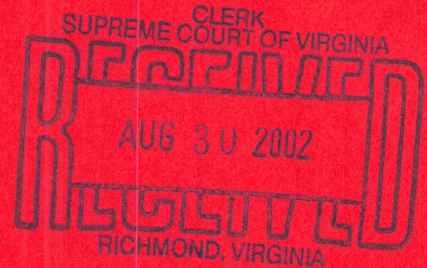


265VA 228

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IN THE  
**Supreme Court of Virginia**

RECORD NO. 020834



**NORFOLK AND WESTERN  
RAILWAY COMPANY,**

*Appellant,*

**v.**

**RAYMOND P. KEELING,**

*Appellee.*

JOINT APPENDIX  
Volume I

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FERRIS, EAKIN & THOMAS, P.C.  
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(540) 344-3233

*Counsel for Appellee*



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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING, JR.,

Plaintiff,

vs.

No. C196-925

NORFOLK AND WESTERN RAILWAY  
COMPANY, a corporation,  
T.K. GROUP, INC., a corporation,  
and QUALITY SERVICES, INC.,  
a corporation,

Defendants.

PLEASE SERVE SUMMONS ON:

Mr. Wiley F. Mitchell  
Registered Agent  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510-2191

T.K. Group, Inc.  
208 West State Street  
Suite 250  
Rockford, IL 61101

Quality Services, Inc.  
2001 Clay Street  
North Kansas City, MO 64116

MOTION FOR JUDGMENT

COUNT I

NOW COMES the Plaintiff, RAYMOND P. KEELING, JR., by and through his attorneys, PRATT, BRADFORD, TOBIN & ALEXANDER, P.C., and RIDER, THOMAS, CLEAVELAND, FERRIS & EAKIN, P.C., and for his cause of action against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, alleges as follows:

1. That at all times relevant herein, and for some time prior thereto, the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, was engaged in the business of interstate commerce in and throughout the several states of the United States as a

common carrier by railroad, and for the purposes thereof did operate and do business in and about the City of Roanoke, State of Virginia.

2. That on or about August 16, 1994, Plaintiff, RAYMOND P. KEELING, JR., was employed by the Defendant as an electrician and engaged in the performance of his duties in Roanoke, Virginia, as an employee of NORFOLK AND WESTERN RAILWAY COMPANY, while working in furtherance of interstate commerce, he was injured as hereinafter alleged.

3. That at all times relevant thereto, Defendant was engaged in interstate commerce as a common carrier by railroad, and all or part of the Plaintiff's duties as an employee of the Defendant were in furtherance of interstate commerce and closely, directly and substantially affected the same, by reason whereof the rights and liabilities of the parties were governed by the Act of Congress known as the Federal Employers' Liability Act, 45 U.S. Code, Sections 51-60.

4. That the Plaintiff, RAYMOND P. KEELING, JR., was engaged in the course of his employment, and was required or directed by Defendant to take a pulmonary function test and was caused to be injured, as a result, in whole or in part, as hereinafter alleged.

5. That the Defendant, by and through its officers, agents and other employees, negligently and carelessly violated the terms of the Federal Employers' Liability Act, to-wit:

- (a) Failed to retain competent and qualified persons to administer Plaintiff's pulmonary function test;



- (b) Failed to retain persons with adequate equipment and facilities to administer Plaintiff's pulmonary function test;
- (c) Failed to inspect the facilities and equipment of those retained to do Plaintiff's pulmonary function test;
- (d) Failed to inspect the testing procedure used by those administering the pulmonary function test to Plaintiff;
- (e) Failed to adequately inform Plaintiff of the risks inherent in a pulmonary function test;
- (f) Failed to properly administer Plaintiff's pulmonary function test;
- (g) Failed to discontinue Plaintiff's pulmonary function test after Plaintiff had difficulty completing same;
- (h) Failed to properly determine whether Plaintiff was physically fit to undergo or continue pulmonary function testing;
- (i) Failed to properly instruct or train Plaintiff in taking the pulmonary function test;
- (j) Failed to adequately take a medical history from Plaintiff before and during his pulmonary function test;
- (k) Otherwise failed to provide the Plaintiff with reasonably safe methods of work.

6. That as a result, in whole or in part, of one or more of the foregoing negligent acts or omissions, the Plaintiff, RAYMOND P. KEELING, JR., sustained severe and permanent injuries to his ears and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself

for medical aid and attention; and his future earning capacity has been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00).

## COUNT II

NOW COMES the Plaintiff, RAYMOND P. KEELING, JR., by his attorneys, PRATT, BRADFORD, TOBIN & ALEXANDER, P.C., and RIDER, THOMAS, CLEVELAND, FERRIS & EAKIN, P.C., and for his cause of action against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, alleges as follows:

1. That from May of 1970 to August of 1994, the Plaintiff was in the employ of the Defendant as an electrician and while in the regular course of his duties as an employee of the NORFOLK AND WESTERN RAILWAY COMPANY, and while working in furtherance of interstate commerce, he was a victim of noise exposure at the Shaffer's Crossing at Roanoke, Virginia, and other locations, which are owned, operated and maintained by the Defendant.

