

1 IN THE COURT OF COMMON PLEAS

2 CUYAHOGA COUNTY, OHIO

3 DANNY MERRITT,

4 Plaintiff,

5 - vs -

JUDGE McMONAGLE

CASE NO. 401357

6 STATE FARM INSURANCE
7 COMPANY,

8 Defendant.

9 - - - -

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

19 - - - -

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On behalf of the Defendant.

ALSO PRESENT:

Paul Tedrick, Video Operator

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1 VIDEO OPERATOR: We are on the record.

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

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

9 BY MR. KENNEALLY:

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

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

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

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

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

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

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

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

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

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

1 a naval hospital.

2 I did mostly orthopedic surgery at that time,
3 but also general surgery. I was surgeon for the
4 7th Fleet. That was kind of it at that time.

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

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

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

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

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

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

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

6 A. I do.

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

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

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

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

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

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

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

22 Q. When were you board certified?

23 A. Let me see, 1968.

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

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

3 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

1 9, 2000 examination.

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

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

10 A. Right.

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

13 A. Yes.

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

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

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

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

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

1 perform this examination, review records and
2 render an opinion.

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

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

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

11 A. Yes.

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

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

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

19 A. Yes, he gave me a history.

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

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

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

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

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

1 A. He told me the car he was driving on May 13,
2 1998, which now is approaching four years now,
3 right, right, we're in April 2002, that he was
4 broadsided from the passenger side, passenger
5 front by another car in Cleveland. Then the
6 other car apparently went through a stop sign.
7 He told me he tried to brace himself and that
8 after the accident he had pain in his left side,
9 his hip, but mainly his right shoulder.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 A. I did have some records, yes.

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

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

19 He had some physical therapy in May, June and
20 July of 1998. So that's the, two months after
21 the accident and then he had been seen by Dr.
22 Audley Mackel. At that time my records show from
23 May 18, 1998 to January 3, 2000, but by August
24 1998 Dr. Mackel stated that the shoulder was
25 better and there was no follow up treatment after

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

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

6 A. Seventeen months, you know.

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

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

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

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

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

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

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

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

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

25 Type II acromion means a build-up of bone on

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

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

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

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

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

25 Conditions, people in the room here, some of

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

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

9 A. The next batch of records I received on May 30,
10 2001, also from Dr. Mackel, included the records
11 from January 1998 and February 1998 , that would
12 be three months before this accident, and that
13 was because of an injury that Mr. Merritt
14 sustained when he was lifting boxes when he was
15 working at Meridia Huron Hospital on January 9 ,
16 1998.

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

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

1 He treated Mr. Merritt on one occasion with a
2 shot of cortizone to his shoulder. On February
3 9, 1998, which is, what, three months before this
4 accident we're talking about, Mr. Merritt was
5 still complaining of shoulder pain.

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

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

13 So then the next record that I received from
14 Dr. Mackel were duplicates that started on May
15 18, 1998 five days after this accident and then
16 there was another examination, which I was not
17 aware of.

18 After August 24, 1998 Mr. Merritt was not
19 seen by Dr. Mackel again until January 3, 2000.
20 That's 17 months. And then he was not seen again
21 by Dr. Mackel until April 26th, 2001, that's 15
22 more months. So in 32 months, between August 24,
23 1998 and April 26th, 2001, he only had one visit
24 with Dr. Mackel that I'm aware of.

25 There is reference by Dr. Mackel, Dr. Mackel

1 stated in his report that Mr. Merritt told him
2 that he had seen another doctor after January
3 2000 and had received numerous cortizone
4 injections for his shoulder symptoms. But I'm
5 not sure what that means because I didn't receive
6 any records of that.

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

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

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

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

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

1 mentioned before, including your 35 plus years of
2 experience as an orthopedic physician, as to
3 what, if any, injury Mr. Merritt suffered to his
4 right shoulder in the car accident of May 13,
5 1998?

6 A. I do have an opinion.

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

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

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

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

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

24 A. I do have an opinion.

25 Q. What is your opinion in that regard?

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

6 Q. What is the basis for that opinion?

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

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

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

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

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

1 kind of reference as to other doctors and shots,
2 but unless you can show me other records, my
3 opinion remains firm that Dr. Mackel was the only
4 treating doctor for the shoulder and the
5 treatment that happened afterwards sporadically
6 17 months later and then 15 months after that
7 were for flare-ups of a shoulder condition that
8 was a preexisting condition that would relate to
9 what Mr. Merritt was doing every day, natural
10 aging flare-ups of a natural condition, which is
11 known to happen even without irritation and
12 aggravation.

