State of Ohio,) ss:
County of Ashtabula.)

Doc. 218

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IN THE COURT OF COMMON PLEAS

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ROGER GLENN MERRITT, et al.,)
Plaintiffs,)
v.) Case No. 93CV496
ILDEA ASKINS,)
Defendant.)

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THE VIDEOTAPED DEPOSITION OF RICHARD S. KAUFMAN, M.D.

FRIDAY, JUNE 2, 1995

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The videotaped deposition of RICHARD S. KAUFMAN, M.D., a Witness, called for cross-examination by the Defendant, under the Ohio Rules of Civil Procedure, taken before me, Michele E. Eddy, Registered Professional Reporter and a Notary Public in and for the State of Ohio, pursuant to notice, at the offices of Richard S. Kaufman, M.D., 23250 Mercantile Road, Beachwood Ohio, commencing at 1:30 p.m., the day and date above set forth.

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APPEARANCES:

On behalf of the Plaintiff:

HENRY W. CHAMBERLAIN, ESQ.
Weisman, Goldberg & Weisman
1600 Midland Building
Cleveland, Ohio 44115

On behalf of the Defendant:

JOSEPH TIRA, ESQ.
Quandt, Giffels & Buck
800 Leader Building
Cleveland, Ohio 44114

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ALSO PRESENT:

Frank J. Kerka, Video Evidence, Inc.

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MR. TIRA: Let the record reflect that this deposition is being taken for trial purposes in lieu of Dr. Kaufman's personal appearance at trial, taken stenographically and by videotape, and it will be played to the jury.

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RICHARD S. KAUFMAN, M.D.

a Witness, called for direct examination by the Defendant, under the Rules, having been first duly sworn, as hereinafter certified, deposed and said as follows:

DIRECT EXAMINATION

BY MR. TIRA:

Q. Doctor, will you state your name for the ladies and gentlemen of the jury, please?

A. Richard S. Kaufman, M.D.

Q. We're here this afternoon at your offices?

A. That's correct.

Q. They are located where?

A. 23250 Mercantile Road, Beachwood, Ohio.

Q. Doctor, will you tell us briefly about your educational background beginning with college, please?

A. I received my BA degree summa cum laude, that means with highest honors, from Yale University in 1952, and my MD degree from Columbia University in 1956.

I then had five years of postgraduate training; a year of internship at Mt. Sinai Hospital in Cleveland; a year of residency at University Hospitals in Cleveland; two years of orthopaedic surgery residency at Mt. Sinai Hospital; and a year of orthopaedic surgery residency at Indiana University Medical Center in Indianapolis.

Q. Doctor, are you licensed to practice medicine in any states?

A. Yes, I'm licensed to practice in the State of Ohio since 3.956, which is now 38 years. And I'm also licensed to practice in Indiana and California.

Q. Doctor, do you specialize in any area of medicine?

A. I specialize in the field of orthopaedic surgery.

Q. What is orthopaedic surgery?

A. Orthopaedic surgery is the branch of medicine that deals with the diagnosis and treatment both medically and surgically of diseases and injuries to what we might call the locomotor system, the parts of the body that move you about. Primarily that's the bones and joints, but it also involves the muscles and ligaments, tendons, nerves of the spine and the arms and legs.

Q. Doctor, are you Board certified in orthopaedic surgery?

A. I'm certified by the American Board of Orthopaedic Surgery.

Q. When were you so certified?

A. 1963.

Q. How does one go about becoming Board certified and what does it mean?

A. When I became Board certified, I had to have, of course, four years of college, four years of medical school, five years of postgraduate training. Following this I took a three-day series of written and oral examinations, which I passed the first time.

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

Q. Doctor, will you tell us about the staff privileges at various hospitals you have had and do have?

A. I'm on the active staff at Meridia Southpoint Hospital where I've been the chief of orthopaedic surgery for 29 years; Mt. Sinai Hospital; Hillcrest Hospital. I was the chief of orthopaedic surgery at Woman's General Hospital for 23 years until it closed, and I'm the orthopaedic consultant to the Arthritis Clinic at Cleveland Metropolitan General Hospital.

Q. Doctor, do you hold any teaching positions?

A. I'm a clinical instructor of orthopeadic surgery at

Case Western Reserve University Medical School for the last 31 years. And I was a professor for 20 years at the Ohio College of Podiatry.

Q. Doctor, are you published in your area of expertise?

A. I've published some papers dealing primarily with the healing of fractures or broken bones, which are the same thing, and I've given innumerable lectures on various topics. I was invited to present a paper at Orthopaedic Grand Rounds at Harvard University Medical School in Boston. I gave the Harold Cummins Lectureship at Tulane University in New Orleans. I was invited to participate in a symposium at the Midamerica Orthopaedic meeting at Colorado Springs, and I gave the Dr. Russell Risso Memorial Lectureship here in town.

Q. Doctor, would you relate to the ladies and gentlemen of the jury, please, a few of the professional organizations to which you belong?

A. I'm a member of the Cleveland Orthopaedic Society, the Ohio State Orthopaedic Society, the Great Lakes Orthopaedic Club, the Midamerica Orthopaedic Society, the Clinical Orthopaedic Society, the Bioelectric Repair and Growth Society. I'm a Fellow of the American College of Surgeons, a Fellow of the American Academy of Orthopaedic Surgeons, and a Diplomate of the American Board of

Orthopaedic Surgery.

Q. Doctor, in the past have you given testimony as a medical expert in litigation matters?

A. Oh, yes. Because I'm an orthopaedic surgeon, a lot of our patients come to us with broken bones or injuries who are injured, and people who are injured sometimes have attorneys, and people who have attorneys sometimes go to litigation, so I certainly have given testimony in litigation matters before.

Q. And as giving testimony in litigation, Doctor, has that been both on behalf of your patients and in connection with independent medical examinations requested by the defense?

A. Yes, I've been asked both by defense attorneys and plaintiff's attorneys to be an expert witness, more frequently by plaintiff's attorneys, because about five percent of my practice is seeing patients for an examination and report only either to plaintiff's attorneys or defense attorneys or third parties, or whatever.

Ninety-five percent of the people I see are sick and injured patients, so that I do -- I'm asked to do a deposition more frequently for -- by the patient's attorneys, plaintiff's attorneys than by defense attorneys.

Q. Doctor, in the past I've requested you to conduct independent medical examination matters, have I not?

A. Yes.

Q. And has Mr. Weisman's office requested you to give testimony on behalf of plaintiffs who claim injuries in litigation?

A. Yes.

MR. CHAMBERLAIN: Objection.

BY MR. TIRA:

Q. Now, what would you be doing if you were not taking your time this afternoon to give this trial deposition, Doctor?

A. I would be either seeing patients or surgery or whatever I'm scheduled to do.

Q. Would you be compensated for those services?

A. Yes.

Q. And in that you're taking your time away from your practice, I take it there is a charge for your services rendered today?

A. Yes, there is.

Q. Doctor, you do perform surgery, do you not?

A. Oh, yes.

Q. Also you treat individuals, patients who are injured in motor vehicle accidents?

A. Yes.

Q. Have you had occasion to treat patients suffering from degenerative disc disease and arthritis?

A. Yes, most people who are over 40 have some degree of degenerative disc disease and arthritis of the spine.

Q. Have you also had occasion to treat individuals with bulging, protruding or herniated discs?

A. Yes.

Q. Doctor, what is degenerative disc disease?

A. Well --

Q. If it would help with a model, please do so.

A. The back is made up of a series of bones stacked one on the other, and between each of the bones is a disc of cartilage that acts like a shock absorber.

