IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

DANNY MERRITT,

Plaintiff,

-vs-

JUDGE McMONAGLE
CASE NO. 401357

STATE FARM INSURANCE COMPANY,

Defendant.

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Videotape deposition of ROBERT D. ZAAS, M.D., taken as if upon direct examination before Rachel M. Gentile, a Notary Public within and for the State of Ohio, at the offices of Robert D. Zaas, M.D., 6803 Mayfield Road, Suite 314, Mayfield Heights, Ohio, at 6:20 p.m. on Thursday, April 11, 2002, pursuant to notice and/or stipulations of counsel, on behalf of the Defendant in this cause.

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ALSO PRESENT:

Paul Tedrick, Video Operator

W I T N E S S I N D E X

VIDEO OPERATOR: We are on the record.

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

DIRECT EXAMINATION OF ROBERT D. ZAAS, M.D.

BY MR. KENNEALLY:

Q. Doctor, would you please introduce yourself to the members of the jury?

A. My name is Dr. Robert David Zaas. I spell my last name Z-a-a-s. I am a physician, an M.D. I practice in orthopedic surgery.

Q. Would you tell the members of the court and jury, please, what the medical specialty of orthopedic surgery embraces?

A. Orthopedic surgery, or orthopedics, is a subspecialty that deals with the surgical and medical treatment of conditions that relate to the skeletal system. That means our bones and our joints, but also to muscles, ligaments, tendons, circulation and nerves that involve the spine. That's from the neck to the tail bone and the extremities, the arms and the legs.

Again, as orthopedic surgeons our primary training has been in the surgical field, but we also treat and -- the majority of patients that I see I can treat without surgical intervention.

Q. Where did you receive your medical training to become an orthopedic surgeon?

A. Well, after I graduated from Case Western Reserve way back in 1953 I went to medical school at the University of Chicago School of Medicine. I graduated from there in 1957 with an M.D. degree.

I then went on and had six additional years of post-graduate training, which I received at Mount Sinai Hospital in Cleveland, which was subsequently closed, at University Hospital of Cleveland, at Akron General Hospital and I finished in spine surgery in pediatrics at Indiana University in Indianapolis.

Q. After completing your post-graduate studies and training, Doctor, did you then engage in the full time practice of your medical specialty?

A. Right. Some of my training was interrupted, remember Vietnam, we're talking the '60s now, and I spent two years of active duty with the United States Navy in the western Pacific. One year I was on an aircraft carrier duty and the other in

a naval hospital.

I did mostly orthopedic surgery at that time, but also general surgery. I was surgeon for the 7th Fleet. That was kind of it at that time.

In 1965 I did go into private practice in Cleveland. Our office at that time was near St. Luke's Hospital on the east side of Cleveland. I've been continuously in private practice since June of 1965 coming up on 32 years.

Q. Are you presently on the staff of any hospitals in the greater Cleveland area?

A. Well, we're connected with Hillcrest Hospital at this building. You're now sitting in our office building, which is 6803 Mayfield Road, Mayfield Heights, Ohio. We're in the Hillcrest Medical Building. Directly across the street is Hillcrest Hospital.

Every doctor has to be affiliated with the Cleveland Clinic and Hillcrest Hospital in this building. That's mandatory. Otherwise, you can't become rentees over here like that.

For years, actually, since 1965 to 19 -- I'm sorry -- 19, well, almost 2000 I practiced at Mount Sinai Hospital, did all of my surgery there, my teaching responsibilities, patient

admission. Mount Sinai closed right in the beginning of, actually, the summer of 2000. So it's about a year and a half already.

Q. Do you belong to any professional societies or groups within the field of orthopedic surgery?

A. I do.

Q. Would you list for the members of the jury, please, a few of the more noteworthy ones?

A. I belong to a group of organizations whose membership is for doctors in good standing. That includes, on a national level, the American Medical Association; on the state level the Ohio State Medical Association; locally, the Academy of Medicine of Cleveland, which has now another name, Northeastern Ohio Medical Association.

I also belong to a group of organizations whose membership is limited to orthopedic surgeons including the American Board of Orthopedic Surgery, the Ohio State Orthopedic Association, the Cleveland Orthopedic Society, which I've been every officer there including past president.

a. Doctor, what are requirements for a physician such as yourself to become what we kind of commonly refer to as board certified?

A. Board certification by definition means that a doctor is a recognized accredited specialist in his field, he is recognized by his peers, by other doctors in the field.

To become so recognized, doctor has to, number one, complete college, have a minimum of five years of post-graduate training. We used to even call it internship and residency in my years, now they call it PG or post-graduate training, and then be able to take and successfully pass two sets of examinations, oral and written. You can't even take the second set of examinations until you've been in practice for two and a half years. And completing everything successfully, a doctor is said to be board certified.

If you go into your doctor's office, you see the plaque on the wall that says American Board of Orthopedic Surgery or Internal Medicine, depending on what your doctor's specialty is and that's internationally recognized.

Q. When were you board certified?

A. Let me see, 1968.

Q. In addition to your clinical practice here in the Hillcrest Medical Building, which you mentioned a

moment ago in which you treat your own patients, I assume?

A. Yes.

Q. Do you also on occasion perform what we sometimes refer to as independent medical examinations?

A. Right. For the jury's sake, that terminology, independent medical, means, really to me means second opinion. It can be done in certain different ways. It is an examination in which I am asked to do a evaluation of a person's condition, render a report, send out a report, but I will not be their treating doctor.

Those examinations sort of started when certain companies required that if a real doctor said that you needed surgery, you needed a second opinion in order for them to cover you for the surgery. That's another examination.

I used to get, I still get some, but not as many requests from the big auto companies, especially Ford, but also General Motors, Chevy, to make a determination if a person is capable of working in what type of work they have. I'm not their doctor. They just want a evaluation.

Another examination perhaps that occurred on the case we're going to discuss is where I'm

asked to make an evaluation of an injury, review records and then give an opinion, but not treat the person.

Q. All right. And that kind of brings us to why we're here today to take your deposition.

As you know, Doctor, this is the case of Danny Merritt versus State Farm Insurance Company and I represent State Farm Insurance Company, and am I correct that I asked you to examine Danny Merritt, the plaintiff, in this case to review records which were furnished to you from his treating physicians and also to render an opinion with respect to that material?