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

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

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

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

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

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

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

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

3 MR. YOUNG: Objection.

4 A. I do have an opinion.

5 Q. What's that opinion, Doctor?

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

12 Q. And your basis for that opinion, Doctor?

13 MR. YOUNG: Objection.

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

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

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

7 MR. YOUNG: Objection.

8 A. I have an opinion.

9 Q. What's that opinion, Doctor?

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

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

23 MR. KENNEALLY: Thank you, Dr.

24 Zaas. That's all I have.

25

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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?

1 A. I don't know anything about State Farm. I know
2 Mr. Kenneally. There's nothing I have here about
3 any company. Mr. Kenneally did ask me to render
4 the opinion.

5 Q. You charged \$250 per hour?

6 A. Yes, I do.

7 Q. Okay. And State Farm paid those bills, isn't
8 that right?

9 A. I guess they did. I didn't know that until I
10 guess you're the one who asked for this today and
11 we printed out a bill here which they paid for,
12 yes.

13 Q. What you're talking about is your bill?

14 A. Uh-huh.

15 Q. So therefore, this was for Mr. Kenneally and
16 State Farm, right?

17 A. I only sent it to Mr. Kenneally. Where he sent
18 it is his business. I only sent it to him. I
19 don't know where he sent it.

20 Q. You would agree also that you set aside about one
21 appointment every Tuesday for these IMEs?

22 A. Well, that's what I usually do. It's either
23 Tuesday at 10:00 and if that doesn't come
24 through, I make time at 3:30 on Wednesday. It
25 depends. Sometimes I have something previously

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

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

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

15 A. Oh, they're all, almost all of them are. I think
16 -- for the jury's sake, I don't know if they know
17 what we're talking about. Every week I see about
18 75, 80 patients, say 75. Seventy-four of those
19 will be patients that come here for treatment or
20 expectations of treatment, one will be for an
21 independent exam, which I do exactly the same
22 examination, but won't render treatment like
23 that. So I think almost all of the ones that I
24 have seen now for this independent has been with
25 what you call defense, not for direct treatment.

1 Q. Okay. What I mean for defense is for the
2 defendant in cases of litigation?

3 A. Again, probably 25 or so a week -- a year,
4 because of the others that I have seen for what
5 we call independent exams maybe for, oh, work
6 related things, second opinions for surgery,
7 things of that type.

8 Q. In addition to being paid for the independent
9 exam, you get paid to review the records and
10 write the four reports that Mr. Kenneally talked
11 about?

12 A. Right. I charge by the hour. It doesn't really
13 make any difference if I see a person for 30
14 minutes and spend four hours on the records or
15 see that person for one hour and spend three
16 hours on the records. My time is my time and
17 that's basically what I do for a living.

18 Q. In addition, Mr. Kenneally is paying for you
19 today to testify, isn't that correct?

20 A. Right. All doctors, and Dr. Mackel will do the
21 same thing, because I know him very well and we
22 have discussed this in general, not over this
23 case, will charge by the hour for time away from
24 their practice during court testimony or in this
25 case, testimony through a deposition media.

1 Q. And you already testified on direct that you're
2 being paid about \$1,300 or you've been paid
3 \$1,300 already?

4 A. Right. Over a two year period of time been paid
5 on four different occasions and it's \$600, \$250,
6 \$250, \$250 -- two, four, six, \$1,250.

7 MR. KENNEALLY: \$1,350.

8 A. \$1,350, right.

9 Q. And that doesn't include your testimony for
10 today?

11 A. No. Depending what time we spend.

12 Q. You indicated that the records that you reviewed
13 show Mr. Merritt had a preexisting arthritic
14 condition?

15 A. Right. Some arthritis, but also impingement,
16 yes.

17 Q. In your report you indicate that Mr. Merritt's
18 arthritic changes are long standing?

19 A. Yes.

20 Q. And you even told Mr. Kenneally on direct what
21 your definition of long standing is?

22 A. Yes.

23 Q. And you said that it could be, I think you said
24 on direct it could be several years before this
25 accident?

1 A. When the condition was developing?

2 Q. Yes.

3 A. Well, I think the part of it, the acromion, which
4 causes the impingement, is developmental. He's
5 had that all his adult life and it was getting
6 worse because you build up extra calcium the
7 older you are and the more that you strain and
8 stretch your joint. So part of it was there for
9 most of his adult life.

