VIRGINIA: IN THE CIRCUIT COURT FOR COUNTY OF YORK

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| JULIA RININGER | ) | |
| V | ) | CL06000495-00 |
| TIMOTHY SCHMIDT | ) | |

De Bene Esse Deposition of DR. LOEL PAYNE, taken before Virginia M. Giles, a Notary Public for the State of Virginia at Large, in the office of Dr. Loel Payne, 901 Enterprise Parkway, Suite 900, Hampton, Virginia, on September 2, 2010, at 3:30, pursuant to Notice to take De Bene Esse Deposition and agreement of counsel in the above-titled cause, pending in the Circuit Court for the County of York, Yorktown, Virginia.

VIRGINIA M. GILES
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I N D E X


| PLAINTIFF'S WITNESS | DIRECT | CROSS | REDIRECT |
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| LOEL PAYNE, M.D. ---------- | 4 | 21 | 38 |

1
2 LOEL PAYNE, M.D.,
3 being duly sworn, called as a witness on behalf of the
4 Plaintiff, testified as follows:
5
6 DIRECT EXAMINATION
7 BY MR. LEWIS:
8 Q Good afternoon, Doctor. For
9 our jury, would you state your full name, please.
10 A Yes. Loel Zachary Payne.
11 Q You are a medical doctor?
12 A I am.
13 Q What is your area of specialty
14 within the practice of medicine?
15 A Orthopedic surgery.
16 Q And would you tell us, Doctor,
17 what your formal educational background is, that
18 qualifies you to practice orthopedic surgery, starting
19 with your undergraduate college degree.
20 A I went to undergraduate at
21 Duke University, to medical school at the University of
22 North Carolina. I did an orthopedic training residency
23 at Yale University. And then an additional year
24 fellowship training in shoulder surgery at the Hospital
25 for Special Surgery in New York.

1 Q When did you complete that
2 final year of specialized training regarding shoulders?
3 A 1995.
4 Q And when did you begin in the
5 private practice of medicine, Doctor?
6 A The same year.
7 Q 1995?
8 A 1995.
9 Q You presently practice in
10 Hampton -- or your office where we are located is in
11 Hampton, Virginia?
12 A That's correct.
13 Q How long have you been
14 practicing medicine in Virginia?
15 A Fifteen years.
16 Q And for those of us who may
17 not have a complete understanding, would you describe
18 for us what the specialty of orthopedic surgery directs
19 itself to, specifically as it pertains to your practice.
20 A Orthopedic surgery deals with
21 problems of bones, joints, muscles, tendons. In
22 particular, I do mostly shoulder, so I deal a lot with
23 injuries to the shoulder joint and to the muscles around
24 the shoulder.
25 Q And have you been -- had a

1 special interest in shoulder injuries since you
2 completed your formal medical training?
3 A Yes.
4 Q And that continues through
5 today?
6 A It does.
7 Q Your professional address is
8 what, Dr. Payne?
9 A It's 9 -- 900 -- I never get
10 asked this much. 900 Enterprise Parkway, Suite 901.
11 Q That's in Hampton?
12 A Yes.
13 Q Are you licensed to practice
14 medicine by the Commonwealth of Virginia?
15 A Yes, I am.
16 Q Dr. Payne, are you also board
17 certified by the American Academy of Orthopaedic
18 Surgeons?
19 A The board certification is the
20 American Board of Orthopaedic Surgeons.
21 Q I should have thought of that
22 myself. Would you share with our jury what board
23 certification is and what you had to do to obtain it.
24 A Board certification is a
25 series of tests that are nationally administered to

1 maintain a level of competency within the area of
2 specialization, in this case orthopedic surgery. It
3 involves a written test, and within one to two years
4 after completion of your residency, a year or two later,
5 there's an oral test based on surgeries and patients
6 that you've treated.
7 Q And when were you certified by
8 that board?
9 A Initial certification would
10 have been 1997, I believe.
11 Q And you're still board
12 certified by that?
13 A I am.
14 MR. LEWIS: At this point I
15 would offer Dr. Payne as an expert witness in the field
16 of orthopedic surgery, qualified to render opinions as
17 it relates to that field of medical specialty and his
18 care and treatment of Julia Rininger.
19 MR. BOESTER: I agree.
20 BY MR. LEWIS:
21 Q Dr. Payne, do you know Julia
22 Rininger?
23 A Yes, I do.
24 Q How do you know her
25 originally?