A. Yes. I believe you did. I don't -- maybe your secretary, did but prior to my examination of Mr. Merritt on August 9, 2000, that's almost two years ago, I did receive records and received a request from you asking that I do an examination.

Q. And following that examination in review of records did you cause a report to be completed?

A. Well, yes, several reports. First time I didn't have all the records and this is one of those cases in which I had some records, but some important records I didn't have, so I didn't make a report. Then made a report based on my August

9, 2000 examination.

Then at a later date, which happened to be May 30, 2001, more records were received, sent out another report. On May 18, 2001 I received more records and sent another report out. On January 14, 2002 more records I had to review and I made another report. So actually I did send four reports out.

Q. And you have those four reports in front of you?

A. Right.

Q. And did you bill me for those four records, Doctor, or did your office bill me?

A. Yes.

Q. And what were the charges for the four reports, please?

A. Two, four, six, 750 and 6, $1,350.

Q. So the first report, the initial one, was $600 and the other ones were each $250?

A. Right. The first one was for the examination, review of records, completing a report and the other reports each were for the hours spent reviewing records and issuing three other reports.

Q. And just so that the record is clear also, Doctor, I hired you in this particular case to

perform this examination, review records and render an opinion.

Have you and I in the past worked together on these types of cases?

A. Right. I think you've gone both sides. I think you represented people and you have represented the defense side also, yeah.

Q. Have you in some of those cases where you did a report testify as you are now at a deposition setting like this?

A. Yes.

Q. Okay. Now, Doctor, I asked you to look at Danny Merritt. What was the date of that examination?

A. August 9, 2000. We're sitting here today on April 11, 2002.

Q. Okay. When Mr. Merritt came into your office on August 9, 2000, did he, did you take a history from him?

A. Yes, he gave me a history.

Q. All right. Before getting into the specifics of the history that Mr. Merritt gave you, tell, for the benefit of the court and jury, tell the jurors what the importance is of a history to any doctor seeing a patient for the first time.

A. It's important in certain cases more so than in

others, but basically the history, at least in orthopedics, is about a third of the examination. It may have heavier weight than that in some cases. It tells the doctor what the symptoms are. It tells the doctor when the person first felt them. Then it goes through from forward and backward, if the person's condition was there beforehand and then following the onset of symptoms the history goes into detail of what treatment the person had received, how it affected his life, how it affected his employment, things like that.

Very important aspect of medicine. It's what makes human medicine different from veterinary medicine. Sounds like we're talking about a silly thing here in a deposition, but what we really talk about when you bring your Cocker Spaniel to the veterinarian all you can do is say the dog won't eat. I could ask Mr. Merritt when did his injury happen, what happened to him and go on for details. I couldn't get that from the Cocker Spaniel.

Q. Tell the jury now what the history was that Mr. Merritt gave to you when he came in to see you on August 9, 2000.

A. He told me the car he was driving on May 13, 1998, which now is approaching four years now, right, right, we're in April 2002, that he was broadsided from the passenger side, passenger front by another car in Cleveland. Then the other car apparently went through a stop sign. He told me he tried to brace himself and that after the accident he had pain in his left side, his hip, but mainly his right shoulder.

And his right shoulder apparently has been the issue in this whole case because Mr. Merritt told me that was the only condition that was ongoing from this accident.

Now, he also very straightforward told me that he had had a previous problem with his right shoulder and, in fact, he had injured his right shoulder at work four or five months before that and that the right shoulder had been treated by Dr. Audley Mackel, M-a-c-k-e-1, who is an orthopedic surgeon, who I'm very familiar with, I know him very well, and Dr. Mackel had treated his condition from the work injury for about two months and that Mr. Merritt told me that his right shoulder had improved, but that he had some tenderness even up to May 13, 1998, but after the

car accident his shoulder got worse. He had to go back to Dr. Mackel five or six days later. Dr. Mackel treated him with medicine and he told me that he continues to have shoulder pain when I saw him.

Q. All right. What, if any, complaints did Mr. Merritt make to you when you saw him on August 9, 2000 with reference to the right shoulder?

A. He complained to me that his right shoulder was painful in the front side there, that the pain would get worse if he would kind of reach up, lift and twist movements, like elevation movements, and that his shoulder would be painful at night sometimes and wake him up at night.

Now, I said what do you do at work. Well, he's got at least two jobs. I'm not sure if it's two or three. I know he had two. One he had worked for almost 30 years for the Waste Division of the City of Cleveland and by the time, I think he was 50 years old when I saw him, I think he was 51, he had more of a supervisory job with that. He had done heavier work for a long time, but with his seniority he had pretty much a supervisory type of thing. But his other job he

told me was at Case Western Reserve University and at that time apparently he was doing floors and operating one of those power scrubbing machines and that's what he complained to me about that, you know, using the scrubbing machine was causing his shoulder to get painful.

Q. Did you -- after obtaining that history from him, Dr. Zaas, did you then perform a physical examination of him?

A. Yes, I did. Incidentally he had no other problems. He told me that he had some medicine that he was taking for blood pressure, but everything was fine. His health was fine. He didn't have any other complaints. And when I examined him, physically that's all I found was an abnormality in his right shoulder. He was tenderness across the front of the shoulder in what we call the rotator cuff area. He had pain that would increase when he would raise his arm upward. He had pain and limitation of turning his arm inward or outward.

For instance, with his left arm he could bring his arm way back behind his back. With his right shoulder he couldn't reach back as far and he had more pain anteriorly. And other tests

that I did were consistent with a diagnosis of anterior impingement. He had good rotator cuff power, but he did have signs of impingement of his shoulder.

Q. What is meant by the term anterior impingement, Dr. Zaas?

A. Thank goodness for athletics and sports because now we hear that in our baseball pitchers and things like that. It is a condition in which the ball of the humerus, the arm bone, starts to scrape against the overlying shelf that's called the acromion.

In some people, baseball pitchers have a tremendous predilection to get that, but you can see why. You can sit back there and put your arm through this violent movement 140 times or 130 times a day. Even though it's only once a week, but tremendous strain there. That's why so many baseball pitchers have that kind of problem.

A lot of people in a lot work conditions do it. People in construction, cleaning or things like that they have to go up and down all the time. They're predisposed to this. It's just the fact that as you get older you get a little build-up of bone and that makes it even more

likely to have scraping of your arm against the overlying shelf. So it's a common condition mostly caused by repetitious up and down movements, violent throwing, can be caused by trauma or injury.