Now, with wear and tear, the discs degenerate. They get worn out, they get -- lose their water content. They get less spongy or less elastic, and they shrink up and get smaller, also. This is a degenerative disc disease. We see it primarily -- it's more pronounced at the ends of the removable sections of the spine, that is at the base of the neck, the lower vertebrae in the neck and the lower vertebrae in the lower back.

And besides the degenerating discs, you also see generally arthritis or spur formation in the little joints in the back of the neck and around the bones which are also part of the degenerative process.

Q. Is that the same as arthritis, Doctor?
A. It's a form of arthritis. It's called degenerative osteoarthritis. There are lots of other forms like rheumatoid arthritis and gout and things like that. This type of arthritis is what we call degenerative osteoarthritis, which is a wear and tear type of arthritis,
Q. Is that part of the aging process?
A. Yes.
Q. Doctor, in your experience of 38 years as an orthopaedic surgeon, based upon that experience can you tell us whether or not an individual can sustain a neck injury when they are punched in the head?
A. Oh, yes, you can -- if your head is snapped around, you can hurt your neck, yes.
Q. What about being kicked in the head?
A. Absolutely, same way, probably even more so.
Q. Now, Doctor, I provided you with various hospital records, physician office records and medical reports, x-ray films and MRI films of the Plaintiff -- one of the plaintiffs in this case, Evelyn Merritt, did I not?
A. Yes.
Q. And would you relate for us what records and radiographic studies you did in fact receive and review, please?

A. Well, at the time I saw her, I reviewed x-rays from Geauga County Hospital of her arm and leg and neck, and an MRI, which is a magnetic resonance imaging. It's a type of imaging in which the patient is placed in a large magnetic field. The magnetic field is spun 90 degrees, it's spun back again, and the atoms and molecules of the patient's tissue disturb the magnetic field, and this is all recorded and run into a computer. That's all I know about it, but it comes out with a picture not only of the bones but of the soft tissues, the nerves and the discs that you can't see on the regular x-ray. And an MRI was -- I reviewed that, one was done February 22nd, '93.

Q. Doctor --

A. This is Evelyn's, right.

Q. Excuse me, Doctor.

Do you recall my providing you with records from Warren General Hospital?

A. Yes.

Q. From University Orthopaedic Associates?

A. Yes.

Q. Office records from Dr. Brandeberry?

A. Yes.

Q. Some records from University Hospitals?

A. Some records, yes.

Q. The emergency room record of January 16, 1992 from

Geauga Community Hospital?

A. Yes.

Q. And records from Miller Outpatient Therapy Clinic?

A. Yes.

Q. Did you review those records and films?

A. Yes, I did.

Q. And some of those records, did they predate the motor vehicle accident of January 16, 1992?

A. Yes.

Q. Now, I asked you to examine the patient Evelyn Merritt, did I not?

A. That's correct.

Q. What was the date of your examination?

A. August 2nd, 1994.

Q. Did you obtain a history from her at that time?

A. Yes, I did.

Q. Before we get into the history, Doctor, would you please tell us briefly what the purpose is of obtaining a history from a patient?

A. Well, a history is the patient's story as she tells it to me. Whatever she says I put down and I ask her how she's been hurt, how she's been treated, how she's feeling today, how her symptoms have changed, and whatever she says I put down.

Q. Does that include any questions concerning past

history and injuries?

A. Oh, yes, that would be important as, in any case of an injury, to find out if they've had problems with the same areas in the past.

Q. Is that past history of any significance when you as an examiner is attempting to determine what injuries are related to a certain accident or event as opposed to some other accident or event or physical condition?

A. Oh, yes, it would be quite important. Often it is quite important because if a patient is already having problems in that area, then obviously the event may have had nothing to do with it.

Q. Now, the Plaintiff Evelyn Merritt is complaining of neck discomfort as a result of the motor vehicle accident in question. At the time you obtained the history from her, did she relate to you any past history of neck discomfort?

A. I asked her specifically if she had any previous injuries or symptoms to her neck, and she said she had not.

Q. Now, Doctor, based upon your review of the medical and hospital records we previously discussed, did any of those records reveal any injury involving the neck?

A. Yes, the Dr. Brandeberry -- Brandeberry had seen her just three months before this incident, at which time

she had had a neck injury. As a matter of fact I think she was being seen as late as about three weeks before this accident with a lot of neck pain and spasm in the muscles of the neck.

Q. Was that the result of an altercation that occurred in October of 1991?

A. I believe it was a result of an altercation in which she was hit or kicked in the head and developed neck pain.

Q. Now, Doctor, I did provide you with the records and office notes and reports from University Orthopeadics where Drs. Bolesta, was formerly associated, and Drs. Yoo and Wilber are currently associated, which two latter doctors have -- or will give -- have given testimony in this case by videotape, have I not?

A. Yes.

Q. Based upon your review of their notes concerning the history obtained from the Plaintiff, did you find any notation of the Plaintiff relating to them a history of this neck injury occurring in October 1991?

A. No, she did not.

Q. Okay. Doctor, based upon your review of the records pertaining to the October 1991 neck x-ray, in your opinion do you believe that to be a significant injury --

MR. CHAMBERLAIN: Objection.

Q. -- or not?

MR. CHAMBERLAIN: Same objection.

A. The October --

Q. The altercation.

A. Yes. Oh, I'm sorry.

Yes, the altercation was in October of 1991, which was three months before this automobile incident. It apparently was a very significant injury. She had pain and spasm in the muscles in her neck.

Dr. B. said it wasn't significant

Q. Is spasm an objective finding?

A. Yes, spasm is the involuntary contracture of the muscle when there's underlying pain. The muscles go into spasm and prevent the joint from moving in order to minimize the amount of pain. You can feel spasm through the skin, an examiner can, and that was what would make it an objective finding.

Objective findings are those which the examiner can tell without the patient telling them they are present; such things as muscle spasms, swelling, redness, heat, a deformity, skin discoloration, that sort of thing. These are all objective findings.

Subjective findings are those things the patient tells the examiner that they're there and there's no way of knowing one way or another whether they are, such

things as tenderness or pain on motion.

So spasm is an objective finding, yes.

Q. Doctor, based upon your experience of 38 years as an orthopaedic surgeon, would you expect a patient to relate to you a neck injury such as that which you saw in Mrs. Merritt's medical records as a result of the October '91 altercation, if she presented to you with complaints of neck pain following a January 1992 motor vehicle accident?

MR. CHAMBERLAIN: Objection. WP

A. Yes, based on my experience as a treating physician, the patient certainly should and I would expect the patient to tell me that three and a half weeks prior to this automobile accident she was having neck spasms and pain in her neck, prior to this.

Q. Doctor, you told us that you have reviewed cervical x-ray films and a cervical MRI study?

A. Yes.

Q. What did those films reveal? Excuse me.

A. The plain films, that is regular x-rays, showed disc degeneration at multiple levels and spurring osteophytes, which are the little like icicles and bones that are a part of the degenerative process. The MRI also showed the same with disc bulges -- some disc bulging around osteophytes, large osteophytes at

particularly three different levels, the three lowest levels in the neck.

Q. Which are --

A. Well, there are the -- they name the levels by the bones, so there are seven bones in the neck. They call them C-1 through C-7. And this was between C-4/5, C-5/6 and C-6/7, which would be the last three levels in the neck. This is the area where you get the most degeneration. It's sort of the short end of the stick, where you get most of the wear and tear, and this is where you expect to find osteophytes and disc degeneration, and that's what she had.