1 A She -- I first met her in the
2 operating room at the Sentara Careplex Hospital where
3 she was a circulating nurse in the operating room where
4 I worked.
5 Q And so, as a circulating
6 nurse, you would get to meet her, talk to her, figure
7 out who she was?
8 A Yes.
9 Q Okay. Did there come a time,
10 Dr. Payne, when Julia came to see you as a patient?
11 A I first saw her as a patient
12 in this office December 13th, 2005.
13 Q And when she came to see you
14 on December 13th of 2005, did she tell you why she was
15 here?
16 A It was for pain in her right
17 shoulder.
18 Q And did she tell you how and
19 when that pain in her right shoulder started?
20 A She said that she had been
21 involved in a motor vehicle accident and that she began
22 developing shoulder discomfort following that.
23 Q Okay. Did she -- tell us
24 whether or not she offered any alternative explanations
25 to you as to what was causing her shoulder pain other

1 than an auto accident.
2 A No, she did not.
3 Q Okay. I want to take a little
4 bit of time going over your first visit, Dr. Payne.
5 Once you figured out why Julia was in your office, did
6 you perform a physical examination?
7 A I did.
8 Q Would you share with us the
9 pertinent findings that you appreciated when you
10 examined this young lady.
11 A She had full movement in her
12 shoulder. She was weaker on using the arm overhead.
13 There was some mild weakness on rotating it out to the
14 side. There was pain as her arm was brought into an
15 overhead position. There was some tenderness to
16 pressure or palpation, particularly around the front of
17 the shoulder and the region of the biceps tendon.
18 Q At that point, Doctor, did you
19 formulate at least an initial impression as to what was
20 going on with this lady?
21 A I thought at that time that
22 she had a probable rotator cuff tear and a probable tear
23 of the biceps tendon.
24 Q And what medical plan did you
25 and she formulate from her going forward from that first

1 visit on December 13th?

2 A I recommended that she have an

3 MRI obtained of the shoulder to determine if there was a

4 tear.

5 Q And for those of us who have

6 never had to endure an MRI, would you tell us what it is

7 and what it's intended to do for the diagnostician such

8 as yourself.

9 A An MRI is a type of x-ray or

10 radiology study that uses magnetic waves instead of

11 regular x-ray beams. It is used to diagnose primarily

12 soft tissue problems in the body, things that we can't

13 see on a regular x-ray such as bone. In the shoulder,

14 in particular, we use it to look for tears in the

15 tendons and ligaments, things, again, that we can't see

16 with a regular x-ray.

17 Q And did Ms. Rininger comply

18 with your request that she get an MRI?

19 A Yes, she did.

20 Q The record I'm looking at,

21 Doctor, looks like she got it two days later, December

22 15th, if your record shows. I don't know.

23 A Yes. That's correct, December

24 15th.

25 Q Okay. And did you evaluate

1 the MRI yourself?
2 A I did.
3 Q And is reading MRIs of the
4 shoulder something you have training in and experience
5 in doing?
6 A Yes, it is.
7 Q And would you share with us
8 what your relative findings were when you looked at
9 Julia's MRI.
10 A After reviewing the MRI, she
11 had a very large tear in the rotator cuff, such that the
12 end of the tendon had pulled away from where it was
13 supposed to attach by roughly an inch and a half or so.
14 Q Okay. Did you formulate an
15 opinion, Doctor, as to the relationship between the
16 findings you just shared with us that you made when you
17 examined Julia, and the findings you saw in the MRI?
18 Did they have any causal relationship?
19 A I was surprised to see that
20 the tear was so large. I expected a tear of the rotator
21 cuff. Normally, people who have such a large tear as
22 was seen on the MRI, have difficulty lifting their arm
23 up and their strength is severely diminished. My
24 initial physical exam findings of Ms. Rininger, she had
25 full movement, her strength was diminished, but only