2. That the Defendant herein is a railroad corporation, licensed to do business in the State of Virginia and was at all times mentioned herein doing business in Virginia and the City of Roanoke as a common carrier in interstate commerce.

3. That at all times relevant thereto, Defendant, as stated hereinabove, was engaged in interstate commerce as a common carrier by railroad, and all or part of Plaintiff's duties as an employee of Defendant were in furtherance of interstate commerce and



closely, directly and substantially affected the same, by reason whereof the rights and liabilities of the parties were governed by the Act of Congress known as the Federal Employers' Liability Act, 45 U.S. Code, Section 51-60.

4. That the Defendant, by and through its officers, agents and other employees, negligently and carelessly violated the terms of the Federal Employers' Liability Act, to wit:

- (a) Failed to adequately measure noise levels to which the Plaintiff was exposed at work in a timely fashion;
- (b) Failed to implement timely and adequate administrative or engineering controls to protect Plaintiff's hearing;
- (c) Failed to provide safe and suitable equipment to the Plaintiff to perform the tasks assigned in a timely fashion;
- (d) Failed to supply adequate hearing protection in a timely fashion to allow the Plaintiff to perform his tasks assigned in a safe manner;
- (e) Failed to adequately test the hearing of the Plaintiff in a timely fashion to determine that noise exposure at work was causing a gradual, insidious, permanent hearing loss to the Plaintiff;
- (f) Failed to warn the Plaintiff that over the years of his employment he was being subject to a noise level that would cause gradual, insidious, permanent damage to his hearing;
- (g) Failed to timely warn or advise Plaintiff as to when and where his work subjected the Plaintiff to noise exposure which would cause gradual, insidious, permanent damage to his hearing;
- (h) Failed to warn or advise the Plaintiff in a timely fashion as to the type of hearing protection that was adequate to protect him from the noise levels to which he was exposed;

- (i) Failed to have in place company medical and safety regulations concerning noise pollution, or in the alternative, failed to enforce the company's existing medical and safety regulations concerning noise pollution;
- (j) Failed to adhere to and enforce federal laws and regulations concerning noise pollution;
- (k) Failed to provide the Plaintiff with a reasonably safe place to work.

5. That as a result, in whole or in part, of one or more of the foregoing negligent acts or omissions, Plaintiff sustained severe and permanent injuries to his ears, and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00).

6. That the injuries to Plaintiff's ears caused by excessive noise exposure manifested on or about August 16, 1994.



COUNT III

COMES NOW the Plaintiff, RAYMOND P. KEELING, JR., by and through his attorneys, PRATT, BRADFORD, TOBIN & ALEXANDER, P.C. and RIDER, THOMAS, CLEAVELAND, FERRIS & EAKIN, P.C., and for his cause of action against the Defendant, T. K. GROUP, INC., a corporation, states:

1. That on or about August 16, 1994, the Plaintiff, RAYMOND P. KEELING, JR., was a resident of Roanoke, Virginia, and employed by NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, as an electrician.

2. That on or about August 16, 1994, the Defendant, T. K. GROUP, INC., was a corporation in the business of contracting with Norfolk and Western Railway Company to provide pulmonary function tests to Norfolk and Western employees, including the Plaintiff.

3. That on or about August 16, 1994, T. K. GROUP, INC., arranged for a pulmonary function test for the Plaintiff in Roanoke, Virginia.

4. That prior to and on August 16, 1994, the Defendant held itself out and informed the public that it had the requisite skill, competence, personnel, equipment and information to properly arrange for a pulmonary function test for the Plaintiff, RAYMOND P. KEELING, JR.

5. That the Defendant, T. K. GROUP, INC., retained Quality Services, Inc., on behalf of Norfolk and Western Railway Company, to administer a pulmonary function test to the Plaintiff on August

16, 1994, in Roanoke, Virginia.

6. That on August 16, 1994, the Plaintiff entrusted himself to the care of T. K. Group, Inc., and its agents, servants and employees, for purposes of a pulmonary function test.

7. That on or about August 16, 1994, there was a duty on the part of T. K. Group, Inc., to arrange for medical services consistent with the medical requirements of those persons submitting to pulmonary function testing so as not to negligently cause injury to said persons, including the Plaintiff, RAYMOND P. KEELING, JR.