Q. Have you in your practice over the past 35 years, Doctor, treated your own patients who suffered from impingement syndrome of the shoulder?

A. Right. If you want to go from joint to joint, the impingement syndrome is probably the most common condition that we see in the shoulder. It can be associated with a rotator cuff tear.

If you keep impinging and scraping, eventually the rotator cuff will wear through and tear completely. As if your -- the knees of your pants and you're working on your knees all the time you can wear, you know, remember the old jeans you can wear right through the bottom, that's one way of doing it. It's a common condition, yeah.

Q. Now, so far you've told us about the history that you took from Mr. Merritt, about the fact that he had told you that he had a prior problem, injury to his right shoulder, about the fact that he was still somewhat symptomatic in the shoulder at the

time of the accident and about the fact that he suffered an injury to his right shoulder at the time of this accident in May of 1998. You also told us about the physical exam that you conducted.

Moving to the next phase of this independent medical process, did you have an opportunity to review initially some records which I sent to you?

A. I did have some records, yes.

Q. What did you learn from those records, Doctor?

A. The records that I received were those of the emergency room at, I believe it's Euclid Hospital, yeah, Meridia Euclid Hospital on the date of the accident and at that time Mr. Merritt did complain of right shoulder and low back pain and had x-rays of his right shoulder which shows some arthritis and no evidence of a fracture.

He had some physical therapy in May, June and July of 1998. So that's the, two months after the accident and then he had been seen by Dr. Audley Mackel. At that time my records show from May 18, 1998 to January 3, 2000, but by August 1998 Dr. Mackel stated that the shoulder was better and there was no follow up treatment after

that until we got into January 2000. So there was no treatment in the records that I received from August 1998 to January 3, 2000 as far as I could tell.

Q. That would be a period of about, what, 17 months?

A. Seventeen months, you know.

Q. Okay. Now, I mentioned before that you, because of the fact that we received records on this case on a piecemeal basis, and part of the reason for that is because Mr. Merritt eventually underwent surgery, you authored three additional reports with reference to this case; am I correct?

A. Right. As you pointed out, all of the records came eventually, but in four different stages.

Q. What did you learn from the subsequent review of records that were furnished to you as I obtained them?

A. Well, on May 18, 2001 I received more records from Dr. Mackel, but basically these were repeat of the records that I already had plus a report that Dr. Mackel wrote in which he diagnosed rotator cuff impingement syndrome, contusion right shoulder, preexisting rotator cuff syndrome right shoulder. And that first report, I don't think I added very much, although when I had all

the records together it was my opinion that Mr. Merritt's return visit to Dr. Mackel in January 2000 after a 17 month interim was due to the fact that he was working, using heavy equipment and had recurrent pain in his right shoulder over a month or two before that.

Q. You mentioned a term, I just want to make sure the jury is aware of. You mention the term preexisting.

What is meant by that term in relation to this particular case and the injuries and complaints that Mr. Merritt made?

A. Just about all the diagnosis that Dr. Mackel made are exactly the same that I made. Dr. Mackel and I, in writing, have both diagnosed contusion to right shoulder. That means bruise. I certainly agree with his conclusion that's what Mr. Merritt had suffered at the time of this accident and had recovered from. Dr. Mackel made the same conclusion.

Dr. Mackel and I both made the diagnosis of anterior impingement of the right shoulder and Type 11 acromion as well as arthritic changes of the right shoulder.

Type II acromion means a build-up of bone on

the shelf overlying the head of the humerus that allows the humerus to scrape. Preexisting means existed before this accident.

The conditions of arthritis, the Type II acromion, the anterior -- anterior impingement, Type II acromion and arthritis were all conditions that were there before the car accident. They were not caused by the car accident and they were of long standing.

Q. When you say long standing, what do you mean by that?

A. Anterior acromion, shape, we call it Type II acromion, the shape of the acromion, that just develops as an adult and maybe got a little bit thicker as time went by just because of the strain from work. That's a developmental condition.

Impingement is something that develops from overuse, from repetitive movements, up and down, too much lifting, too much carrying, too much throwing baseballs. Well, he's not a baseball pitcher. So those conditions were there for years before and conditions like that are not necessarily symptomatic.

Conditions, people in the room here, some of

us can have anterior impingement that will hurt, but the conditions that were diagnosed by Dr. Mackel and myself, other than the contusion, were all conditions that were there before this accident and were not caused by this accident.

Q. Now, what about the two subsequent reports that you mentioned? What additional information, if any, did you have with respect to those reports?

A. The next batch of records I received on May 30, 2001, also from Dr. Mackel, included the records from January 1998 and February 1998 , that would be three months before this accident, and that was because of an injury that Mr. Merritt sustained when he was lifting boxes when he was working at Meridia Huron Hospital on January *9,* 1998.

He complained at that time that after he lifted something happened to his shoulder and he couldn't lift his right arm after the injury without pain.

He saw Dr. Mackel. Dr. Mackel diagnosed rotator cuff impingement syndrome and rotator cuff sprain and strain. The same diagnosis, but he diagnosed that in January 1998 four months before your accident.

He treated Mr. Merritt on one occasion with a shot of cortizone to his shoulder. On February 9, 1998, which is, what, three months before this accident we're talking about, Mr. Merritt was still complaining of shoulder pain.

He called it symptoms were improved, but he was still having aching about the shoulder. Word for word from Dr. Mackel.

Dr. Mackel recommended that he needed a course of physical therapy in February 1998, but apparently he didn't get it because at least I didn't see any records that he did.

So then the next record that I received from Dr. Mackel were duplicates that started on May 18, 1998 five days after this accident and then there was another examination, which I was not aware of.

After August 24, 1998 Mr. Merritt was not seen by Dr. Mackel again until January 3, 2000. That's 17 months. And then he was not seen again by Dr. Mackel until April 26th, 2001, that's 15 more months. So in 32 months, between August 24, 1998 and April 26th, 2001, he only had one visit with Dr. Mackel that I'm aware of.

There is reference by Dr. Mackel, Dr. Mackel

stated in his report that Mr. Merritt told him that he had seen another doctor after January 2000 and had received numerous cortizone injections for his shoulder symptoms. But I'm not sure what that means because I didn't receive any records of that.