1 about 20 percent. For such a large tear, I would have
2 expected it to have been greater than 50 percent.
3 Q And what do you make of the
4 difference between what you saw when you examined her
5 and what you would have expected to see given the MRI
6 findings?
7 A That she had good strength in
8 the other muscles around the shoulder that was able to
9 compensate for the lack of having a rotator cuff.
10 Q Were you able to, with the
11 benefit of the physical exam and the MRI, formulate an
12 opinion as to what was causing her pain?
13 A I felt that her pain was due
14 to the large tear in the rotator cuff. I noticed on the
15 MRI that she was starting at that time to show some very
16 early changes of arthritis as well that were setting in.
17 Q And did you -- for most of us,
18 arthritis is part of the aging process. How did her
19 arthritis -- in your opinion, how did her arthritis
20 relate to the rotator cuff tear that you saw?
21 A When people develop a very
22 large tear of the rotator cuff, there's nothing to hold
23 the ball in the socket and the ball will start to ride
24 out of the socket. And because of that abnormal
25 positioning of the ball, it will lead to arthritis.

1 Q Doctor, at my request, you
2 brought a model of the shoulder with you. And I was
3 wondering if I could get our videographer to kind of
4 zero in on it, and if you could use that model to show
5 us what the injuries were that you found and where. And
6 first, just give us a little mini anatomy lesson on what
7 we're looking at there.
8 A This is a model of a right
9 shoulder. So it would sit much like I'm positioning it
10 here, with the collarbone in the front. The shoulder
11 blade here, being in the back, and this will be the arm
12 that goes up and down. The arm is controlled deep by
13 four tendons that comprise the rotator cuff. There's
14 one in the front. There's two that are up on top and
15 then there's another, a fourth in the back. These
16 tendons are what allow the arm to be lifted, as well as
17 to rotate back and forth. Between the part of the
18 rotator cuff in the front and the two on top, is a
19 smaller tendon. That's the biceps tendon. That goes
20 down to the biceps muscle further down in the arm. The
21 ball of the shoulder, if we pull the rotator cuff back,
22 fits into a socket where it's able to rotate and to be
23 lifted up and down.
24 The findings of the MRI
25 indicated that she had torn both of the tendons that

1 attached along the top of the ball. It appeared from
2 the MRI, as well, that she had torn the biceps tendon.
3 There appeared to be a partial tear of the tendon in the
4 front. The tendon in the back was still intact. The
5 tendon of the rotator cuff is supposed to attach at the
6 edge of the bone where the red is being shown here. In
7 her case, the tendon was no longer attached there and
8 had pulled back to the level of the socket, which I
9 can't show as clearly on this model. But the end of the
10 tendon would be back here at the edge of the socket
11 instead of coming across the top of the ball and
12 attaching over here on this side. So that leaves a big
13 hole over the top of the ball where there's nothing
14 covering it. And without that covering, the ball is
15 going to ride up against this bony ledge of the shoulder
16 blade. And as it rubs on that bony ledge, that's what's
17 going to lead to the arthritis.
18 Q Doctor, Ms. Rininger saw you
19 numerous times. In fact, the records that I've got show
20 that she saw you into at least as late as November of
21 2008. Now, I'm not going to ask you to walk us through
22 every single office visit, but summarize for us the way
23 you took care of this lady during that time period,
24 starting with the, you know, the early attempts to
25 address her pain, and then where you ended up with her.

1 A Based on the findings of the
2 MRI when she came back to see me, I was surprised at the
3 severity of the tear, given her good movement and
4 relatively good strength. I did not feel at that time
5 that the tear was repairable.
6 Q Why not?
7 A Once arthritis has started to
8 set in with tears such as this, the tears have reached
9 the point where they're no longer fixable. When it
10 tears and such a large gap forms between the end of the
11 tendon and where it's supposed to attach, it scars into
12 that position and you can't pull it back over where it
13 needs to go to successfully repair it. So, therefore,
14 my recommendation was that we just continue to -- that
15 we continue to manage her with arthritis pain, accepting
16 that there was always going to be some weakness.
17 Q Okay. And what sorts of
18 treatment did you bring to bear for her benefit when she
19 would come into see you from time to time?
20 A The best treatment for that
21 type of arthritis pain is a cortisone shot.
22 Q And did you give her a number
23 of those?
24 A And she received a number of
25 those over time, which initially were helpful for the

1 pain. And as the arthritis gradually got a little
2 worse, the shots became less effective.
3 Q And did there come a time when
4 you had a conversation with Julia about a surgical
5 approach to this injury?
6 A Yes. As the shots became less
7 effective, she was hoping for something that was more
8 long-lasting. And then in that case, it is a partial
9 shoulder replacement to address the arthritis part of
10 it.
11 Q And Doctor, your chart looks
12 like you did that surgery on March the 7th, of 2007?
13 A That's correct.
14 Q Over at Sentara Careplex?
15 A Yes.
16 Q And if you think it would be
17 helpful to refer to the model, that's fine, but what I'd
18 like for you to do for all of us here today is just
19 describe the surgery that you performed and give us the
20 benefit of what you were trying to achieve by whatever
21 it is that you're about to explain for us.
22 A Okay. This model won't allow
23 the ball to ride up underneath the shoulder blade, as I
24 said before.
25 Q Yes, sir.