8. That on or about August 16, 1994, after assuming the care and treatment of the Plaintiff in arranging for his pulmonary function test, the Defendant, T. K. GROUP, INC., by and through its duly authorized agents, servants and employees, were then and there guilty of one or more of the following wrongful acts and/or omissions:

- (a) Failed to retain competent and qualified persons to administer Plaintiff's pulmonary function test;
- (b) Failed to retain persons with adequate equipment and facilities to administer Plaintiff's pulmonary function test;
- (c) Failed to inspect the facilities and equipment of those retained to do Plaintiff's pulmonary function test;
- (d) Failed to inspect the testing procedure used by those administering the pulmonary function test to Plaintiff;
- (e) Failed to adequately inform Plaintiff of the risks inherent in a pulmonary function test;



- (f) Failed to properly administer Plaintiff's pulmonary function test;
- (g) Failed to discontinue Plaintiff's pulmonary function test after Plaintiff had difficulty completing same;
- (h) Failed to properly determine whether Plaintiff was physically fit to undergo or continue pulmonary function testing;
- (i) Failed to properly instruct or train Plaintiff in taking the pulmonary function test;
- (j) Failed to adequately take a medical history from Plaintiff before and during his pulmonary function test.

9. That as a direct and proximate cause of one or more of the foregoing wrongful acts and/or omissions of the Defendant, T. K. GROUP, INC., the Plaintiff, RAYMOND P. KEELING, JR., sustained severe and permanent injuries to his ears and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00).

COUNT IV

COMES NOW the Plaintiff, RAYMOND P. KEELING, JR., by and through his attorneys, PRATT, BRADFORD, TOBIN & ALEXANDER, P.C. and RIDER, THOMAS, CLEAVELAND, FERRIS & EAKIN, P.C., and for his cause of action against the Defendant, QUALITY SERVICES, states:

1. That on or about August 16, 1994, the Plaintiff, RAYMOND P. KEELING, JR., was a resident of Roanoke, Virginia, and employed by NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, as an electrician.

2. That on or about August 16, 1994, the Defendant, QUALITY SERVICES, INC., was a corporation in the business of administering pulmonary function tests.

3. That on or about August 16, 1994, QUALITY SERVICES, INC., administered a pulmonary function test to the Plaintiff in Roanoke, Virginia.

4. That prior to and on August 16, 1994, the Defendant held itself out and informed the public that it had the requisite skill, competence, personnel, equipment and information to properly administer a pulmonary function test to the Plaintiff, RAYMOND P. KEELING, JR.

5. That the Defendant, QUALITY SERVICES, INC., was retained by T.K. Group, Inc., on behalf of Norfolk & Western Railway Company to administer a pulmonary function test to the Plaintiff on August 16, 1994.

6. That on August 16, 1994, the Plaintiff entered Defendant's mobile van and entrusted himself to the care of the



Defendant, agents, servants and employees, for purposes of a pulmonary function test.

7. That on or about August 16, 1994, there was a duty on the part of the Defendant to render medical services consistent with the medical requirements of those persons submitting to pulmonary function testing so as not to negligently cause injury to said persons, including the Plaintiff, RAYMOND P. KEELING, JR.

8. That on or about August 16, 1994, after assuming the care and treatment of the Plaintiff in administering a pulmonary function test, the Defendant, QUALITY SERVICES, INC., by and through its duly authorized agents, servants and employees, were then and there guilty of one or more of the following wrongful acts and/or omissions:

- (a) Failed to retain competent and qualified persons to administer Plaintiff's pulmonary function test;
- (b) Failed to retain persons with adequate equipment and facilities to administer Plaintiff's pulmonary function test;
- (c) Failed to inspect the facilities and equipment of those retained to do Plaintiff's pulmonary function test;
- (d) Failed to inspect the testing procedure used by those administering the pulmonary function test to Plaintiff;
- (e) Failed to adequately inform Plaintiff of the risks inherent in a pulmonary function test;
- (f) Failed to properly administer Plaintiff's pulmonary function test;
- (g) Failed to discontinue Plaintiff's pulmonary function test after Plaintiff had difficulty completing same;

- (h) Failed to properly determine whether Plaintiff was physically fit to undergo or continue pulmonary function testing;
- (i) Failed to properly instruct or train Plaintiff in taking the pulmonary function test;
- (j) Failed to adequately take a medical history from Plaintiff before and during his pulmonary function test.

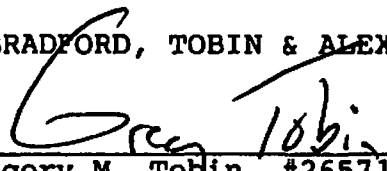
9. That as a direct and proximate cause of one or more of the foregoing wrongful acts and/or omissions of the Defendant, QUALITY SERVICES, INC., the Plaintiff, RAYMOND P. KEELING, JR., sustained severe and permanent injuries to his ears and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00).

WHEREFORE, Plaintiff, RAYMOND P. KEELING, JR., prays for judgment against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, in the sum of ONE MILLION DOLLARS (\$1,000,000.00), and for costs of suit and for judgment against the Defendant, T. K. GROUP, INC., in the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) and for costs of suit and for judgment against the Defendant, QUALITY SERVICES, INC., in a sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), and for costs of suit.