10 Q. And I believe you said that that condition, and
11 this was in your report, clearly predates our
12 accident?

13 A. Correct.

14 Q. Yet, despite the long standing degeneration,
15 Mr. Merritt functioned without pain prior to the
16 trauma?

17 A. Well, he did up until January of 1998 when he was
18 working at Huron Road and he injured his shoulder
19 lifting. And apparently, after about a month or
20 six weeks he was better, but he may have had a
21 little bit of ongoing symptoms even up to the May
22 1998 accident. Before that, before January 1998
23 I have no indication. He told me he was not
24 having any problems before January 1998.

25 Q. You would also agree that an injured person with

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

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

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

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

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

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

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

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

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

4 Q. Okay.

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

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

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

16 A. I agree.

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

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

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

1 essentially not painful condition, to get
2 painful?

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

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

8 A. Oh, it sure can. Sure.

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

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

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

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

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

4 A. At Euclid General, yeah.

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

6 A. Correct.

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

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

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

12 A. Correct.

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

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

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

20 A. Right.

21 Q. Or any treatments for physical therapy or
22 anything?

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

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

3 Q. But you agree that Dr. Mackel's records document
4 that Mr. Merritt's work related preexisting right
5 shoulder injury had improved by February 9th,
6 1998?

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

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

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

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

21 A. That's correct.

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

24 A. Yes.

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

1 arm?

2 A. Yes. That's a good point. He was right handed.
3 He is right handed, and he injured his right
4 shoulder in January 1998 and there is no question
5 that he injured his right shoulder on May 13,
6 1998 at the time of this accident. He was
7 dominant on that side, yes.

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

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

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

23 A. Absolutely.

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

1 shoulder?

2 A. It can certainly be a contributor to development
3 of impingement, sure.

4 Q. Okay. You stated also on direct that Mr. Merritt
5 did not see Dr. Mackel for a period of time,
6 isn't that right?

7 A. Two different visits. Two different spans of
8 time, '98 to 2000, 2000 to 2001. One visit in 32
9 months.

10 Q. Yet you have not seen any medical records which
11 indicate that Mr. Merritt sustained any
12 additional trauma to his right shoulder since the
13 car accident?

14 A. I'm pretty certain that he had no other injury.
15 Certainly didn't tell me anything about an
16 injury. Again, there's nothing in Dr. Mackel's
17 record about an injury. I don't think there is
18 any doubt in my mind that there was only the two
19 injuries, one in January 1998 and the second at
20 the time of this May 1998 car accident.

21 Q. And no records indicate any work related
22 injuries?

23 A. Other than the January 1998, yeah.

24 Q. Okay. You were talking about the scrubbing
25 machine that you've seen?

1 A. That's what he told me, yeah.

2 Q. Yeah. You said that you've seen them at your
3 old, at Mount Sinai when Mount Sinai was open?

4 A. Right. Right. They used to use that down on the
5 first floor a lot, yeah.

6 Q. And you've described sort of this machine?

7 A. I think we have all seen them, anyone that visits
8 a big building. It's a big round disc like
9 equipment with usually a stainless steel top and
10 it's got this long handle, kind of shaped a
11 little bit like a lawn mower except it's round
12 and then what happens, you turn it on, that big
13 disc goes around and around and you have to use
14 the strength of your arm to keep it, it flies
15 away from you like that and that's what
16 Mr. Merritt complained to me about when I saw him
17 in August 2000 that was giving him a lot of
18 trouble with his shoulder.

19 Q. Have you ever worked one of these machines?

20 A. Probably a little bit. I think we rented one
21 when I was young and foolish and I tried a wood
22 floor to try to sand off the old covering like
23 that. Yeah. It's hard. I think I did once. It
24 may have not been a super big machine. I don't
25 know. The kind you rent might not have been as

1 big as the one that Mr. Merritt was using.

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

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

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

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

20 Q. Do you know how much it weighs?

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

1 pounds.

2 Q. Does it have wheels?

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

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

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

16 A. No, I do not.

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

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

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

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

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

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

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

1 to how much it weighs, that type of a thing?

2 A. Not really. You're not lifting it up. It's like
3 I can take a snow blower at my age and push it
4 down the driveway even if it weighs 75 pounds.
5 I'm not going to lift it up. I'm just pushing
6 it.

7 Q. Okay. As a treating physician you've had
8 patients of your own who've come to you for
9 shoulder injury, correct?

10 A. Oh, very commonly.

11 Q. You've even referred them to physical therapy?

12 A. Sure.

13 Q. To help them with their pain?

14 A. Oh, sure.

15 Q. And sometimes even after therapy the problem
16 continues?

17 A. Oh, it can. It can. There is no treatment that
18 is 100 percent in any form. Surgery is not 100
19 percent. Therapy is not 100 percent.