1 A But with that understanding,
2 here is, essentially, what it would look like as we went
3 into fix her shoulder. There's no rotator cuff. So
4 once we're down to the shoulder joint, you're looking
5 right at the top of the ball. And the top of the ball
6 here has became worn because it's rubbing on this bony
7 ledge. And that's the area of arthritis and that's
8 what's producing the pain. So, with the surgery that
9 she had, we replaced the ball, and even replaced part of
10 the bone over here, where the rotator cuff had normally
11 attached, with a metal ball.
12 Q Okay. And how do you do that?
13 A The ball portion is cut off.
14 The edge of the bone over here is cut off as well so
15 that it will be a nice, smooth metal ball all the way
16 around. There is a central portion that goes down the
17 center hollow part of the upper arm to help hold it in
18 position. It goes down, roughly, three or four inches.
19 So there's a central portion down in the center of the
20 bone. Attached to that is the metal ball. Then that is
21 fixed into position. Once that is resurfaced, it's now
22 a metal ball that's rubbing underneath this bony ledge
23 as the arm is raised up and down. So it gets rid of the
24 arthritis.
25 Q Other than the three-inch

1 protrusion you showed us that goes down into the arm to
2 help secure that ball, what else do you do to make sure
3 that it's in there securely?
4 A Often we'll cement it in
5 place.
6 Q And that is the surgery that
7 you performed on Ms. Rininger in March of '07?
8 A That's correct.
9 Q And would you tell us how she
10 did post-operatively for the times that you saw her.
11 A She recovered well. She was
12 able to get back her movement like she had prior to the
13 surgery, as expected. The shoulder, however, continued
14 to maintain the weakness that she had before, which is
15 what was expected because we're not able to repair the
16 rotator cuff, and that was her understanding going into
17 it. She still had some residual discomfort at times,
18 but in general, most of the arthritis pain had been
19 alleviated.
20 Q Doctor, as part of her
21 rehabilitation, was physical therapy also prescribed?
22 A Yes, it was.
23 Q And would you tell us, please,
24 sir, what physical therapy you thought would be helpful
25 for this lady and why.

1 A We work early on after the
2 surgery to help get movement back. So she's sent to
3 physical therapy for them to stretch her shoulder, to
4 also help her with some pain control so that she can
5 move the shoulder on her own. Then we gradually started
6 adding strength to try and get as much function back as
7 we possibly can.
8 Q Doctor, at some point towards
9 the end of your doctor/patient relationship with Julia,
10 your record indicates that you also did perform a
11 disability rating for her?
12 A Yes, I did.
13 Q And would you share with us
14 what that -- what a disability rating is and what her
15 rating was.
16 A A disability rating is an
17 impairment based on a book published by the American
18 Medical Association that uses various charts and tables
19 to determine the patient's disability or impairment, if
20 you will, based on things that you can measure. It's
21 not based on their pain. It's not based on things that
22 they can or can't do, necessarily. It's based on how
23 much movement they have that you can actually measure,
24 how much strength they have, which you can actually
25 measure. So in her case her impairment is based on her

1 movement and also based on her strength. We use the
2 charts and tables that are provided in this national
3 guideline. And in her case, her total impairment for
4 her right arm was 20 percent.
5 Q And can you tell from your
6 chart there, Doctor, when you performed that evaluation?
7 A The date of the record was
8 December 2nd, 2008.
9 Q And Doctor, during the course
10 of your care and treatment of Julia, did you formulate
11 an opinion, to a reasonable degree of medical certainty,
12 as to what inflicted the rotator cuff tear on her?
13 A Based on her history that she
14 had no symptoms in the shoulder prior to the accident,
15 then I feel that the accident is what led to the tear of
16 the rotator cuff.
17 Q And in your opinion, to a
18 reasonable degree of medical certainty again, Doctor
19 Payne, was all the care and treatment brought to bear
20 for Ms. Rininger by you, and/or at your direction,
21 reasonably medically necessary?
22 A Yes, it was.
23 Q And was it reasonably
24 medically related to the automobile accident she told
25 you that she had been in September, I think, of 2004?