PLAINTIFF DEMANDS  
TRIAL BY JURY

PRATT, BRADFORD, TOBIN & ALEXANDER, P.C.

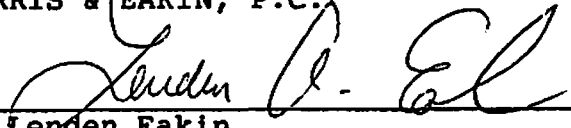
BY:

  
\_\_\_\_\_  
Gregory M. Tobin #26571  
David A. Hyll  
Route 111 at Airline Drive  
P. O. Box 179  
East Alton, IL 62024  
(618) 259-8011

and

RIDER, THOMAS, CLEAVELAND,  
FERRIS & EAKIN, P.C.

BY:

  
\_\_\_\_\_  
Lenden Eakin  
22 Luck Avenue, S.W.  
P. O. Box 1791  
Roanoke, VA 24008  
(540) 344-3233

ATTORNEYS FOR PLAINTIFF

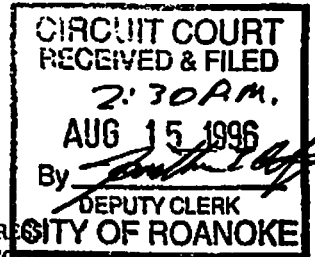


LAW OFFICES  
RIDER, THOMAS, CLEAVELAND, FERRIS & EAKIN  
A PROFESSIONAL CORPORATION

ROBERT F. RIDER  
RICHARD M. THOMAS  
WILLIAM H. CLEAVELAND  
RAPHAEL E. FERRIS  
LENDEN A. EAKIN  
PAUL R. THOMSON, III

22 LUCK AVENUE, S.W.  
ROANOKE, VIRGINIA 24011

MAILING ADDRESS  
P.O. BOX 1791  
ROANOKE, VA 24008-1791  
(540) 344-3233  
FACSIMILE (540) 344-3510



August 15, 1996

Arthur B. Crush, III, Clerk  
Roanoke City Circuit Court  
315 West Church Avenue, S.W.  
Roanoke, Virginia 24016

RE: Raymond P. Keeling v. Norfolk and Western Railway, et al

Dear Bert:

I have enclosed the original and six copies of a Motion for Judgment in the above-styled matter for filing. I have also enclosed a check in the amount of \$184.00, payable to the "Clerk of Roanoke City Circuit Court".

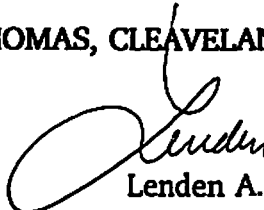
Additionally, I have enclosed a check in the amount of \$12.00, payable to the "Sheriff" for service on the defendant, Norfolk and Western Railway Company's, registered agent, Mr. Wiley F. Mitchell, Norfolk Southern Corporation, Three Commercial Place, Norfolk, Virginia 23510 (City of Norfolk).

Finally, I have enclosed the original and two copies of an Affidavit for Service of Process on the Secretary of the Commonwealth for each of the other defendants in this matter. I would appreciate your preparing the service copies and forwarding them to the Sheriff in Richmond for service on the Secretary of the Commonwealth. I have enclosed two checks in the amount of \$15.00, payable to the "Secretary of the Commonwealth" and two checks in the amount of \$12.00, payable to the "Sheriff".

Thank you for your anticipated assistance and cooperation. If you have any questions or need any additional information, please do not hesitate to call.

Yours truly,

RIDER, THOMAS, CLEAVELAND, FERRIS & EAKIN, P.C.

  
Lenden A. Eakin

LAE:rbk  
Enclosures

c.c. David A. Hylla, Esquire

V I R G I N I A:

CIRCUIT COURT  
RECEIVED & FILED

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING,

'96 SEP 11 A9:13

Plaintiff

v.

*K. M. M. M. M.*  
RESPONSIVE PLEADING OF  
DEFENDANT DEPUTY CLERK  
Law No. CL94-000870 ROANOKE

NORFOLK AND WESTERN RAILWAY  
COMPANY, a corporation,  
T. K. GROUP, INC., a corporation,  
and QUALITY SERVICES, INC.,  
a corporation,

96-925

Defendant

For its answer and grounds of defense to Plaintiff's Motion for Judgment, defendant, Norfolk and Western Railway Company ("N&W") comes by counsel and states:

(1) Paragraph 1 of Count I of the Motion for Judgment is admitted.

(2) As to paragraph 2 of Count I, defendant admits only that plaintiff was employed by defendant on or about August 16, 1994.

(3) As to paragraph 3 of Count I, defendant admits only that it is engaged in interstate commerce as a common carrier, and that part of plaintiff's duties in furtherance of his employment with defendant was in furtherance of interstate commerce.