Q. Doctor, do you have an a opinion based upon reasonable medical certainty as to whether those changes that you observed on the MRI and x-ray films of the cervical spine predated the motor vehicle accident of January 16, 1992?

A. Oh, yes, these are changes which take a long period -- a long time to develop. They're a slowly growing degenerative process, and it doesn't get -- it obviously gets, increases over time as all arthritis does, but it takes a long time to do it. And it was obviously present at the time of the accident.

Q. That is part of the aging process?

A. Yes.

Q. Doctor, I'm going to hand you -- it hasn't been marked as an exhibit yet, but I believe it will comprise one of the Plaintiff's exhibits -- the x-ray interpretation from Geauga Hospital on January 16, 1992, the day of the accident.

A. Yes.

Q. The interpretation has a word called in it, degenerative osteophytic or phytic spurs. What is that?

A. Well, an osteophyte is a bony spur, it's a little like an icicle or bone. And with the degenerative process, these little icicles of bone form around the joints, and this is a degenerative process. So a degenerative osteophyte is a bony spur formed by the wear and tear process.

Q. The impression on this interpretation also indicates the words neural foraminal encroachment. What does that mean, Doctor?

A. At each level in the spine, the nerves go down the inside of the bone, and then at each level a pair of nerves are given off that go to the arms or legs or where they're supposed to go.

Now, this hole that the nerve comes out of isn't really a hole. Actually it's a space between the bone above it and the bone below it, and this is called a foramen. A foramen is I guess Latin for hole, and the

foraminal encroachment is the fact that this hole or space has gotten smaller because of the degenerative changes, and that tends to pinch the nerve.

Q. And what happens when the nerve is pinched because of the degenerative changes?

A. You can have pain in the distribution of the nerve where it goes down the arm or down the leg depending on where it's pinched. You can have numbness wherever the nerve is supposed to be going, in the arm, there are certain areas that each nerve goes to in the arm or in the leg, very specific areas, and this is the sort of symptoms you'll get with a pinched nerve.

Q. Doctor, getting back to the history obtained from Mrs. Merritt on August 2, 1994, would you relate the history that she gave to you at that time, please?

A. She said that she was injured January 16th, 1992 when the van in which she was riding in the front seat was involved in a collision from the front with a car which turned in front of her. She was not wearing a seat belt. She said that her left side hit the dashboard. She said her head hit the windshield. She said she was stunned and somewhat shaken, but not unconscious.

Following the accident she said, quote, her whole body hurt her, unquote. When asked where she hurt, she said her whole body hurt.

In particular she said she had pain in her neck and upper spine as well as bruises of the left arm from the shoulder to the elbow and bruises of the chest, the left hip and thigh and the left knee.

She went to Geauga Community Hospital the day of the accident and was released after examination and x-rays.

Following the accident she saw Dr. Brandeberry who treated her with ultrasound, which is a type of deep heat, and osteopathic manipulations to her neck without relief. She said her symptoms had gotten worse.

She then went to Miller Therapy, who treated her with massage to her neck without relief.

She had an MRI -- that's that magnetic resonance imaging, of her neck and of her thoracic spine -- that's her mid back where the ribs are attached -- February 2nd, 1993, which would be three weeks after the accident, which was said to show moderate right-sided disc protrusion or osteophyte. It's hard to tell whether it's an osteophyte or disc, but it's called osteophyte disc complex at C-5/6, which is the second to the lowest level and the one which gets the most amount of stress. That's the one that usually degenerates. And a broad-based disc bulge or osteophyte at disc C-6/7.

The transverse sections, that is the pictures

looking at the spine this way (indicating) were said to suggest disc herniation at C-4/5, but only disc degeneration and bulging at C-5/6 and C-6/7. And I reviewed that MRI and I agree with it.

She also had a CT scan. A CT scan is a computerized x-ray in which a series of x-rays are taken around the body, and then all the x-rays are fed into a computer and you get a picture as if you're looking on it end on like this, as if you sliced it down and you can see all these different slices. It's called a CAT scan or a CT scan.

And a myelogram is a test in which they inject special fluid into the space surrounding the nerves, there's a watery fluid there. They inject some special material in there that x-rays won't go through, and that then outlines the space and it outlines the nerves and it outlines the discs. And then you can do the two together, a meylogram and a CT scan at the same time. And that was done of her neck, and that was said to show large osteophytes at C-5/6 and C-6/7 with some disc material. But she did have large osteophytes, which is from this degenerative process.

There was also said to be some indentation of the sac, that is the sac that surrounds the nerves, and some flattening of the cord at C-5/6. The patient then

apparently was seen by Dr. Bolesta who recommended surgery of her neck, but this wasn't done. She said that she'd been on Ibuprofin, which is Motrin; and Daypro, which is an anti-inflammatory medication; along with Soma, which is a muscle relaxant, at night. It's also sort of a tranquilizer. And she said she sometimes takes it during the day.

At the time that I saw her, she said that the neck pain had become worse. She said that it was located on both sides of her neck, in the front going down to the collarbone, and in the back going down to the top of the collarbones the left side more than the right.

The pain was said to be constant and varying in degree from bad to worse. Those were her words, quote, bad to worse.

She said that it was made worse by lifting with her right arm and also by damp and cold weather. She said it was worse with any activity and with any motion or any jarring of her neck. She said it was relieved by nothing that she knew of. She said she used a cervical collar when driving, but it didn't help her pain, so I really don't know why she used it, but she said she used it anyway.

She said that there was spread of the pain to both shoulders. She said that she would have intermittent

numbness of both hands from the mid palm down, including, she said, quote, maybe the whole hand.

This is a nonanatomical distribution, that is there is no nerve that goes from the middle of the palm and involves all the fingers. There are actually three different nerves that go to the fingers, and they go to places -- more places than just the mid-palm.

She said there was constant weakness of the entire area of both of her arms, the entire upper extremities, the right more than the left. Again there's no one nerve that goes to all the muscles of the upper extremities; there's actually five or six. So that this is again a non -- what we call a nonanatomical complaint, that she had constant weakness of the entirety of both arms.

The midback pain was said to have become worse. She said it was located on both sides, mostly to the right. It was primarily in the lower dorsal spine region, that is the midback, the lower part of the midback The midback is the part where the ribs are attached. It was said to be constant and moderate in degree. It was said to be made worse by nothing that she knew of and was relieved by nothing that she knew of. There was no spread of this pain, it just stayed right in the back.

The symptoms in her left knee she said had become

worse. The pain was said to be located in the front of the knee and in the front of the shin bone. It was said to be constant and aching in nature. It was said to be made worse by nothing that she knew of and it was relieved by nothing that she knew of. She said that she had experienced no symptoms of swelling of her knee. She said the knee would lock at times as if it was, quote, out of position, unquote, and that she had to exercise to get it back in.

The last time this had happened was a couple of days earlier. She said that she had had some giving way of the knee, the last time a couple of days earlier.

The left hip pain she said had become worse.

Q. Doctor, if I could stop you there. Mrs. Merritt complained of left knee discomfort?

A. Yes.

Q. I'm going to hand you -- it hasn't been marked as an exhibit yet -- the Geauga Hospital Emergency Room record. And if you would look at that record to determine what complaints were voiced and what x-rays were obtained, is there any indication of a left knee complaint or any left knee x-rays?

A. No, just the pain in the neck, the left arm and the right leg, not the left leg.

Q. So the only complaint at the time of the accident

was the right leg, nothing involving the left knee or left leg?