1 A I believe it was.

2 Q And have all the opinions that

3 you have shared with us here this afternoon, Dr. Payne,

4 been to a reasonable degree of medical certainty?

5 A Yes, they have.

6 MR. LEWIS: Doctor, thank you

7 for answering my questions. If you would answer Mr.

8 Boester.

9

10 CROSS EXAMINATION

11 BY MR. BOESTER:

12 Q Doctor, when you did the

13 surgery on her rotator cuff, is it fair to say that the

14 damage you found was large, significant, that type of

15 thing?

16 A Yes.

17 Q The tears that you found were

18 to how many different muscles?

19 A They were primarily to the two

20 tendons on the top of the shoulder, the two tendons I

21 pointed out for the rotator cuff called the

22 supraspinatus and the infraspinatus.

23 Q And you mentioned that when

24 she came in for her first visit, there was some talk of

25 an injury to her biceps tendon. When you did the

1 surgery, was there any damage found to her biceps
2 tendon?
3 A I did not see a tear to the
4 biceps tendon at the time of the surgery.
5 Q So the surgery was done to
6 help alleviate pain from a fairly massive rotator cuff
7 tear?
8 A That's correct.
9 Q Now, you didn't become
10 involved until, roughly, 15 months after the accident,
11 correct?
12 A That's correct.
13 Q As we sit here today, have you
14 seen any of the records of the treatment she had from
15 other physicians before she got to you?
16 A No, I have not.
17 Q So the history that you were
18 relying on to answer the question, what caused this
19 injury, was based entirely on the interview you did with
20 her; is that correct?
21 A Yes. And as has been pointed
22 out earlier, I had seen her in the operating room,
23 informally, on several occasions prior to that, where
24 she had mentioned to me her shoulder hurt.
25 Q Okay. You wouldn't know

1 exactly when those dates were, that kind of thing?
2 A No. And I never examined her.
3 Q Do you know whether or not she
4 ever mentioned her shoulder was hurting before the
5 accident?
6 A No, I don't recall.
7 Q All right. So, from a formal
8 basis, as far as looking at your chart, the history,
9 you're speaking of was totally given by her as opposed
10 to you reading other doctors' record?
11 A That's correct.
12 Q Now, when -- well, let me ask
13 you this. How do these type of injuries normally
14 happen? I assume you've treated these more than once?
15 A Yes.
16 Q Is this something you
17 regularly treat?
18 A It is.
19 Q You're actually a shoulder
20 specialist; is that right?
21 A That's correct.
22 Q Give the jury an idea, how
23 many times do you think you've treated people with
24 rotator cuff injuries.
25 A I probably do six to seven

1 rotator cuff surgeries a week.
2 Q So we're talking thousands at
3 this point?
4 A Yes.
5 Q Would it be fair to say that
6 -- well, let me back up again. How do these normally
7 happen? What brings on a rotator cuff? I know
8 everybody has heard about baseball pitchers getting
9 them. What else can cause it?
10 A Well, the most common way is a
11 traumatic injury, a fall, the arm is jerked, car
12 accident, something traumatic that produces it. It can
13 also occur from an overuse, repetitive-type of activity.
14 Sometimes we'll see it with wear and tear, as of old
15 age.
16 Q And when you do the surgery,
17 is there any way to tell whether an injury was brought
18 on traumatically, like by throwing or a car accident, as
19 opposed to wear and tear?
20 A No, you cannot tell.
21 Q Now, if somebody in a
22 traumatic nature, like a throwing motion or a car
23 accident, has this significant of a rotator cuff injury,
24 I would expect that would hurt?
25 A Yes.