(4) Paragraphs 4 through 6 of Count I of the Motion for Judgment are denied.

WODS, ROGERS  
WZLEGROVE  
Attorneys at Law

M#354976

(5) As to paragraph 1 of Count II of the Motion for Judgment, defendant admits only that plaintiff was an employee of defendant from May of 1970 through August of 1994.

(6) Paragraph 2 of Count II is admitted.

(7) As to paragraph 3 of Count II of the Motion for Judgment, defendant admits only that it is engaged in interstate commerce as a common carrier, and that a part of plaintiff's duties in furtherance of his employment with defendant was in furtherance of interstate commerce.

(8) Paragraphs 4 through 6 of Count II of the Motion for Judgment are denied.

(9) Defendant, Norfolk and Western Railway Company, has insufficient information to admit or deny the allegations in Count III and Count IV of the Motion for Judgment in that they are directed at other parties. To the extent that these counts contain any allegations about Norfolk and Western Railway Company, the defendant denies such allegations.

(10) Defendant, Norfolk and Western Railway Company, denies that it is indebted to plaintiff for the amount alleged in the Motion for Judgment or for any other sum whatsoever, and calls upon plaintiff for strict proof of each and every item of alleged injury and damage alleged in the Motion for Judgment.

(11) All allegations in the Motion for Judgment not expressly admitted herein are denied.

(12) Defendant denies that it violated any legal duty owed plaintiff, or that caused the accident and injuries alleged in the Motion for Judgment.

WOODS, ROGERS  
HAZLEGROVE  
Attorneys at Law

(13) Defendant denies that any negligence on its part resulted in injury or damage to plaintiff.

(14) Defendant alleges that plaintiff was guilty of negligence and/or contributory negligence which caused or contributed to the accident in question and which will bar or limit any recovery by plaintiff in this case.

(15) Defendant alleges that plaintiff has failed to mitigate any damages which he may have suffered as a result of this injury.

(16) Defendant alleges that some or all of the injuries and damages alleged by plaintiff were not caused by the incident described in the Motion for Judgment.

(17) Defendant alleges that the injuries and damages alleged by plaintiff are the result of circumstances for which defendant was not responsible and over which it had no control.

(18) Defendant alleges that plaintiff's cause of action is barred by the applicable statute of limitations.

NORFOLK AND WESTERN RAILWAY COMPANY

By   
Of Counsel

DODS, ROGERS  
WILLEGROVE  
Attorneys at Law

William B. Poff, Esq.  
Leslie E. Hagie, Esq.  
WOODS, ROGERS & HAZLEGROVE, P.L.C.  
First Union Tower, Suite 1400  
10 South Jefferson Street  
P.O. Box 14125  
Roanoke, Virginia 24038-4125

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Gregory M. Tobin, Esq., Pratt, Bradford, Tobin & Alexander, P.C., Route 111 at Airline Drive, P. O. Box 179, East Alton, IL 62024 and Lenden Eakin, Esq., Rider, Thomas, Cleaveland, Ferris & Eakin, P. C., 22 Luck Avenue, S.W., P. O. Box 1791, Roanoke, VA 24008, Counsel for Plaintiff; T.K. Group, Inc., 208 West State Street, Suite 250, Rockford, IL 61101; and Quality Services, Inc., 2001 Clay Street, North Kansas City, MO 64116, on this 9<sup>th</sup> day of September, 1996.



**WOODS, ROGERS  
& HAZLEGROVE**

*Attorneys at Law*

LESLIE E. HAGY  
540 983-7693  
INTERNET: lhagy@woodsrogers.com

CIRCUIT COURT  
RECEIVED & FILED

'96 SEP 11 A9:13

September 9, 1996

BY *K. M. [Signature]*  
DEPUTY CLERK  
CITY OF ROANOKE

Arthur B. Crush, Clerk  
Circuit Court, City of Roanoke  
P.O. Box 2610  
Roanoke, VA 24016

Re: Raymond P. Keeling v. Norfolk and Western Railway Company,  
T.K. Group, Inc. and Quality Services, Inc.  
Railway Company - Law No. CL-94-000870

*96-925*

Dear Bert:

Enclosed for filing, please find the Responsive Pleading of Defendant, Norfolk and Western Railway Company in the above-styled matter, a copy of which has been mailed to all counsel of record.

Thank you for your assistance in this matter.

Very truly yours,

WOODS, ROGERS & HAZLEGROVE, P. L. C.

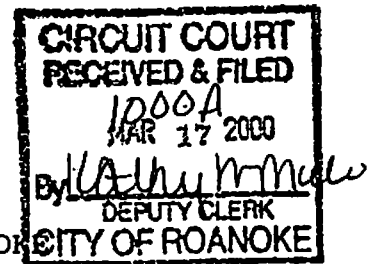
*Les Hagy*  
Leslie E. Hagie

Enclosure

cc: Gregory B. Tobin, Esq. (w/enclosure)  
Lenden Eakin, Esq. (w/enclosure)  
T.K. Group, Inc. (w/enclosure)  
Quality Services, Inc. (w/enclosure)

M#355179





VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING, JR.,

Plaintiff,

vs.