Anyhow, after April 26th, 2001 Dr. Mackel requested and obtained a right shoulder MRI scan, which showed exactly the same changes that were present on the regular x-ray, arthritic changes of the acromial clavicular joint, tendonitis of the rotator cuff. All of that would be consistent with anterior impingement.

So the third set of records did help in that they showed what Dr. Mackel treated Mr. Merritt for before the May 1998 accident and it showed the follow-up visits up until April of 2001.

Q. Okay. All right. I want to ask you some opinion questions.

Now, Doctor, based upon your work in this case -- and I want you to answer my questions to a reasonable degree of medical certainty if you would.

First of all, Dr. Zaas, do you have an opinion based upon all those factors that you

mentioned before, including your 35 plus years of experience as an orthopedic physician, as to what, if any, injury Mr. Merritt suffered to his right shoulder in the car accident of May 13, 1998?

A. I do have an opinion.

Q. Tell the members of the court and jury, please, what your opinion is.

A. In my opinion, Mr. Merritt suffered a contusion to his right shoulder and a transient, which is another word for temporary, aggravation of the preexisting anterior impingement and arthritis of his right shoulder.

Q. What is the basis for that opinion, Doctor?

A. I base the opinion on the history that Mr. Merritt gave me, my physical findings, and review of x-rays, reports, MRI scan report and particularly the records of Dr. Mackel.

Q. Doctor, do you have an opinion further based upon all of those factors as to the probably duration of the shoulder contusion and transient or temporary aggravation of the right shoulder impingement syndrome?

A. I do have an opinion.

Q. What is your opinion in that regard?

A. It is my opinion strongly based on the documented medical records, but also on what Mr. Merritt told me, that the accident of May 1998 caused symptoms and necessitated treatment for approximately four months.

Q. What is the basis for that opinion?

A. Again, Mr. Merritt's own doctor. Dr. Mackel in his records stated that by July, and certainly into August of 1998, which would take us, what, three and four months after the accident, that Mr. Merritt's shoulder was better. He had returned to work and he did not provide any further treatment, in fact, didn't even see him again for 17 months.

Q. Would it be your opinion that the medical bills that Mr. Merritt incurred during that period of time, May until August of 1998, would be related to the car accident of May 13th, 1998?

A. Right. I think the visit was the end of August, August 26th, I believe it was. So it's through August, yeah.

Q. Then as you've testified, Mr. Merritt did not see Dr. Mackel for a 17 month period?

A. Right. To my knowledge, Dr. Mackel was the only doctor that treated his shoulder. There was some

kind of reference as to other doctors and shots, but unless you can show me other records, my opinion remains firm that Dr. Mackel was the only treating doctor for the shoulder and the treatment that happened afterwards sporadically 17 months later and then 15 months after that were for flare-ups of a shoulder condition that was a preexisting condition that would relate to what Mr. Merritt was doing every day, natural aging flare-ups of a natural condition, which is known to happen even without irritation and aggravation.

So problems that came on after August of 1998 were for an extension of a preexisting condition that were not caused by the May 1998 accident.

Q. How significant, in your opinion, to your opinion, is the type of work that Mr. Merritt told you he performed, the type of work he did, specifically the work at Case Western Reserve University?

A. Yeah. He made it very clear to me -- he's a good communicator. He didn t hide anything and I thought he was very honest about everything that he told me. That -- he was using those buffing machines. I remember those at old Mount Sinai

with the old kind of tiled floor and it's those great big machines that you have to kind of like a rodeo, you have to kind of push around. He said that was bothering him a lot.

The only good thing about that kind of job, he didn't have to go overhead, which would have bothered him more. If he had been a ceiling painter, that would have been really bad, but he was pushing back and forth. That was his biggest complaint when he came to me. That as of, I guess it was August of 2000, he still said that was bothering him. I'm not sure he still had that job.

Some information apparently was given that he resigned from that job at some later date or at that date, but he was telling me at that time that was the kind of problem he was having with his shoulder in operating that type of equipment.

Q. Dr. Zaas, do you have an opinion based upon reasonable medical certainty again and based upon those factors that we touched on, the history, the physical exam, the review of the records and your experience as an orthopedic physician as to whether the surgery that Mr. Merritt underwent, this surgery that Dr. Mackel performed in the

year 2001, whether that is related to the motor vehicle accident of May 13, 1998?

MR. YOUNG: Objection.

A. I do have an opinion.

Q. What's that opinion, Doctor?

A. In my opinion, the October 2001 arthroscopic surgery to Mr. Merritt's right shoulder performed by Dr. Mackel with a diagnosis of impingement syndrome and with the procedure being arthroscopic acromial decompression was not causally related to the May 1998 accident.

Q. And your basis for that opinion, Doctor?

MR. YOUNG: Objection.

A. The surgery as described by Dr. Mackel in his records was just to release pressure from the narrow space, what we call impingement, due to a downward sloping acromion, which was developmental and which was augmented by arthritic changes. There was no evidence of trauma. There was no rotator cuff tear. There was no fracture. There was no dislocation.

The only surgery that Dr. Mackel did, according to his records, was to relieve pressure and tightness from a narrow space, which was developmental and not related to trauma.

Q. Finally, Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not Danny Merritt suffers any permanent disability to his right shoulder as a direct and proximate result of the motor vehicle accident on May 13, 1998?

MR. YOUNG: Objection.

A. I have an opinion.

Q. What's that opinion, Doctor?

A. Number one, just the shoulder itself, regardless of cause, is better. The shoulder is better now than when I saw him because the reason when I saw him he was having anterior impingement signs and symptoms. That's been corrected by Dr. Mackel.

The accident of May 1998 has not caused any permanent disability. It may have gotten him to Dr. Mackel by virtue of attention to his shoulder initially, but the treatment that he received after August 1998 was not for the injury from this accident. It was for the continuing problem of a long standing arthritic condition of his shoulder.

MR. KENNEALLY: Thank you, Dr. Zaas. That's all I have.

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CROSS-EXAMINATION OF ROBERT D. ZAAS, M.D.

BY MR. YOUNG:

Q. Hi, Dr. Zaas. My name is Andrew Young. I'm one of the attorneys for Danny Merritt. I'm going to ask you some questions just like Mr. Kenneally did as well.

You only saw Danny Merritt one time for an examination?

A. That is correct. That was on August 9, 2000.

Q. That one time you saw Danny Merritt was not for medical care, was it?

A. Right. I was not going to be his doctor. He knew that and I also accepted the fact that I'm not going to be his treating doctor.