A. That's correct.

MR. CHAMBERLAIN: Objection. 2/R

BY MR. TIRA:

Q. Thank you.

Continue, please.

A. The left hip pain she said had become worse. She said it was located on the outer side of the hip around the bump -- you feel the bump -- the bony bump you feel on the outer side of your hip.

She said that the pain was constant the first month that she had it, that it was moderate now and severe at times. It was made worse by nothing that she knew of and was relieved by nothing that she knew of. There was no spread of this pain, so -- and that was all the pain that she complained of.

She said they all had become worse and she didn't have any idea what made them worse or what made them better. She had just said they had gotten worse.

Q. Any additional history?

A. She said that she was not employed at the time of the accident and that she had not worked since the accident. She said she had no previous or subsequent injuries or symptoms in any of these areas, in the neck,

the mid back, the knee or the hip.

I asked her specifically if she had any other previous problems with these areas and she said she had not. She said she'd been in good health with no serious illnesses or operations.

She had taken no medication which would affect her symptoms on the day of this examination. She said that she took Advil three and a half hours before I saw her, but she said it was not having any effect at the time I examined her.

Q. Did you conduct a history of Mrs. Merritt, Doctor?

A. A physical exam.

Q. A physical exam, I'm sorry.

A. Yes.

Q. Would you tell the ladies and gentlemen of the jury what your physical examination consisted of and what your findings were, please?

A. On physical examination, Mrs. Merritt appeared to be in no discomfort when I was taking the history. She certainly seemed quite comfortable. However, during the examination, she immediately began to groan and grimace with any neck motion.

Coming into the examining room she wore a cervical collar, one of these soft, cervical collars. But when she took it off, she moved her head quite easily without

it until she was examined.

She was told to let me know if anything caused her pain during the examination.

Her gait, the way she walked was normal, and she moved about easily. She could walk on her heals and toes without difficulty. Examination of her cervical spine, of her neck -- cervical spine means neck -- showed her to hold her head straight. It wasn't tipped to one side or the other.

There was moderate restriction of all motion due to the complaints of pain when she was being examined. That is when I asked her to put her head down and back and side-to-side and turn it from side-to-side, she complained of pain, actually of moderate pain on all motion and it was quite restricted. However during the other parts of the examination when I wasn't examining her neck, she moved her head quite freely.

Q. Is that of any significance to you, Doctor, as an examiner?

A. Well, yes, obviously when I asked her -- when I tried to examine her neck, she would hold it stiff and say it hurt. But when I wasn't examining her neck, she moved it really quite freely. That is significant.

Q. Thank you, Doctor.

A. Moderate tenderness was said to be present in both

the trapezius muscles, that's these big muscles of the side of the neck. When I pressed on it, she said it was tender.

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

There was weakness of grip in the right hand when I asked her to voluntarily grip my hand, I asked her just to see how strong she was, I asked her to grip my hand, and the grip on the right hand seemed weaker than the left. There was numbness said to be present over both hands from these joints here, these joints here to the tips of the fingers of these four fingers. This is again a nonanatomical distribution. There is no nerve distribution which will give numbness from these joints outwards on all four fingers.

Examination of her left hip joint revealed the contour appeared to be normal. There was no swelling or fluid in the joint or instability of the hip joint. There was no redness or heat or any evidence of the joint was inflamed. There was no skin discoloration such as redness or black and blue.

Range of motion in the joint was normal. All

motions were painfree. There was no crepitus. Crepitus is a sort of feeling of grinding sensation when there's a rough joint surface, one rough surface moving on another, that's sort of a sandpapery feeling. It's called crepitus. That was not present.

There was no tenderness anywhere about the hip joint, and there was specifically no tenderness over the outer side of the hip joint. That bony bump where she said she was having pain, there was no tenderness there specifically.

Examination of her left knee revealed the contours to be normal. There was no swelling or fluid in the knee joint. There was no instability of the knee joint. There was no redness or heat or evidence of inflammation. There was no skin discoloration such as black and blue.

Range of motion in the knee was normal, it straightened completely and bent completely and all motions were without any pain at all. Again there was no crepitus present, this sandpapery feeling. There was no tenderness anywhere about the knee joint.

The examination of the left knee joint was totally normal. Examination of her mid back, thoracic spine, showed no deformity. There was moderate restriction of motion due to complaints of pain. That is, again, she would not move much at all in her mid back because she

said it hurt.

There was no spasm in the muscles of her mid back. Spasm, as I say, is the involuntary contracture of the muscle when there is underlying pain. You can feel this through the skin, and there wasn't any.

There was no tenderness noted about the perispinal muscles or the shoulder blade areas, which you would expect to find if you have pain on motion, you expect to find tenderness in the muscles and ligaments, and there was no tenderness found.

Moving the shoulder blades across the chest, back and forth and up and down, was normal in range without pain.

Q. Doctor, I'm going to ask you a series of questions based upon the following factors which I would ask that you keep in mind. Your experience as an orthopaedic surgeon for the past 38 years, the history you obtained from the Plaintiff and your examination of her on August 2, 1994, your review of her records from Geauga Hospital, from Warren General Hospital and the office records of Dr. Brandeberry pertaining to his treatment following the altercation of October 9, 1991 and based upon your review of Mrs. Merritt's x-ray films of the cervical spine and the MRI study of the cervical spine obtained at the aforementioned hospitals, the MRI at

University Hospitals. Doctor, with those factors in mind, do you have an opinion based upon reasonable medical certainty as to the nature and extent of the injuries sustained by Plaintiff Evelyn Merritt in the motor vehicle accident of January 16, 1992?

A. Yes.

Q. What is your opinion, sir? --

MR. CHAMBERLAIN: Objection.

A. It was my opinion that based on reasonable medical certainty that she had, I'll say it first in medical terms and then translate it, possible cervical myofascitis. Myofascitis. Myo means muscle, fascia means ligament, and itis is an inflammation. So it's an inflammation of the muscles and ligaments. Cervical, means neck, so it would be of the neck. This was based entirely on her complaints of pain in the neck. She obviously had degenerative changes in the neck which were due to wear and tear and not to this accident. There was obvious exaggeration of symptoms.

Q. Doctor, with the same factors in mind, do you have an opinion based upon reasonable medical certainty as to the duration of that possible cervical myofascitis as a result of the motor vehicle accident in question?

MR. CHAMBERLAIN: Objection.

A. Usually it's been my experience based on reasonable

medical certainty of this type of injury, the symptoms last about four weeks, six weeks, something like that.

Q. Doctor, with the same factors in mind, do you have an opinion based upon reasonable medical certainty as to whether the motor vehicle accident of January 16, 1992 aggravated or accelerated Plaintiff Evelyn Merritt's preexisting degenerative disc disease?

A. Yes, it's my --

Q. What is your opinion, sir?

MR. CHAMBERLAIN: Objection. O/R

A. It's my opinion based on reasonable medical certainty that osteoarthritis or degenerative osteoarthritis, which is degenerative disc disease, which is what she has, is not accelerated or aggravated by this type of trauma at all. I've never seen it happen in, I've been following patients for 34 years from my office.

Q. Doctor, do you have an opinion based upon reasonable medical certainty with the same factors in mind as to whether the motor vehicle accident of January 16, 1992 is the direct and proximate cause of the Plaintiff's cervical surgery at University Hospitals in December of 1994?