20 Prescription medicine is not 100 percent, but
21 you're absolutely correct it may not always cure
22 everything just by going to therapy.

23 Q. Under those circumstances with your patients you
24 would explore other treatment options?

25 A. Yeah. I would kind of find the quality and the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 A. You bet.

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

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

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

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

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

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

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

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

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

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

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

1 Q. Sure.

2 A. And so you have a little bit more time in the
3 shoulder.

4 Q. And often times, you know, with some of these
5 patients the pain wouldn't go away and they would
6 come back after thinking about it and then have
7 surgery, correct?

8 A. Right.

9 Q. Given the condition of Mr. Merritt's shoulder,
10 did Mr. Merritt need the surgery?

11 A. I think it was a good option. I think it was a
12 good choice. And according to the early results,
13 I don't have the records that go all the way out
14 long time after the surgery, but certainly the
15 early indications were it was very successful.

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

18 - - - -

19 .FURTHER DIRECT EXAMINATION OF

20 ROBERT D. ZAAS, M.D.

21 BY MR. KENNEALLY:

22 Q. Doctor, you testified that Mr. Merritt treated
23 with Dr. Mackel from shortly after the accident
24 in May until sometime in August?

25 A. Right, from five days after the accident. So

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

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

8 A. On January 3, 2000.

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

12 MR. YOUNG: Objection.

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

21 But according to Mr. Mackel, on January 3,
22 2000 Mr. Merritt complained that his right
23 shoulder was now aggravated over the past month
24 and a half and that he had some limitation of
25 motion and function in his right shoulder.

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

7 MR. YOUNG: Objection.

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

17 MR. YOUNG: More to strike.

18 MR. YOUNG: Thank you, Doctor.

19 That's all I have.

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

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

1 transcript.

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

6 MR. KENNEALLY: Sure.

7 MR. YOUNG: Yes.

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

10 - - - -

11 (Off the record.)

12 - - - -

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

17 MR. KENNEALLY: Sure.

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

21 MR. KENNEALLY: When was that wage
22 loss incurred?

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

25 MS. McCARTHY: To the extent this

1 is the exhibit --

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

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

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

9 MS. McCARTHY: Right.

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

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

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

going to stipulate to this letter.

MS MCCARTHY: I won't mean to stipulate to the causation of the lost time. What I'm asking you to stipulate to is that the record 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.

M KENNEDY: Let me think you about. I'm not trying to make this more arduous for you than it is, and I won'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 ^a b^rot some time.

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

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

10 MS. McCARTHY: Go ahead and ask
11 him.

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

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

16 - - - -

17 FURTHER DIRECT EXAMINATION OF

18 ROBERT D. ZAAS, M.D.

19 BY MR. KENNEALLY:

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

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

1 A. I am.

2 Q. When did you obtain your license?

3 A. 1958. You can see there in the license up there
4 one year after my internship.

5 Q. And I have in front of me your State Medical
6 Board of Ohio card that you just handed to me.
7 It expires what date?

8 A. I don't know. I haven't looked at it yet. This
9 is good until October 1, 2003 before I get
10 renewed again. Every couple years they renew
11 your active license.

12 MR. KENNEALLY: Thank you, Doctor.

13 That's all I have.

14

15

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16

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

19

- - - -

20

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1
2
3 C E R T I F I C A T E

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

6
7 I, Rachel M. Gentile, a Notary Public
8 within and for the State of Ohio, authorized to
9 administer oaths and to take and certify
10 depositions, do hereby certify that the
11 above-named witness was by me, before the giving
12 of their deposition, first duly sworn to testify
13 the truth, the whole truth, and nothing but the
14 truth; that the deposition as above-set forth was
15 reduced to writing by me by means of stenotypy,
16 and was later transcribed into typewriting under
17 my direction; that this is a true record of the
18 testimony given by the witness; that said
19 deposition was taken at the aforementioned time,
20 date and place, pursuant to notice or
21 stipulations of counsel; that I am not a relative
22 or employee or attorney of any of the parties, or
23 a relative or employee of such attorney or
24 financially interested in this action; that I am
25 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.

20
21 Rachel M. Gentile
22 Rachel M. Gentile, Notary Public, State of Ohio
23 1750 Midland Building, Cleveland, Ohio 44115
24 My commission expires November 7, 2002
25

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