1 Q And is the pain the type of
2 thing that comes on over time or is it something you
3 would feel immediately?
4 A You would feel some pain from
5 it immediately.
6 Q And in this case, I can tell
7 you that the first medical care she had was the day
8 after the accident. Would you expect in a visit with a
9 physician on the day after the accident that she would
10 be in considerable pain from this type of injury had it
11 happened in the car accident?
12 A I would have expected some
13 pain.
14 Q Would you expect -- now, when
15 doctors do an exam, and I think you said you did this,
16 you test something called range of motion; is that
17 correct?
18 A Correct.
19 Q Tell the jury what that means.
20 A Range of motion is determining
21 how much movement there is in different directions. So
22 range of motion would be tested in different areas or
23 planes. So straight up, how far they can raise their
24 arm overhead, how far they can rotate it to the side,
25 raise it out to the side, up the back.

1 Q And then as a part of a
2 physical exam, a doctor like yourself would also do
3 something called strength testing; is that right?
4 A That's correct.
5 Q What is that?
6 A That is a measure of how much
7 resistance they can withstand. So I typically will have
8 them hold their arm out to the side while I try to push
9 it down. That gives me some idea as to how much
10 strength is present.
11 Q And in this case, if Ms.
12 Rininger had sustained this massive rotator cuff injury
13 in a car accident that brings us all here today, would
14 you expect on the day after the accident that she would
15 be in pain, have limited range of motion and at least
16 somewhat reduced strength?
17 A I would expect some reduced
18 strength.
19 Q I'm going to show you a record
20 from her first medical treatment, which was at Sentara
21 Medical Group on J. Clyde Morris, which is dated
22 September 29th, 2004. Can you take a look at that,
23 please. It would be fair to say you've never seen that
24 before; is that right?
25 A That's correct.

1 Q If you would take a look.
2 A Okay.
3 Q What objective evidence is
4 there in that record that she sustained a massive
5 rotator cuff injury the day before?
6 A From what they have recorded
7 here, there's nothing.
8 Q I'm sorry? From what?
9 A From what they have recorded
10 of their exam, there's nothing to indicate a tear of the
11 rotator cuff.
12 Q Okay. Now, I can tell you
13 that the next time that she sought medical treatment was
14 not until, roughly, six weeks later, on November the
15 17th, 2004, when she returned to the same facility. Let
16 me show you that record. Take a look at that, please.
17 A Okay.
18 Q Would it be fair to say that
19 when a physical exam was done that day, her range of
20 motion testing was normal and her strength testing was
21 normal?
22 A It's a very basic exam. Full
23 range of motion, shoulders and back, five over five,
24 which means full strength, of all four extremities.
25 Q Now --

1 A So they don't go into specific
2 testing of the rotator cuff here. They're just saying
3 that they tested strength in that arm and it was five --
4 you know, normal. They could have just tested the hand
5 for all I know.
6 Q Having looked at those two
7 records, are those two records consistent or
8 inconsistent with her having sustained a massive rotator
9 cuff injury on September the 28th, 2004?
10 A Each one notes that she's
11 complaining of shoulder pain. So she subjectively, her
12 description has pain in the shoulder. I don't see a
13 good enough exam of the shoulder to be able to really
14 tell what is there in terms of rotator cuff strength.
15 She had full movement, yes, but I don't know what
16 they're testing when they say that there's normal
17 strength in the extremities. They may just be testing
18 the hand.
19 Q If you had reviewed those
20 records when she got to you -- or let's say at the time,
21 when you looked at those records, is there something
22 there to suggest that she was in a great deal of pain or
23 couldn't move her shoulder normally or had lost any
24 strength?
25 A There's nothing here to

1 suggest that.

2 Q Okay. Now, I can tell you

3 that after that, she was sent to physical therapy. Let

4 me give you that record. This is from Sentara

5 Rehabilitative Services. You're familiar with that

6 group, I take it?

7 A Yes.

8 Q This one is in Port Warwick.

9 If you could take a look at those, please.

10 A Okay.

11 Q Is it correct to say that the

12 physical therapy she received there in the fall of 2004

13 was for her back and neck?

14 A It was for her left hip and

15 lower back.

16 Q Is there anything to indicate

17 that she made complaints of or received therapy for her

18 shoulder?

19 A I don't see any mention of the

20 shoulder.

21 Q All right. Now, would you

22 agree that up to this point none of the records I've

23 shown you support a finding of rotator cuff tear

24 resulting from the accident?

25 A In my opinion, nothing

1 supports it, but I don't see it to disprove it either.

2 Q All right. Now, is it

3 possible for someone to sustain a rotator cuff tear from

4 throwing something?

5 A It is possible.

6 Q I guess the one I mentioned

7 earlier was this is something that happens to some

8 baseball pitchers.