Q. This was an IME, right?

A. It was an independent examination in which I do exactly the same examination I do for everybody regardless of why I see them except for the one conclusion that, I made a conclusion, I made a diagnosis, but I was not, going to be his treating doctor, so I did not prescribe.

Q. You explained on direct that that conclusion is basically an opinion and Mr. Kenneally's office, on behalf of State Farm, asked you to render that opinion?

A. I don't know anything about State Farm. I know Mr. Kenneally. There's nothing I have here about any company. Mr. Kenneally did ask me to render the opinion.
Q. You charged $250 per hour?
A. Yes, I do.
Q. Okay. And State Farm paid those bills, isn't that right?
A. I guess they did. I didn't know that until I guess you're the one who asked for this today and we printed out a bill here which they paid for, yes.
Q. What you're talking about is your bill?
A. Uh-huh.
Q. So therefore, this was for Mr. Kenneally and State Farm, right?
A. I only sent it to Mr. Kenneally. Where he sent it is his business. I only sent it to him. I don't know where he sent it.
Q. You would agree also that you set aside about one appointment every Tuesday for these IMEs?
A. Well, that's what I usually do. It's either Tuesday at 10:00 and if that doesn't come through, I make time at 3:30 on Wednesday. It depends. Sometimes I have something previously

scheduled and it's either one of those two times and on occasion none and on other occasions I've seen both.

I think it came out in the year 2001 I saw a total, I think it was 41 independent medical examinations in 52 weeks, but we looked at at least ten of those were for second opinion related to another doctor's recommendation for surgery. They just wanted another opinion. So I think of these type of examinations with legal things probably would be under 25 to 30.

Q. But you would agree of the 25, 30 you do for legal matters, two-thirds of those IMEs are for the defense?

A. Oh, they're all, almost all of them are. I think -- for the jury's sake, I don't know if they know what we're talking about. Every week I see about 75, 80 patients, say 75. Seventy-four of those will be patients that come here for treatment or expectations of treatment, one will be for an independent exam, which I do exactly the same examination, but won't render treatment like that. So I think almost all of the ones that I have seen now for this independent has been with what you call defense, not for direct treatment.

Q. Okay. What I mean for defense is for the defendant in cases of litigation?
A. Again, probably 25 or so a week -- a year, because of the others that I have seen for what we call independent exams maybe for, oh, work related things, second opinions for surgery, things *of* that type.
Q. In addition to being paid for the independent exam, you get paid to review the records and write the four reports that Mr. Kenneally talked about?
A. Right. I charge by the hour. It doesn't really make any difference if I see a person for 30 minutes and spend four hours on the records or see that person for one hour and spend three hours on the records. My time is my time and that's basically what I do for a living.
Q. In addition, Mr. Kenneally is paying for you today to testify, isn't that correct?
A. Right. All doctors, and Dr. Mackel will do the same thing, because I know him very well and we have discussed this in general, not over this case, will charge by the hour for time away from their practice during court testimony or in this case, testimony through a deposition media.

Q. And you already testified on direct that you're being paid about $1,300 or you've been paid $1,300 already?
A. Right. Over a two year period of time been paid on four different occasions and it's $600, $250, $250, $250 -- two, four, six, $1,250.
MR. KENNEALLY: $1,350.
A. $1,350, right.
Q. And that doesn't include your testimony for today?
A. No. Depending what time we spend.
Q. You indicated that the records that you reviewed show Mr. Merritt had a preexisting arthritic condition?
A. Right. Some arthritis, but also impingement, yes.
Q. In your report you indicate that Mr. Merritt's arthritic changes are long standing?
A. Yes.
Q. And you even told Mr. Kenneally on direct what your definition of long standing is?
A. Yes.
Q. And you said that it could be, I think you said on direct it could be several years before this accident?

A. When the condition was developing?
Q. Yes.
A. Well, I think the part of it, the acromion, which causes the impingement, is developmental. He's had that all his adult life and it was getting worse because you build up extra calcium the older you are and the more that you strain and stretch your joint. So part of it was there for most of his adult life.
Q. And I believe you said that that condition, and this was in your report, clearly predates our accident?
A. Correct.
Q. Yet, despite the long standing degeneration, Mr. Merritt functioned without pain prior to the trauma?
A. Well, he did up until January of 1998 when he was working at Huron Road and he injured his shoulder lifting. And apparently, after about a month or six weeks he was better, but he may have had a little bit of ongoing symptoms even up to the May 1998 accident. Before that, before January 1998 I have no indication. He told me he was not having any problems before January 1998.
Q. You would also agree that an injured person with

arthritis cannot tolerate a traumatic injury as well as a person without arthritis?

A. I think that's correct. I think they tend to aggravate the condition, sometimes bring it to light. That's probably true.

Q. And you would agree if traumatized this arthritic condition would cause pain?

A. Oh, I think so, yeah. If you superimpose a strain or a contusion on a arthritis of a joint, you can expect pain.

Q. And you would also agree that an injured person without arthritis would suffer pain from trauma, but the pain in an arthritic person would last a bit longer?

A. It tends to do that. I think you have to take a lot of different people. Individuals, it doesn't work like that. For instance, you may take an individual, a 70 year old individual, traumatize her shoulder and they may recover within a week. You may take a 16 year old, strained their shoulder and it goes on all summer, but if you took a hundred 70 year olds and a hundred 20 year olds, the 20 year olds will heal faster.

Q. But generally my question is that a person injured without arthritis would suffer pain from

trauma, but the pain in an arthritic person would last a little bit longer?

A. Okay. That's what I'm saying.

Q. Okay.

A. Arthritis means aging. It may not be aging on birthdays. Some people have less arthritis if they're 50 than others that are at 35. Some people have a predilection to it. Arthritis is a certain hereditary condition, but in general I agree with what you're saying.

If you have arthritis, which means you have aging changes in the joint, you will tend to suffer longer and it won't heal as quickly.

Q. Right. And it doesn't go away as quickly with treatment either?

A. I agree.

Q. And of course you would agree that there is a medical diagnosis called symptomatic activation of a previous arthritic condition?

A. Right. Activation or aggravation of a preexisting condition, absolutely.

Q. And by symptomatic activation, that means even though the condition, the arthritis was there before an accident or trauma may occur, the force of the accident has caused the previous,

essentially not painful condition, to get painful?