A. Yes.

Q. What is your opinion?

MR. CHAMBERLAIN: Objection. O/R

A. It is my opinion based on reasonable medical certainty that the surgery which was subsequently done in her neck, subsequent to my examination of her, was not the direct result of the automobile accident of January 16th, 1992, but was necessitated by the degenerative osteoarthritis, which she had -- which preexisted at the time of that accident.

Q. As a follow-up to that question, Doctor, do you have an opinion based on reasonable medical certainty with the same factors in mind as to whether the expenses related to the December 1994 surgical procedure involving the cervical spine at University Hospitals is related to the motor vehicle accident of January 16, 1992?

MR. CHAMBERLAIN: Obje on. D/R

A. Yes, it's my opinion based on reasonable medical certainty that since I do not think the surgery was related to the accident, I don't think expenses were either.

Q. Okay. Doctor, Dr. Wilber has given testimony in this case that there has been a nonunion of bone following the December 1994 -- I'm sorry, yes, December 1994 cervical operation.

Doctor, with the same factors in mind, do you have an opinion based upon reasonable medical certainty as to whether any future surgery upon Mrs. Merritt's cervical

spine is a direct and proximate cause or related to the motor vehicle accident of January 16, 1992?

MR. CHAMBERLAIN: Objection.

A. Yes, it would be my opinion since I don't think the original surgery was a result of the accident that any subsequent surgery, it is my opinion it would not be a result of the accident, either.

Q. Doctor, the surgery that Mrs. Merritt did undergo in December 1994, what levels did that involve?

A. I believe C-4 -- 4/5, 5/6 and 6/7.

Q. And what levels did she -- does she have degenerative disc disease at?

A. All those three levels. That's why I -- that's my opinion why it was done was for degenerative disc disease, for her degenerative arthritis and not for any trauma which she might have sustained in the accident. The surgery was done at the exact levels that she has the degenerative changes.

Q. Based upon the history that Mrs. Merritt gave you about going forward and her head hitting the windshield and injuring her neck, based upon your experience of individuals who are involved in such injuries where they injure their neck, has it been your experience that if there is any disc injury, it is at one level, two levels, three levels, or more?

A. It's been my experience that many patients that I have followed that if the disc herniation is caused by injury by trauma, that it is at one level. It certainly is not at three levels. Occasionally it may be at two, but certainly not at three, that you would get the disc herniation at one level. That's where the major forces would be applied if that were the cause of the herniation and that it -- the force would be dissipated and that would be it, there wouldn't be herniating discs at various levels.

Then Fight has no relevance

Q. Doctor, with the previous factors I had mentioned, if you keep those in mind, based upon those factors, do you have an opinion based upon reasonable medical certainty as to whether or not Plaintiff Evelyn Merritt sustained any permanent disability as a result of the motor vehicle accident of January 16, 1992?

MR. CHAMBERLAIN: Objection. OR

A. Yes.

Q. What is your opinion, sir?

A. It is my opinion that she probably did not result -- develop a permanent disability from that accident, that her problems are her degenerative arthritis and not from the accident.

MR. CHAMBERLAIN: Same o 'ection. OR

BY MR. TIRA:

Q. Doctor, Dr. Wilber has given a videotape trial deposition testimony in this case that based upon his examination of Plaintiff Evelyn Merritt in May of 1995, he found that the surgical procedure he had performed, there has not been a nonunion of the bone at C-7 and that future surgery is required.

You've already given your opinion concerning the future surgery, I won't ask you again, but relative to that nonunion, Dr. Wilber has testified that prior to the surgery he advised Mrs. Merritt to stop smoking cigarettes because the smoking of cigarettes can result in a nonunion of bone following this type of surgery.

Do you agree with that statement?

A. Oh, yes, yes, absolutely, smoking cigarettes -- cigarette smoking has been shown to be one of the major factors in, we call it nonunion, that is not healing of the bony fusion.

MR. TIRA: Okay. Thank you, Doctor.

I have no further questions.

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CROSS-EXAMINATION

BY MR. CHAMBERLAIN:

Q. Okay. Doctor, my name is Hank Chamberlain.

A. Mr. Chamberlain.

Q. Doctor, how are you?

Along with Mitchell Weisman, we represent Mr. and Mrs. Merritt who have brought the claim. Before I begin your cross-examination, I would like to take a moment, if I can, and see the files that you have on both Mr. and Mrs. Merritt.

A. Certainly.

MR. CHAMBERLAIN: We can go off the record.

MR. TIRA: Sure.

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

Q. We've met before, haven't we?

A. Yes, sir.

Q. In fact in the professional circumstances that you and I seem to run into, it's when a defense lawyer in the City of Cleveland asks you to examine somebody that we represent, huh?

A. Not always. I see people from your office as well.

Q. But you've never seen anybody that I represent, is that true?

A. I don't remember. I probably don't.

Q. In fact this is probably the eighth or ninth time that we've got together in the circumstances where a

defense attorney has asked you to examine one of my clients; is that correct?

A. I don't remember. I don't keep track of this.

Q. Well, Doctor, you're familiar with the care and treatment that was provided to Evelyn Merritt, correct?

A. I hope so. I presume I am.

Q. Okay. I want to -- I'm going to ask you some questions about that, but before I get to that, I want to talk to you about your role in this lawsuit.

You were contacted by the defense attorney, Mr. Tira, in this case, correct?

A. My office was, that's correct.

Q. Right. The sole purpose of your involvement was to examine the Merritts and report back to Mr. Tira, correct?

A. That's correct.

Q. Your purpose was not to care or provide help to Mr. or Mrs. Merritt?

A. No.

Q. Okay. You had a one-time examination of these individuals, correct?

A. Yes.

Q. And that occurred on August 2nd of 1994, correct?

A. Well, let me just look at Mr. Merritt's as well.

Yes.

Q. That was over two and a half years after the collision that took place, correct?

A. Yes.

Q. And you never saw them before that, correct?

A. That's correct.

Q. Your physical examination that you spoke about of Ms. Merritt, can you tell first of all the jury what the physical examination is?

A. Well, it's a -- when I examine the -- actually it starts when I am taking the history because I watch the way she moves, the way she looks around the room, the way she handles herself, and then after I take the history, I do a more formal examination of the areas of which she complains.

Q. Well, Doctor, setting aside watching her move and getting to the hands-on portion of your examination, are you aware that that portion of your physical exam lasted seven minutes?

A. No, I don't keep track of it. I go in, I do a complete and thorough examination and then I leave. As I say the examination starts when I'm taking the history, but it doesn't take as long when there's not much wrong, but I don't know how long it took.

MR. TIRA: Objection.

BY MR. CHAMBERLAIN:

Q. You wouldn't dispute that someone from my office was there during your examination of Mrs. Merritt?

A. I don't dispute anything, that's your profession, not mine. My profession is taking care of people.

Q. Was somebody from my office in your examining room while you examined Miss Merritt?

A. Dan Geotz.

Q. And you wouldn't dispute if Mr. Geotz --

A. I don't dispute anything.

Q. -- timed your physical examination at seven minutes?

A. I don't know what Mr. Geotz would tell you. He's your employee. I think you've got a dispute with him, not me.

MR. TIRA: Objection. O/R

Q. And, Doctor, you've done examinations and reports before for defense attorneys, correct?

A. For Plaintiff's attorneys, for defense attorneys, for a lot of different people, yes.

Q. And without pulling out your other depositions that I have here, you've testified before that you do independent medical examinations at least on the order of six to eight a week?

A. No, about -- I think about six I have testified to

in the past.