9 A It is.

10 Q The one that's been in the

11 news, the Washington pitcher, that's an elbow injury,

12 correct?

13 A Correct.

14 Q But the more famous one that

15 people typically get is a tear in the rotator cuff?

16 A Correct.

17 Q All right. I'm going to show

18 you a record now from January 12th, 2005, when she saw

19 Dr. Harriet Jones. Do you know who that is?

20 A Yes, I do.

21 Q All right. If you'd take a

22 look at that, please.

23 A Okay.

24 Q Is it correct that she

25 reported to Dr. Jones as of that date, the beginning of

1 2005, that she had a sudden pain in her right shoulder
2 after throwing a bag into her car?
3 A That's right.
4 Q Is that the type of incident
5 that can lead to a rotator cuff tear?
6 A It could.
7 Q And the fact that she had a
8 sharp pain following throwing her bag into the car,
9 isn't it also entirely possible that that is what
10 brought on the rotator cuff tear?
11 A It could be possible.
12 Q All right. Now, having looked
13 at the medical records I've shown you, especially the
14 one that's in your hand right now, can you still state
15 to a reasonable degree of medical certainty that it was
16 the auto accident that caused this massive rotator cuff
17 tear as opposed to that throwing incident?
18 A What was the date of this? I
19 don't know I can tell.
20 Q January the 5th, 2002 --
21 January the 5th, 2005.
22 A Okay.
23 Q I'm sorry. It was January 12,
24 2005.
25 A That was -- what was the date

1 of accident?

2 Q The date of the accident is

3 September 28th, 2004.

4 A Okay. So this is after the

5 accident?

6 Q That's about working on four

7 months after the accident.

8 A Four months after the

9 accident.

10 Q And about eight months before

11 she saw you. No. More than that. Eleven months before

12 she saw you.

13 A Right. We still can't tell

14 because this is after the accident. If this had been

15 before the accident, I think that would have been

16 different. But after the accident, if she had sustained

17 some injury to the rotator cuff, even a small tear, this

18 second injury could have made it a massive tear.

19 Q Okay. That's more of a guess,

20 is it not?

21 A It is. This is a guess, too,

22 but it's hard to know what could have caused it.

23 Q Okay. What I'm asking you is,

24 putting together the records I've shown you for the

25 treatment between the day of the accident, and the

1 record that's in your hand, and then looking at that
2 record where she reports a sharp pain following throwing
3 a bag into her car, when you put all that together, can
4 you state to a reasonable degree of medical certainty
5 what brought on the massive rotator cuff tear that you
6 treated, or is it just a guess?
7 A It's all going to depend on
8 her history.
9 Q I'm sorry?
10 A It is all going to depend on
11 her history. And if her history is that the pain
12 started at the time of the car accident, then that would
13 be the defining factor that could have -- or would have
14 most likely precipitated a tear of the rotator cuff.
15 Q Well, the history certainly
16 includes the records I've shown you so far, correct?
17 A Correct.
18 Q Putting it all together as
19 part of the history, can you point to one or the other
20 or it could have been either one?
21 A I don't know what the history
22 is to any certainty from the time of the car accident
23 until this event you've shown me in January of 2005. If
24 she is continuing to have should pain from the time of
25 the accident until this incident in January of 2005,

1 then I still state that the car accident was the cause.
2 If her pain had completely resolved from the time of the
3 car accident until this, then I cannot say that. So I
4 don't know that history. That's my point.
5 Q So the history that you were
6 relying on and reaching the opinion you gave Mr. Lewis
7 earlier, is the brief history she gave you when she came
8 into your office on December 13th, 2005; is that
9 correct?
10 A That's correct.
11 Q Part of the history she gave
12 you was that she had injured her biceps tendon, which
13 you later found to be incorrect, is that also true?
14 A That is incorrect. But even
15 on my first physical exam, I thought that she had
16 probably torn the biceps too.
17 Q And there was no biceps tendon
18 injury?
19 A Correct.
20 Q All right. What is it in her
21 history that you were pointing to that leads you to
22 believe that this was brought on by the car accident and
23 not by the throwing incident, which you just learned
24 about now?
25 A Her statement that the

1 symptoms started at the time of the car accident.