Law No. CL96-925

NORFOLK AND WESTERN RAILWAY  
COMPANY, T.K. GROUP, INC.  
and QUALITY SERVICES, INC.

Defendants.

AMENDED MOTION FOR JUDGMENT

COUNT I

NOW COMES the Plaintiff, RAYMOND P. KEELING, JR., by and through his attorneys, PRATT & TOBIN, P.C., and RIDER, THOMAS, CLEVELAND, FERRIS & EAKIN, P.C., and for Count I of his cause of action against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, alleges as follows:

1. That at all times relevant herein, and for some time prior thereto, the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, was engaged in the business of interstate commerce in and throughout the several states of the United States as a common carrier by railroad, and for the purposes thereof did operate and do business in and about the City of Roanoke, State of Virginia.

2. That on or about August 16, 1994, Plaintiff, RAYMOND P. KEELING, JR., was employed by the Defendant as an electrician and engaged in the performance of his duties in Roanoke, Virginia, as an employee of NORFOLK AND WESTERN RAILWAY COMPANY, while working

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Video Deposition:

Transcript of the video deposition of John S. May, M.D. (the video is contained in the box on file with the Clerk's Office of the Supreme Court of Virginia). . . . .	701
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in furtherance of interstate commerce, he was injured as hereinafter alleged.

3. That at all times relevant thereto, Defendant was engaged in interstate commerce as a common carrier by railroad, and all or part of the Plaintiff's duties as an employee of the Defendant were in furtherance of interstate commerce and closely, directly and substantially affected the same, by reason whereof the rights and liabilities of the parties were governed by the Act of Congress known as the Federal Employers' Liability Act, 45 U.S. Code, Sections 51-60.

4. That the Plaintiff, RAYMOND P. KEELING, JR., was engaged in the course of his employment, and was required or directed by Defendant to take a pulmonary function test and was caused to be injured, as a result, in whole or in part, as hereinafter alleged.

5. That the Defendant, by and through its officers, agents and other employees, negligently and carelessly violated the terms of the Federal Employers' Liability Act, to-wit:

- (a) Failed to retain competent and qualified persons to administer Plaintiff's pulmonary function test; and/or
- (b) Failed to retain persons with adequate equipment and facilities to administer Plaintiff's pulmonary function test; and/or
- (c) Failed to inspect the facilities and equipment of those retained to do Plaintiff's pulmonary function test; and/or
- (d) Failed to inspect the testing procedure used by those administering the pulmonary function test to Plaintiff; and/or

- (e) Failed to adequately inform Plaintiff of the risks inherent in a pulmonary function test; and/or
- (f) Failed to properly administer Plaintiff's pulmonary function test; and/or
- (g) Failed to discontinue Plaintiff's pulmonary function test after Plaintiff had difficulty completing same; and/or
- (h) Failed to properly determine whether Plaintiff was physically fit to undergo or continue pulmonary function testing; and/or
- (i) Failed to properly instruct or train Plaintiff in taking the pulmonary function test; and/or
- (j) Failed to adequately take a medical history from Plaintiff before and during his pulmonary function test; and/or
- (k) Set blood pressure standards too high for the pulmonary function test; and/or
- (l) Failed to instruct or warn that if the blood pressure was over a certain amount that no pulmonary function test should be done that day; and/or
- (m) Otherwise failed to provide the Plaintiff with reasonably safe methods of work.

6. That as a result, in whole or in part, of one or more of the foregoing negligent acts or omissions, the Plaintiff, RAYMOND P. KEELING, JR., sustained severe and permanent injuries to his ears and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has

been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of TWO MILLION DOLLARS (\$2,000,000.00).

COUNT II

NOW COMES the Plaintiff, RAYMOND P. KEELING, JR., by and through his attorneys, PRATT & TOBIN, P.C., and RIDER, THOMAS, CLEVELAND, FERRIS & EAKIN, P.C., and for Count II of his cause of action against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, alleges as follows:

1. That at all times relevant herein, and for some time prior thereto, the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, was engaged in the business of interstate commerce in and throughout the several states of the United States as a common carrier by railroad, and for the purposes thereof did operate and do business in and about the City of Roanoke, State of Virginia.

2. That on or about August 16, 1994, Plaintiff, RAYMOND P. KEELING, JR., was employed by the Defendant as an electrician and engaged in the performance of his duties in Roanoke, Virginia, as an employee of NORFOLK AND WESTERN RAILWAY COMPANY, while working in furtherance of interstate commerce, he was injured as hereinafter alleged.