Q. All right. Well, let's -- you gave your deposition back in another case that you were involved in, a different defense lawyer, back in February of '93 and you --

A. February of '93 would be what, two and a half years ago?

Q. Right.

A. Yes.

Q. And you were asked the question, "And during this deposition" --

A. May I see it?

Q. Sure.

A. Yes, it was six to eight. I think it's more -- it's closer to six. I was just estimating it. I don't really keep track of it. It doesn't -- as I say, when I examine a patient like this, I examine the patient exactly the same way as I would a patient I would go to treat. A new patient is done exactly the same way, but I think it's probably the ones I don't treat, altogether that is Plaintiff's attorneys and defense attorneys and third parties might be six to eight a week.

Q. Six to eight.

And what do you charge for those examinations?

A. $350.00.

Q. So if we do the math, that comes out to somewhere between $2,100 and $2,200 a week for doing independent medical examinations?

A. I don't know. Six times that would be about -- yes, that sounds about right.

Q. And you testify like you're doing here today at least two times a week, correct?

A. About. At least, but about. Again including Plaintiff's attorneys and defense attorneys, about two times a week.

Q. All right. Again, in another deposition that I have here that was taken on September 27th of '91 where you were deposed --

A. You're really getting back there, that's four years ago.

Q. You were asked a question there --

A. Yes.

Q. "Can you give me a typical month, for example, let me give you an example, I have a case -- strike that."

"If you said half a dozen times per month, would that be in the ballpark that could be" --

A. Six.

Q. And you said, "Oh, I think at least that, yes."

A. I think that's six. That's -- yeah.

Q. At least two times a week?

A. I didn't say at least two times a week. I said at least six a month, That's about one and a half a week.

Q. Doctor --

A. I think two a week is about right, but I don't keep track of it, I don't know.

Q. Doctor, let's talk specifically about your care and treatment of Evelyn -- or not your care and treatment, your examination, excuse me.

A. Yes.

Q. Your examination of Evelyn Merritt.

You mentioned during your direct examination and in your report that the symptoms of Evelyn Merritt were exaggerated, correct?

A. Yes.

Q. I want to talk about this right up front here. In your report you say there is some exaggeration of symptoms. You put that in your report, right?

A. That's correct.

Q. And you testified on direct that that's what you said -- that that is what she did?

A. Yes.

Q. Evelyn Merritt exaggerated her symptoms.

A. I believe so.

Q. In fact you also said that there was a hand strength evaluation done which showed evidence of a

voluntary lack of cooperation. You put that in your report, correct?

A. Yes, that's correct.

Q. She was faking, correct?

A. I didn't say she was faking. I said there was a lack of cooperation.

Q. And exaggeration?

A. And exaggeration.

Q. Correct?

A. That's right. That's true.

Q. Would you agree with me that she was exaggerating or manufacturing signs or symptoms and that was your opinion when you looked at her?

A. I think some of the symptoms she exhibited were definitely exaggerated.

Q. You're familiar with Dr. Wilber, correct?

A. I know his name. I don't know him.

Q. All right. Well, are you aware that Dr. Wilber spends about 95 percent of his time treating spinal injuries?

A. Operating, that's correct.

Q. And he's the Director of the Spinal -- of Spinal Surgery at Metro?

A. That's right. If he doesn't operate on them, he doesn't take care of them.

Q. Are you aware that Metro has the largest trauma unit in the State of Ohio?

MR. TIRA: Objection.

A. What does that have to do with -- no, I'm not aware of that.

Q. Let me ask you, Doctor, if she was exaggerating her symptoms at the time she saw you and some of these symptoms were manufactured, why would Dr. Wilber operate on her four months after you saw her?

A. I certainly wouldn't have.

MR. TIRA: Objection.

A. I can't speak for Dr. Wilber, but I certainly think it's a very poor idea to operate on somebody who's exaggerating her symptoms.

Q. You don't want to suggest that Dr. Wilber had committed medical malpractice, do you?

MR. TIRA: Objection.

A. If you want to suggest that, that's up to you. I didn't say that.

Q. Doctor, in your practice, you wouldn't operate or do a triple laminectomy infusion on someone who you felt was exaggerating her symptoms, would you?

A. No, I certainly would not.

Q. But that was done on Evelyn Merritt, correct?

MR. TIRA: Objection.

A. That's up to Dr. Wilber. I didn't do it.
Q. Whether the symptoms were caused by degenerative disc disease or by trauma, if someone's faking it and faking their symptoms, you don't operate, fair enough?
A. I certainly wouldn't, no.
Q. Now, let's talk about this October 9th of '91 incident. You're familiar with the records in regard to that, correct?
A. I don't know, how many --
MR. TIRA: '92. Oh, I'm sorry, '91, excuse me.
A. The altercation thing. You say the records, I referred to some of the records, but I'm not sure what you mean by the records.
Q. Doctor, I want to show you the Warren General Hospital Emergency Room record, and if you could show me -- and that's where she went after the altercation that she was involved where she was kicked and hit, correct?
Correct, Doctor?
A. I'm just looking to see. I believe so, but I just want to be sure.
Q. All right.
A. I believe so, yes.
Q. Those are the records that you have reviewed

previously, right?

A. Yes.

Q. Is there a complaint of neck pain anywhere in that record?

A. Just a moment, I've got to look at it.

No.

Q. Okay. And, Doctor, if you'll flip to the page that has the home-going instructions, please.

A. They took an x-ray of her neck at that time, took an x-ray of her neck.

Yes.

Q. Okay.

A. Follow-up care at emergency room, is that the page you mean?

a. Yes.

A. M-hm.

Q. Is there a section there, Doctor, that advises the patient about neck or back problems and how to watch for problems subsequently after discharge from that emergency room visit?

A. No, it doesn't say how to watch for problems. It just says how to take care of problems.

Q. How to take care of the problems.

A. Yes.

Q. Is there any indication on that home-going

instruction sheet that she has a neck problem?

A. No.

Q. That's not evident on October 9th of '91 in that incident?

A. Not on this sheet, no.

Q. Are you familiar with the testimony of Dr. Brandeberry, the treating physician that saw her after she went to Warren General Hospital in October of '91?

A. No, I'm not familiar with his testimony.

Q. Are you aware that he considers what happened in October of '91 a minor incident compared to the impact and the injury that she sustained in this automobile collision in January of '92?

A. I'm not aware of what he testified.

Q. Okay. But it's fair to say you disagree with her treating physician who saw her at that time?

MR. TIRA: Objection.

A. I didn't say that at all. I just said that she apparently had muscle spasm three weeks before the accident, the van accident, and she told me she never had any trouble with her neck before.

Q. Let's talk about what she didn't have. Have you seen any evidence between October and January of radiating neck pain or radiculopathy?

A. Radiating or radiculopathy, no. I don't think she had evidence of radiculopathy at any time.

Q. You haven't reviewed or seen any evidence of radiculopathy in this case whatsoever?

A. I'm not aware of any. The symptoms that she related to me are bizarre and not anatomical. And I'm not aware -- I don't have any notes of an EMG that might show some radiculopathy, but I'm not aware that she has any.

Q. Well, can we agree, Doctor, that a complaint or when a patient of yours injures their neck and they say that the pain goes from their neck and down into their arms, that is a radiculopathy or a radiating pain?

A. No, not necessarily. It may be a bizarre pain. In her case that's what it is. She says that her whole -- the entirety of both upper extremities get weak and that her fingers are numb from the proximal -- from the near joints outwards. These are bizarre symptoms. This is not radiculopathy.