2 Q And the findings that were

3 made by the doctors that I showed you that she had full

4 range of motion, that her strength was unaffected, that

5 no one found any swelling, those would all tend to

6 indicate that there had not been a massive rotator cuff

7 injury caused by the car accident, would they not?

8 A I don't know how well those

9 doctors examined her shoulder to make that statement.

10 Q So rather than relying on the

11 medical notes, you're relying on the statement she made

12 to you?

13 A Correct.

14 Q Do you find any support in any

15 of the medical records that I've shown you that the auto

16 accident brought on the injuries you treated?

17 A I'm sorry? Repeat the

18 question.

19 Q Do you find any support in the

20 records that I've shown you that the auto accident

21 brought on the problem that you treated?

22 A Only that it caused shoulder

23 pain.

24 Q That it caused?

25 A Shoulder pain.

1 Q And the pain levels that were
2 reported in the medical records I've shown you were
3 relatively minor, were they not?
4 A I didn't see an indication as
5 to the severity of the pain.
6 Q When she was referred by -- or
7 referred to physical therapy, the physical therapy was
8 not for shoulder pain, it was for back pain; is that
9 right?
10 A That's correct.
11 Q Do you find that consistent
12 with her having sustained a massive shoulder injury?
13 A No. I would have expected
14 more shoulder pain at that time.
15 Q During the time between the
16 accident and when you finally saw her 14 or 15 months
17 later, are you saying you saw her working in the
18 emergency room?
19 A In the operating room.
20 Q In operating room?
21 A Yes.
22 Q And is it -- what do people do
23 in her position in the operating room?
24 A They are required to help
25 bring the patients in and out of the operating room,

1 assist them moving from the stretcher onto the operating
2 room table.
3 Q It's a physical job?
4 A It's a physical job.
5 Q And would it be consistent
6 that someone who had sustained this type of injury to
7 her shoulder in September of 2004, would be able to
8 function without significant pain for almost 15 months?
9 A The job does not require
10 overhead use, and that's where she primarily had the
11 pain and weakness. So she could have functioned in that
12 capacity with pain without too much difficulty.
13 Q When you put everything that
14 I've shown you together, isn't it more likely than not
15 that the auto accident did not cause the shoulder
16 injury?
17 A No. I still don't feel like I
18 have a history to --
19 Q I'm sorry.
20 A -- contradict her -- to
21 contradict her.
22 Q So the entire support that
23 you're giving for your opinion is what she told you in
24 your office?
25 A The only thing you have to

1 rely on here to determine causation is history.
2 Q And by history, you mean what
3 she said to you?
4 A What she said, and as you
5 tried to bring up, other supporting documentation.
6 Q And you would agree with me
7 that the documentation I showed you doesn't support the
8 history she gave you?
9 A It doesn't support that she
10 had a massive tear of the rotator cuff at the time of
11 the accident.
12 MR. BOESTER: That's all I
13 have.
14
15 REDIRECT EXAMINATION
16 BY MR. LEWIS:
17 Q Dr. Payne, would you tell us
18 whether or not you and other colleagues, that you are
19 aware of, routinely rely on the patient's history in
20 determining the cause of injuries that you are asked to
21 treat?
22 A Almost exclusively.
23 Q And finally, Doctor, are any
24 of the health care providers who created the records Mr.
25 Boester showed you trained shoulder specialist?

1 A No, they're not.

2 MR. LEWIS: That's all I have,

3 Doctor. Thank you, very much.

4 MR. BOESTER: Nothing further.

5 THE WITNESS: I waive.

6 (The De Bene Esse deposition

7 was concluded.)

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1 STATE OF VIRGINIA

2 CITY OF HAMPTON: to wit:

3

4 I, Virginia M. Giles, a Notary

5 Public in and for the State of Virginia at Large, do

6 hereby certify that on the 2nd day of September, 2010,

7 the forgoing witness, having been by me first duly sworn

8 to testify the whole truth, gave the above testimony,

9 which was reported by me in stenotype, and that the

10 forgoing pages constitute a true and correct

11 transcription of my said shorthand report to the best of

12 my ability.

13 I further certify that I am

14 not a relative or employee or attorney or counsel of any

15 of the parties hereto, nor am I a relative or employee

16 of such attorney or counsel, nor am I financially

17 interested in the action.

18 Given under my hand this

19 ________ day of _________________, 2010.

20

21

22 ______________________________

23 VIRGINIA M. GILES

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