A. Exactly. Sounds like you're reading from my lecture to the medical students.

Q. So therefore, you've basically been advocating for years that trauma of an accident triggers preexisting arthritis?

A. Oh, it sure can. Sure.

Q. That an injured person might be pain free even though the arthritic condition could be shown on the x-ray or MRI prior to the trauma?

A. Right. For the jury's sake, just because a person has arthritis in a particular joint does not mean that person is suffering significantly at that moment. Arthritis can develop very slowly and gradually. And except for maybe you wake up in the morning and you're kind of stiff or you overdue things and you get a little achiness, you can have arthritis without any pain that you're aware of or at least pain that bothers you.

If you're injuring that joint, however, significant trauma, that arthritis becomes more painful.

Q. On direct you also bought up Mr. Merritt's work

related injury in January of '98. I believe he was lifting boxes, he was doing a raising movement?

A. At Euclid General, yeah.

Q. Okay. And he treated with Dr. Mackel for that?

A. Correct.

Q. In fact, he only just treated two times with Dr. Mackel?

A. Two visits to the middle of February, that is correct.

Q. Okay. The first visit January 19th, 1998?

A. Correct.

Q. Not the middle of February, but February 9th, but who's splitting hairs?

A. Oh, all right. First third of February. How's that?

Q. Right. Then there's a good -- there's no evidence of any other treatments with Dr. Mackel prior to the automobile accident?

A. Right.

Q. Or any treatments for physical therapy or anything?

A. Well, he didn't go. He was supposed to go, but he apparently didn't go. But he told me, asked him about going for treatment, he said he didn't

think so. Was your shoulder all well, I asked him. He said, well, it was a little achy.

Q. But you agree that Dr. Mackel's records document that Mr. Merritt's work related preexisting right shoulder injury had improved by February 9th, 1998?

A. It improved, but it still was enough of a problem for Dr. Mackel to prescribe physical therapy in February 1998 three months before this accident. The therapy was never given.

Q. And I believe you also rendered an opinion, medical opinion, that Mr. Merritt indeed did injure his right shoulder and aggravated a preexisting injury to his shoulder as a result of the car accident?

A. My diagnosis is exactly that and of interest as exactly the diagnosis of Dr. Mackel.

Q. There is no indication in Dr. Mackel's records that Danny Merritt was a candidate for surgery prior to the auto accident?

A. That's correct.

Q. And you agree that Mr. Merritt experienced pain in his shoulder as a result of the car accident?

A. Yes.

Q. Mr. Merritt's shoulder injury was to his dominant

arm?

A. Yes. That's a good point. He was right handed. He is right handed, and he injured his right shoulder in January 1998 and there is no question that he injured his right shoulder on May 13, 1998 at the time of this accident. He was dominant on that side, yes.

Q. And you would agree with me that an injury to a dominant arm has a greater impact on an individual in performing their activities of a daily living than an injury to their nondominant arm?

A. I think the majority of us that's true. Certainly it would be for you and for me -- oh, my goodness, court reporter. I don't know, maybe she could do both of them. I don't know. But most people, we're bothered more if our dominant arm is injured rather than our nondominant arm, yes.

Q. In fact, on direct you did indicate that Mr. Merritt had an impingement of the shoulder, right?

A. Absolutely.

Q. And I believe you also indicated on direct that trauma can cause an impingement of the right

shoulder?
A. It can certainly be a contributor to development of impingement, sure.
Q. Okay. You stated also on direct that Mr. Merritt did not see Dr. Mackel for a period of time, isn't that right?
A. Two different visits. Two different spans of time, '98 to 2000, 2000 to 2001. One visit in 32 months.
Q. Yet you have not seen any medical records which indicate that Mr. Merritt sustained any additional trauma to his right shoulder since the car accident?
A. I'm pretty certain that he had no other injury. Certainly didn't tell me anything about an injury. Again, there's nothing in Dr. Mackel's record about an injury. I don't think there is any doubt in my mind that there was only the two injuries, one in January 1998 and the second at the time of this May 1998 car accident.
Q. And no records indicate any work related injuries?
A. Other than the January 1998, yeah.
Q. Okay. You were talking about the scrubbing machine that you've seen?

A. That's what he told me, yeah.
Q. Yeah. You said that you've seen them at your old, at Mount Sinai when Mount Sinai was open?
A. Right. Right. They used to use that down on the first floor a lot, yeah.
Q. And you've described sort of this machine?
A. I think we have all seen them, anyone that visits a big building. It's a big round disc like equipment with usually a stainless steel top and it's got this long handle, kind of shaped a little bit like a lawn mower except it's round and then what happens, you turn it on, that big disc goes around and around and you have to use the strength of your arm to keep it, it flies away from you like that and that's what Mr. Merritt complained to me about when I saw him in August 2000 that was giving him a lot of trouble with his shoulder.
Q. Have you ever worked one of these machines?
A. Probably a little bit. I think we rented one when I was young and foolish and I tried a wood floor to try to sand off the old covering like that. Yeah. It's hard. I think I did once. It may have not been a super big machine. I don't know. The kind you rent might not have been as

big as the one that Mr. Merritt was using.

Q. Do you know how this machine works? Do you know any of the gadgets or anything or what propels it?

A. Well, it's an electric motor. Again, it's like your vacuum cleaner except that it runs a huge round disc in the bottom of it. You can either make that disc into a scrubber type of machine like washing scrubber or you can make it into a sander. You can make it into a buffer.

What Mount Sinai would do, they would kind of wash it. Then they would take it to buffer and they'd shine that whole surface up on the tiles to begin with like that.

So there's several different types of bottom parts that you fit in to make it either a scrubber, like a brush; a buffer, like a smooth rag that's got a smooth surface; or a sander that's like a great big piece of sand paper.

Q. Do you know how much it weighs?

A. Heavy. I can only remember dragging it up our back steps one time and that's the one I just rented, but I would say that it's got to be as much as a big television, 27 inch television set. I bet you it weighs in the region of 75, 80, 90

pounds.

Q. Does it have wheels?

A. The ones that I saw had like two wheels in the back and you can tilt it backward so that you can kind of push it down from one place to the other. I just remember the two wheels in the back.

See, I'm not an expert. Ladies and gentlemen of the jury, I'm not an expert on floor scrubbers. I'm mean, I'm asked questions. I have used it, but I don't know if I've used the kind that Mr. Merritt used. I used the type that you can rent, take home and tried to sand off a little small floor.