Q. So the complaints -- the symptoms and complaints that you've reviewed in the medical records, Doctor, it's fair to say you don't consider any of those as legitimate radiculopathy?

A. I don't know, I don't really think about any of them, I don't remember any of them.

Q. You don't remember the complaints that are in the records?

A. I don't remember any that would be radiculopathy.

Q. Doctor, as far as her left knee is concerned --

A. We're going to the knee now, okay, go ahead.

Q. Isn't it true that in your patients that have knee problems, whether it is the right or left, because of injury to one leg, that as they progress through time and favor that leg, they can develop problems with the other leg?

A. No. I mean, that's -- yeah, if you broke her leg, but she didn't break her leg, she merely bruised her right leg, she never hurt her left knee, and she comes up with a left knee complaint, I don't think it has anything to do with this accident.

Q. And, Doctor, I've just got to make sure your testimony is clear in this regard. If you have an underlying degenerative disc disease or condition that is acquiescent, or it's not bothering anybody, and you're involved in a motor vehicle collision that subsequently causes pain to the neck area, is it your testimony that it is impossible to accelerate or aggravate the disc disease process?

A. No, I said that you don't get any exaggeration or aggravation of the degenerative arthritis, which is what

she had her surgery for. Theoretically over a long period of time you might get some degenerative disc disease from trauma, but she had degenerative disc disease at the time of her accident. And she had the osteoarthritis at the time of her accident, but I don't think the trauma aggravated or accelerated that.

Q. When was the diagnosis of osteoarthritis made?

A. At the time of her trauma. She had osteophytes seen on the various imagings within a few weeks of her accident.

Q. And, Doctor, individuals can have the condition of osteoarthritis or degenerative disc disease in their neck and be symptom-free, can they not?

A. They can, absolutely.

Q. You -- in fact you and I as we sit here in your office, we probably have some degree of degenerative disc disease going on in our neck?

A. I probably have more than you have.

Q. Exactly, it's related to age.

But people can live their whole lifetime without a neck problem, correct?

A. Absolutely.

Q. And still have some signs and symptoms of degenerative disc disease, correct?

A. No, not signs and symptoms. You just said they

have no problems. That doesn't make any sense. They can have degenerative disc disease and have no signs and symptoms.

Q. Thank you for correcting me. Thank you.

But then those same individuals such as you and I, if we get in an automobile accident, that can cause our neck and the degenerative disc disease process in our necks to become aggravated and activate problems, correct?

A. No.

Q. No, you've never seen that?

A. If you get in an accident and hurt your neck and you can have degenerative disc disease, but I don't think the accident has got anything to do with the degenerative arthritis which she has.

Q. We have no evidence, again, between -- or before the January of '92 collision of any radiculopathy or pain that goes from the neck and radiates into the arms, correct?

A. I don't know of any evidence of any radiculopathy at any time.

Q. And you're aware of the force of the impact that was involved here, correct?

A. Apparently it was quite an accident. I'm not sure what the forces were exactly, but I know it apparently

was quite an accident.

Q. Evelyn Merritt went from a resting position in the front seat of her van and then upon impact, left that seat, hit the dashboard, and then her face impacted with the windshield, correct?

MR. TIRA: Objection.

A. Yes. I don't know the exact -- I mean, if you're telling me to assume this, I will assume it. I don't know. Are you asking me if that's the case? I obviously don't know.

She said that she did -- her left -- she didn't tell me about her -- she said her left side hit the dashboard, not her knees. She told me her left side hit the dashboard and her head hit the windshield. Now, maybe the story's different, I don't know.

Q. And her head hit the windshield, so you do know that her head --

A. No, I don't know that. I know that she said that.

Q. Okay. Do you dispute it?

A. I don't dispute things. That's your department.

Q. All right. But that type of impact, assuming that to be what happened, that can certainly cause herniated discs, can it not?

A. Oh, it could, but it doesn't cause degenerative disc disease, and it doesn't cause osteophytes. But it

could cause a herniated disc, maybe even two herniated discs, but certainly not three.

Q. And that type of impact also can cause radiating pain that goes from the neck down into the arms, correct?

A. If -- no, that's not from the impact. The herniated disc might pinch a nerve and cause true radiculitis or radiculopathy, but she doesn't have. We're not talking about her now. We're just talking about people generally.

Q. I'm not sure I understood your question, that type of impact -- or your answer, Doctor. Let me just rephrase my question.

A. Sure.

Q. That type of impact that I've just discussed with you, that impact can cause radiating pain from the neck down into the upper extremities, correct?

A. No, my answer is the impact itself would not have caused, but if she herniated -- we're not talking about her now -- but if a patient herniated a disc from this type of injury and if that herniated disc were pressing on a nerve root, then it would cause typical nerve root type of pain and a typical distribution of that nerve root. This is patients in general, we're not talking about her because she didn't have that.

Q. Doctor, I want to get back just for a moment to the

testifying. I believe we said that you testify twice a week, correct?

A. About, yeah.

Q. That's an average.

What do you charge for your testimony?

A. $850.00 for a half a day.

Q. Okay. And you block out half a day for each time you testify?

A. Yes.

Q. And you've been doing -- you've been giving testimony such as this for the last 20 years?

A. Oh, I probably -- I don't know when my first deposition was, but it probably was within a couple of years of when I started practice, which was 34 years ago, because it takes a couple of years for the patients I'm treating to get to the point where I have to give a deposition about them. So I would say probably 32 years, more or less.

Q. Doctor, when Evelyn Merritt underwent surgery, the operating physician, again, was Dr. Jeffrey Wilber, correct?

A. I believe so.

Q. Do you know Dr. Jeffrey Wilber to be of a good reputation in the Cleveland community as an orthopeadic surgeon?

A. I believe so. I don't know him particularly -- personally, but I believe he has a good reputation. He certainly does a lot of surgery.

Q. And you haven't heard anything that would call into question his ability to diagnose and treat his own patients?

A. Oh, I can't vouch for that.

Q. Have you heard anything that calls into question his ability to diagnose and treat his patients?

A. I certainly wouldn't want to pass on any hearsay.

Q. Well, Doctor, I take it from your testimony and you may be alluding to this jury that you've heard negative things about Dr. Wilber?

A. I didn't ask it, you did.

Q. And I'm asking you to answer the question.

MR. TIRA: Objection.

A. I think that whatever I've heard about the people I don't think is something to which I can reasonably testifying.

Q. Well, Doctor, certainly if you had anything bad to say or inappropriate or you felt that Dr. Wilber's care and treatment of this patient was inappropriate, you would speak up at this time, correct?

A. No, not necessarily. It depends on what I was asked.

Q. Well, I'll asking you to speak up now, Doctor.
A. What's that?
Q. Do you feel the triple laminectomy infusion in her spine was justified and should been done in September of '94, four months after you saw her --
MR. TIRA: Objection. O R
Q. -- saw Miss Merritt?
A. Based on my examination of her in August, I certainly would not have done that surgery. I don't know whether it was justified for the degenerative changes by the time he saw her in December. I certainly would not have operated on her when I saw her in August.
Q. When was the last time you did a triple laminectomy infusion?
A. I don't do -- I don't operate on the neck. I operate on the lumbar spine, but I don't do neck surgery. I would not have -- I would not have even referred her to him to have surgery done at that point. I don't think that she needed surgery then.
Q. You've never done that procedure?
A. No, not personally.
MR. CHAMBERLAIN: I have nothing further.
/ / /
/ / /

REDIRECT EXAMINATION

BY MR. TIRA:

Q. Doctor, Mr. Chamberlain asked you about fees charged for conducting examinations and for your half day you block off for giving of a trial deposition.

