY
9 SAID WITNESSES; THAT I AM NEITHER COUNSEL FOR, RELATED
10 TO, NOT EMPLOYED BY ANY OF THE PARTIES TO THE ACTION
11 IN WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I
12 AM NOT A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR
13 COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR
14 FINANCIALLY OR OTHERWISE INTERESTED IN THE OUTCOME OF
15 THE ACTION.

16

17 NOTARY PUBLIC IN AND FOR THE
18 COMMONWEALTH OF VIRGINIA

19

20 My Commission Expires:

21 March 31, 1997

22