Q. So you don't know the kind of scrubbing machine that Danny Merritt used?

A. No, I do not.

Q. And he didn't describe for you the kind of scrubbing machine --

A. Well, he said it was commercial he used at the -- I thought it was the university. I guess it might have been the hospital. I'm not sure. He called it Case Western Reserve University. I'm not sure it's the hospital or the college he was working at, but they have hallways. I certainly spent enough time in those institutions. I went

to college there and I taught at the medical school, seen patients in Lakeside, Babies and Children's, so I know their floors there.

Q. If you're going to say that this scrubbing machine produced injury or aggravated a condition for Mr. Merritt, wouldn't be important to know the particulars of the specific machine Mr. Merritt used and the physical movements that it made necessary to --

A. Well, I know what the movements are, what you have to do as a human being. I've seen lots of those. I think the ladies and gentlemen of the jury will recognize that. I don't care what machine he had and exactly what make it was. He told me that he had to go back and forth like this and that was that side-to-side movement that was bothering him.

There may be other forms of scrubbing machines, but the one that he was talking about, he said he had to kind of move back and forth and that was causing a strain because of the power that the machine was exerting against the floor. I don't know anything more about it than that.

Q. Okay. But don't you think that would be important to know a little bit more about it as

to how much it weighs, that type of a thing?
A. Not really. You're not lifting it up. It's like I can take a snow blower at my age and push it down the driveway even if it weighs 75 pounds. I'm not going to lift it up. I'm just pushing it.
Q. Okay. As a treating physician you've had a patients of your own who've come to you for shoulder injury, correct?
A. Oh, very commonly.
Q. You've even referred them to physical therapy?
A. Sure.
Q. To help them with their pain?
A. Oh, sure.
Q. And sometimes even after therapy the problem continues?
A. Oh, it can. It can. There is no treatment that is 100 percent in any form. Surgery is not 100 percent. Therapy is not 100 percent. Prescription medicine is not 100 percent, but you're absolutely correct it may not always cure everything just by going to therapy.
Q. Under those circumstances with your patients you would explore other treatment options?
A. Yeah. I would kind of find the quality and the

quantity or severity of the continuing symptoms. A lot of times therapy is the beginning of a continuous every day exercise program that you have to do for the next six months. Therapy sometimes is the kind of like the kick-off of something that you have to do at home. You can't just do it in therapy. But if things get worse and if they don't get better, we must explore other things, sure.

Q. And other things would be like pain injections, that type of a thing?

A. Localized things like anterior shoulder tendonitis, impingement, tendonitis causes when the tendon is impinged between two bones and you get an inflammation. That's called tendonitis. It could be called bursitis because there is a bursas surrounding the tendon. And another step would be prescribe an antiinflammatory medicine.

Antiinflammatory medicines, for instance, are Advil or Aleve. Some of the newer ones are called Vioxx and Celebrex. If that doesn't work, it is almost diagnostically helpful to get a little needle under local anesthesia, inject the front of the shoulder, which Dr. Mackel did, but he did it in January, I think, for the first

accident, not the second one. I'm not sure. I'm not sure he ever did it in the second one. I mean your accident.

And then if that doesn't work, then you can go on to get more diagnostic studies, one of which is called an MRI scan. MRI scan does show the rotator cuff area very well as well as showing the bones, the joints and the joint surface.

Q. And then what would be another option if all those items didn't work?

A. Next option would be to take a look at it, which means doing arthroscopic surgery.

Q. Okay. And you would explain to your patients the risks of surgery?

A. Right. There are risks to any surgery because of the anesthetic is one problem. Number two, any surgery that invades the portion of the body gives access to potential of getting an infection, bleeding, things of that sort. Yeah, we have to go through that. Sure.

Q. What are some of the risks? You mentioned bleeding.

A. Anesthesia problems, reactions, cardiac problems, things of that sort, local problems. In the

shoulder just with arthroscopy, arthroscopy is really done, you can really do it through two portals, front and back, sometimes you use a third one, which means two little stab wounds, that need one stitch each, that within one year you're hard pressed to see.

So it's not really a big operation, but the biggest risks that you kind of run into is bleeding within the joint because you're doing everything within a small visual telescopic condition in the joint. You should see it, but you can't always stop it. But people get bleeding afterwards, you know, swelling.

You can get an infection. You can get a fluid leak from the inside of the joint and basically you get almost an inflammatory reaction. It's not an infection, but it just stirs up inflammation that gives you problems.

I think the biggest, two biggest things that you kind of worry about, I worry about, would be, is joint bleeding and infection. Other things can happen.

By manipulating the shoulder it's potentially causing some nerve injury. There are nerves around the shoulder that can be affected by

moving the shoulder and turning it into position to see inside the joint with an arthroscope.

Those are basically the problems, things that distally people that are susceptible to other problems can get blood clots, but that usually affects the leg, not the shoulder.

Q. You would sometimes even recommend that people think about the option of having surgery before just jumping right in and operating?

A. You bet.

Q. So you allow them some time to consider it, right?

A. Right. Not always. I've seen people that have really have very acute and progressive condition that you got to jump on right away, otherwise, it's too late, but this is not the kind of thing that he has.

Q. Or any of your patients who would go through the progression of physical therapy, injections and that type of a thing, so those people you wouldn't force them to jump on this?

A. Right. Don't get the wrong idea. It's my particular way of doing things, but there's certainly a teaching that says don't go through and waste your money and time on getting scans,

getting shots and everything, let's go right away and take a look at this instantly. Seems to be a bit aggressive, but it has been taught in some quarter.

Q. And Mr. Merritt didn't do that, right?

A. Dr. Mackel doesn't do that. I know him too well.

Q. Some people even before having the option of surgery they would go home and try to work through the pain without having to go that extra necessary step?

A. That's kind of true with almost everything, certainly maybe more so with the spine. Someone tells you you have a bad disc, I don't think you really want any spine surgery the next day.

And it can be true with the knee, although sometimes the knee gives you a problem that your knee locks and you can't move and you can't put weight on it, which is difficult in a human being.

The shoulder is a little different. We don't stand and walk on our shoulder. It's not a weight bearing joint. We have another arm. We got to reach for something, I just really can't do this, I could always reach across. You know, I don't like it, but I could do it.