3. That at all times relevant thereto, Defendant was engaged in interstate commerce as a common carrier by railroad, and all or part of the Plaintiff's duties as an employee of the Defendant were in furtherance of interstate commerce and closely, directly and substantially affected the same, by reason whereof the rights and



liabilities of the parties were governed by the Act of Congress known as the Federal Employers' Liability Act, 45 U.S. Code, Sections 51-60.

4. That the Plaintiff, RAYMOND P. KEELING, JR., was engaged in the course of his employment, and was required or directed by Defendant to take a pulmonary function test and was caused to be injured, as a result, in whole or in part, as hereinafter alleged.

5. That on said date, T.K. GROUP, INC., a corporation, and QUALITY SERVICES, INC., a corporation, were agents and servants of NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, and were under the control of NORFOLK AND WESTERN RAILWAY COMPANY.

6. That the Defendant, by and through its officers, agents and other employees, negligently and carelessly violated the terms of the Federal Employers' Liability Act, to-wit:

- (a) Failed to retain competent and qualified persons to administer Plaintiff's pulmonary function test; and/or
- (b) Failed to retain persons with adequate equipment and facilities to administer Plaintiff's pulmonary function test; and/or
- (c) Failed to inspect the facilities and equipment of those retained to do Plaintiff's pulmonary function test; and/or
- (d) Failed to inspect the testing procedure used by those administering the pulmonary function test to Plaintiff; and/or
- (e) Failed to adequately inform Plaintiff of the risks inherent in a pulmonary function test; and/or
- (f) Failed to properly administer Plaintiff's pulmonary function test; and/or

- (g) Failed to discontinue Plaintiff's pulmonary function test after Plaintiff had difficulty completing same; and/or
- (h) Failed to properly determine whether Plaintiff was physically fit to undergo or continue pulmonary function testing; and/or
- (i) Failed to properly instruct or train Plaintiff in taking the pulmonary function test; and/or
- (j) Failed to adequately take a medical history from Plaintiff before and during his pulmonary function test; and/or
- (k) Set blood pressure standards too high for the pulmonary function test; and/or
- (l) Failed to instruct or warn that if the blood pressure was over a certain amount that no pulmonary function test should be done that day; and/or
- (m) Otherwise failed to provide the Plaintiff with reasonably safe methods of work.

7. That as a result, in whole or in part, of one or more of the foregoing negligent acts or omissions, the Plaintiff, RAYMOND P. KEELING, JR., sustained severe and permanent injuries to his ears and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of TWO MILLION DOLLARS (\$2,000,000.00).

COUNT III

COMES NOW the Plaintiff, RAYMOND P. KEELING, JR., by and through his attorneys, PRATT & TOBIN, P.C. and RIDER, THOMAS, CLEVELAND, FERRIS & EAKIN, P.C., and for Count III of his cause of action against the Defendant, T. K. GROUP, INC., a corporation, states:

1. That on or about August 16, 1994, the Plaintiff, RAYMOND P. KEELING, JR., was a resident of Roanoke, Virginia, and employed by NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, as an electrician.

2. That on or about August 16, 1994, the Defendant, T. K. GROUP, INC., was a corporation in the business of contracting with Norfolk and Western Railway Company to provide pulmonary function tests to Norfolk and Western employees, including the Plaintiff.

3. That on or about August 16, 1994, T. K. GROUP, INC., arranged for a pulmonary function test for the Plaintiff in Roanoke, Virginia.

4. That prior to and on August 16, 1994, the Defendant held itself out and informed the public that it had the requisite skill, competence, personnel, equipment and information to properly arrange for a pulmonary function test for the Plaintiff, RAYMOND P. KEELING, JR.

5. That the Defendant, T. K. GROUP, INC., retained Quality Services, Inc., on behalf of Norfolk and Western Railway Company, to administer a pulmonary function test to the Plaintiff on August 16, 1994, in Roanoke, Virginia.

6. That on August 16, 1994, the Plaintiff entrusted himself to the care of T. K. Group, Inc., and its agents, servants and employees, for purposes of a pulmonary function test.

7. That on or about August 16, 1994, there was a duty on the part of T. K. Group, Inc., to arrange for medical services consistent with the medical requirements of those persons submitting to pulmonary function testing so as not to negligently cause injury to said persons, including the Plaintiff, RAYMOND P. KEELING, JR.