A. That's correct.

Q. Doctor, when you are requested to give testimony such as this on behalf of one of your patients who is a Plaintiff in an injury lawsuit, do you also charge them for your professional time?

A. We charge the same amount, it's exactly the same amount.

Q. Doctor, relative to the Warren General Hospital Emergency Room record that Mr. Chamberlain showed you, you had indicated that cervical x-rays were obtained?

A. Yes.

Q. And why would an emergency room physician order x-rays of the cervical spine when a patient comes to the emergency room?

MR. CHAMBERLAIN: Objection.

A. Because they thought they had injured their necks because they had some indication that they had injured their neck.

Q. Doctor, based upon the emergency room record, how was Mrs. Merritt brought into the emergency room at

Warren General Hospital on October 9, 1991?

A. She was brought in with a full cervical spine stiff neck collar on a bed -- on a backboard.

MR. TIRA: Thank you, Doctor.

I have no further questions.

MR. CHAMBERLAIN: I have nothing further.

THE WITNESS: Yeah, I'll waive viewing and I'll waive signing of this deposition.

- - -

(DEPOSITION CONCLUDED.)

(SIGNATURE WAIVED.)

- - -

CERTIFICATE

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

I, Michele E. Eddy, a Registered Professional Reporter and Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named witness, RICHARD S. KAUFMAN, M.D., was by me first duly sworn to tell the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was reduced to stenotypy in the presence of said witness, and afterwards transcribed by me through the process of computer-aided transcription and that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid.

I do further certify this deposition was taken at the time and place in the foregoing caption specified.

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 5th day of June, 1995.

Michele E. Eddy

Michele E. Eddy, RPR and Notary Public
in and for the State of Ohio.
My commission expires 5-22-00

LAWYER'S NOTES

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DEPOSITION SUMMARY OF DR. RICHARD KAUFMAN
ON BEHALF OF EVELYN MERRITT
(RE: MERRITT, et al. v. ASKINS)

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10, **3-4** Most people who are over 40 have some degree of degenerative disc disease and arthritis of the spine.

11, 10-17 It is his opinion that an individual can sustain a neck **a** injury by either being punched or kicked in head.

12, 1
13, 4 Prior to seeing Evelyn Merritt he reviewed the following: an MRI film, records from Warren General Hospital, records from University Orthopedic Associates, office records of Dr. Brandenberry, records from University Hospitals, ER records of 1-16-92 from Geauga Community Hospital and records from Miller Outpatient Therapy Clinic.

13, 14-16 He examined Evelyn Merritt on 8-2-94.

14, 13-20 Dr. Kaufman states that he specifically asked Evelyn Merritt about any prior neck problems and she specifically said no..

15, 5-9 She was seeing Dr. Brandenberry as a result of an altercation in October of 1991.

15, 17-21 Based upon his review of the records, he did not see anywhere in the records where Evelyn Merritt told her physicians of the neck injury occurring in October of 1991.

16, 6-10 He says the altercation in October of 1991 was significant. She had pain and spasm in the muscles in her neck. Spasms are objective findings.

17, 3-15 Based on his experience, he would expect a patient to relay a prior injury to the same area that she was now being treated for.

17, 20
18, 25 He says that the x-rays and the MRI showed disc degeneration at multiple levels and spurring osteophytes. These were shown at the C4-C5, C5-C6 and C6-C7 level. He also says "These are changes which take a long period--a long time to develop. They are a slowly growing degenerative process, and it doesn't get--it obviously gets, increases over time as all arthritis does, but it takes a long time to do it and it was obviously present at the time of the accident".

20, 16
25, 13 The doctor describes the history that Evelyn Merritt gave to him when she saw him.

25, 14-24 In the history she complains of left knee discomfort however, that is not in the

Geauga Hospital ER records.

27, 18
28, 17 He describes the examination that he did of her and basically how everything was o.k.

29, 4-8 He says the reflexes of the upper extremities were normal.

29
31 Again he continues with what he found during his physician examination, i.e. the objection findings and once again he says that nothing is wrong.

32, 9-19 His diagnosis of her would be possible cervical myofascitis. What that means in inflammation of the muscles and ligaments in the neck area and this diagnosis was based entirely on her complaints of pain in the neck. He also says there was obvious exaggeration of symptoms.

32, 20
33, 2 It is also his opinion that these types of symptoms last 4-6 weeks.

33, 11-16 It is his opinion with reasonable medical certainty that this degenerative disc disease is not excellerated or aggravated by this type of trauma at all, i.e the automobile collision, and he says he has never seen it happen in his 34 years of following patients.

34, 1-7 It is his opinion that the surgery which was subsequently done on her neck was not the direct result of automobile accident of 1-16-92 but was necessitated by the degenerative osteoarthritis of degenerative disc disease,

34, 8-18 Since he feel that the surgery was not caused by the accident, he also feels the expenses weren't either.

35, 4-7 It is his opinion that any further revision, i.e. any further surgery, is not the result of the accident.

36, 1-10 It is his opinion that when a person suffers a disc herniation type injury caused by a trauma, the herniation is not at 3 levels. It is usually at one level and occasionally it might be at two.

36, 11-24 It is his opinion that she did not develop a permanent disability from this accident and that her problems are degenerative arthritis.

37, 15-18 It is this doctor's opinion that smoking can cause non-union of bones.

This begins the cross-examination section and the cross-examination section was done by Hank.

40, 10-25 Dr. Kaufman says that his physical examination actually begins when he is taking

the history because he watches to see how a patient moves. Furthermore, when questioned that if he knew that his physical exam last seven minutes, he says he has no idea because he doesn;t keep track of it.

41, 21 — He agrees that he probably does 6-8 of these IMEs a week but he feels it is
42, 22 — probably closer to 6.

42, 25 — He charges $350.00 for each IME.

43, 1-5 — Doing the math that comes out to about $2,100 to $2,200.00 a week.

43, 6-10 — He testifies at least two times a week.

44, 1-5 — He says that he actually does about 2 a week.

46, 6-10 — When questioned if he felt that she was exaggerating her symptoms, why Dr. Wilbur would operate an her four months later, he says that he would not have done that.

47, 12 — When asked to look at the ER records from ~~Geauga County~~ Weiker Geneva Hospital from the
49, 5 — 10-91 altercation, he does admit that there is no indication in there of neck pain anywhere in the records.

49, 23 — He has not seen any evidence of radiculopathy either between October and
50, 2 — January or any other time.

50, 10-25 — When questioned why he is has not seen any evidence of radiculopathy and why the complained symptoms in the medical record were in of evidence of radiculopathy he says, "I don't know, I don't really think about any of them, I don't remember any of them".

51, 16 — He repeats that you don't get any exaggeration or aggravation of degenerative
52, 6 — arthritis from trauma.

52, 11-14 — He agrees that individuals can have degenerative disc disease in their neck and be symptom free.

54, 21 — When asked to assume the ~~kind of accident that she has relayed in her history,~~
55, 2 — ~~he says that it could cause herniated disc~~ but it doesn't cause degenerative disc disease and it doesn't cause osteophytes ~~but~~ and it could not cause three herniated discs.

56, 4-9 — He testifies about twice a week and he charged for his testimony $850.00 for a ~~half day and he blocks out a half day each time he testifies.~~

58, 13-21 — He does not operate on the neck and he has never done a triple laminectomy infusion.