Q. Sure.
A. And so you have a little bit more time in the shoulder.
Q. And often times, you know, with some of these patients the pain wouldn't go away and they would come back after thinking about it and then have surgery, correct?
A. Right.
Q. Given the condition of Mr. Merritt's shoulder, did Mr. Merritt need the surgery?
A. I think it was a good option. I think it was a good choice. And according to the early results, I don't have the records that go all the way out long time after the surgery, but certainly the early indications were it was very successful.

MR. YOUNG: Thank you, Doctor. I have no further questions.

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FURTHER DIRECT EXAMINATION OF

ROBERT D. ZAAS, M.D.

BY MR. KENNEALLY:

Q. Doctor, you testified that Mr. Merritt treated with Dr. Mackel from shortly after the accident in May until sometime in August?
A. Right, from five days after the accident. So

August 26th, 1998, so we're talking May, June, July, August, three and a half months or so, yeah.

Q. If you refer to your August 9th report, Doctor specifically page three, the top paragraph, the sentence that begins on January 3, 2000, first paragraph --

A. On January 3, 2000.

Q. Yeah. What was the reason why Mr. Merritt went back to see Dr. Mackel on January 3, 2000 after not having seen him for 17 months?

MR. YOUNG: Objection.

A. Again, that is, this is based on, I'm going to answer this based on what is written in Dr. Mackel's records. Mr. Merritt didn't tell me that, exactly what happened at any time. He sort of said that I had the car accident and since then I've had trouble with my shoulder. He wasn't real specific about how often he went back and why he had to go back each visit.

But according to Mr. Mackel, on January 3, 2000 Mr. Merritt complained that his right shoulder was now aggravated over the past month and a half and that he had some limitation of motion and function in his right shoulder.

Q. And from your knowledge of this case, is it your understanding that during that period of time Mr. Merritt was employed in that capacity with either Euclid General Hospital or Huron Road, or whatever the hospital was, doing the cleaning type work that you told us about?

MR. YOUNG: Objection.

A. Right. As a matter of fact, he didn't tell me he lost any work time. He didn't tell me. I don't know if he did or not, but there is nothing in the record that shows he missed any work time. And my understanding was that he was working as a supervisor for the City of Cleveland and he had these other jobs, either Case Western Reserve and/or at Euclid General, but I can't tell you more about that, the exact detail.

MR. YOUNG: More to strike.

MR. YOUNG: Thank you, Doctor. That's all I have.

VIDEO OPERATOR: Doctor, you have the right to review your videotape deposition in its entirety or you may waive that right.

THE WITNESS: I will waive viewing the video. I will even waive reading the

transcript.

VIDEO OPERATOR: And may we have a stipulation between counsel that Mirror Image will retain custody of the original tape to play back at time of trial?

MR. KENNEALLY: Sure.

MR. YOUNG: Yes.

VIDEO OPERATOR: Thank you. We're off the record.

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(Off the record.)

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MS. McCARTHY: We have a stipulation, Terry, that the medical records are authentic and admissible to the time of trial?

MR. KENNEALLY: Sure.

MS. McCARTHY: What about the wage loss records? Do I have to call in somebody from his employment or --

MR. KENNEALLY: When was that wage loss incurred?

MR. YOUNG: We might have to discuss this one.

MS. McCARTHY: To the extent this

is the exhibit --

MR. YOUNG: I don't know if there is going to be additional.

MS. McCARTHY: Right. But to the extent that that one is accurate.

MR. KENNEALLY: So this would have been during the period of time he had the surgery, right?

MS. McCARTHY: Right.

MR. YOUNG: I think there was two weeks after the accident as well.

MR. KENNEALLY: The two weeks after the accident I don't have a problem with because it's consistent with our position in this case, that it's a self-limiting injury that was a problem from May of 1998 until, as Dr. Zaas testified, August.

So for any lost wages that were incurred during that period of time you don't need to bring anybody in from my standpoint. But with this, this is getting into an area that is at issue in the case with respect to whether these lost wages are related to the accident. So I'm not

going to stipulate to this letter.

MS. McCARTHY: I don't mean to stipulate to the causation of the lost time. What I'm asking you to stipulate to is that the records is authentic, that's what he was making and it's admissible. The jury can accept or reject the contents of it. But for me to call in somebody from his employer seems ridiculous really if we're not arguing over the money or the fact that he was out of work. Just why he was out of work. I mean they're not going to be able to tell us why he was out of work, just that he was out of work.

MR. KENNEDY: Let me think you about. I'm not trying to make this more arduous for you than it is, and I don't normally do that. I'm willing to stipulate to the authenticity of the records.

I'm willing to stipulate to the work that he missed during the period of time that we feel he's entitled to compensation, but let me think about the other, to answer you directly. We still got some time.

MS. McCARTHY: For housekeeping purposes, Terry, the doctor was not properly qualified as an expert. You can ask him about his license to practice. If you want to put it on the record, put it on the record, so I don't have a problem later.

MR. KENNEALLY: That Dr. Zaas is licensed to practice medicine?

MS. McCARTHY: *Go* ahead and ask him.

THE WITNESS: What if I offer a CV? Does that help?

MR. KENNEALLY: Let's go back on the record.

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FURTHER DIRECT EXAMINATION OF

ROBERT D. ZAAS, M.D.

BY MR. KENNEALLY:

Q. We're back on the record, Doctor. Just one, as it's been described housekeeping, question that I don't think is necessary, but just to cover the record.

Are you a duly licensed physician and surgeon in the State of Ohio?

A. I am.
Q. When did you obtain your license?
A. 1958. You can see there in the license up there one year after my internship.
Q. And I have in front of me your State Medical Board of Ohio card that you just handed to me. It expires what date?
A. I don't know. I haven't looked at it yet. This is good until October 1, 2003 before I get renewed again. Every couple years they renew your active license.

MR. KENNEALLY: Thank you, Doctor. That's all I have.

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(The reading and signing of the deposition was expressly waived by the witness and by stipulation of counsel.)

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C E R T I F I C A T E

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

I, Rachel M. Gentile, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named witness was by me, before the giving of their deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulations of counsel; that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney or financially interested in this action; that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 12th day of April, A.D. 2002.

Rachel M Gentile

Rachel M. Gentile, Notary Public, State of Ohio
1750 Midland Building, Cleveland, Ohio 44115
My commission expires November 7, 2002

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