8. That on or about August 16, 1994, after assuming the care and treatment of the Plaintiff in arranging for his pulmonary function test, the Defendant, T. K. GROUP, INC., by and through its duly authorized agents, servants and employees, were then and there guilty of one or more of the following negligent acts and/or omissions:

- (a) Failed to retain competent and qualified persons to administer Plaintiff's pulmonary function test; and/or
- (b) Failed to retain persons with adequate equipment and facilities to administer Plaintiff's pulmonary function test; and/or
- (c) Failed to inspect the facilities and equipment of those retained to do Plaintiff's pulmonary function test; and/or

- (d) Failed to inspect the testing procedure used by those administering the pulmonary function test to Plaintiff; and/or
- (e) Failed to adequately inform Plaintiff of the risks inherent in a pulmonary function test; and/or
- (f) Failed to properly administer Plaintiff's pulmonary function test; and/or
- (g) Failed to discontinue Plaintiff's pulmonary function test after Plaintiff had difficulty completing same; and/or
- (h) Failed to properly determine whether Plaintiff was physically fit to undergo or continue pulmonary function testing; and/or
- (i) Failed to properly instruct or train Plaintiff in taking the pulmonary function test; and/or
- (j) Failed to adequately take a medical history from Plaintiff before and during his pulmonary function test; and/or
- (k) Set blood pressure standards too high for the pulmonary function test; and/or
- (l) Failed to instruct or warn that if the blood pressure was over a certain amount that no pulmonary function test should be done that day.

9. That as a direct and proximate cause of one or more of the foregoing negligent acts and/or omissions of the Defendant, T. K. GROUP, INC., the Plaintiff, RAYMOND P. KEELING, JR., sustained severe and permanent injuries to his ears and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself for medical aid and

attention; and his future earning capacity has been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of TWO MILLION DOLLARS (\$2,000,000.00).

COUNT IV

COMES NOW the Plaintiff, RAYMOND P. KEELING, JR., by and through his attorneys, PRATT & TOBIN, P.C. and RIDER, THOMAS, CLEVELAND, FERRIS & EAKIN, P.C., and for his cause of action against the Defendant, QUALITY SERVICES, INC. states:

1. That on or about August 16, 1994, the Plaintiff, RAYMOND P. KEELING, JR., was a resident of Roanoke, Virginia, and employed by NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, as an electrician.

2. That on or about August 16, 1994, the Defendant, QUALITY SERVICES, INC., was a corporation in the business of administering pulmonary function tests.

3. That on or about August 16, 1994, QUALITY SERVICES, INC., administered a pulmonary function test to the Plaintiff in Roanoke, Virginia.

4. That prior to and on August 16, 1994, the Defendant held itself out and informed the public that it had the requisite skill, competence, personnel, equipment and information to properly administer a pulmonary function test to the Plaintiff, RAYMOND P. KEELING, JR.



5. That the Defendant, QUALITY SERVICES, INC., was retained by T.K. Group, Inc., on behalf of Norfolk & Western Railway Company to administer a pulmonary function test to the Plaintiff on August 16, 1994.

6. That on August 16, 1994, the Plaintiff entered Defendant's mobile van and entrusted himself to the care of the Defendant, agents, servants and employees, for purposes of a pulmonary function test.

7. That on or about August 16, 1994, there was a duty on the part of the Defendant to render medical services consistent with the medical requirements of those persons submitting to pulmonary function testing so as not to negligently cause injury to said persons, including the Plaintiff, RAYMOND P. KEELING, JR.

8. That on or about August 16, 1994, after assuming the care and treatment of the Plaintiff in administering a pulmonary function test, the Defendant, QUALITY SERVICES, INC., by and through its duly authorized agents, servants and employees, were then and there guilty of one or more of the following negligent acts and/or omissions:

- (a) Failed to retain competent and qualified persons to administer Plaintiff's pulmonary function test; and/or
- (b) Failed to retain persons with adequate equipment and facilities to administer Plaintiff's pulmonary function test; and/or
- (c) Failed to inspect the facilities and equipment of those retained to do Plaintiff's pulmonary function test; and/or

- (d) Failed to inspect the testing procedure used by those administering the pulmonary function test to Plaintiff; and/or
- (e) Failed to adequately inform Plaintiff of the risks inherent in a pulmonary function test; and/or
- (f) Failed to properly administer Plaintiff's pulmonary function test; and/or
- (g) Failed to discontinue Plaintiff's pulmonary function test after Plaintiff had difficulty completing same; and/or
- (h) Failed to properly determine whether Plaintiff was physically fit to undergo or continue pulmonary function testing; and/or
- (i) Failed to properly instruct or train Plaintiff in taking the pulmonary function test; and/or
- (j) Failed to adequately take a medical history from Plaintiff before and during his pulmonary function test. and/or
- (k) Set blood pressure standards too high for the pulmonary function test; and/or
- (l) Failed to instruct or warn that if the blood pressure was over a certain amount that no pulmonary function test should be done that day.

9. That as a direct and proximate cause of one or more of the foregoing negligent acts and/or omissions of the Defendant, QUALITY SERVICES, INC., the Plaintiff, RAYMOND P. KEELING, JR., sustained severe and permanent injuries to his ears and man as a whole, resulting in disability and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injuries; and he has been and will in the future be compelled to obligate himself for medical aid and

attention; and his future earning capacity has been seriously diminished thereby; ALL TO THE DAMAGE OF THE PLAINTIFF in a sum of TWO MILLION DOLLARS (\$2,000,000.00).

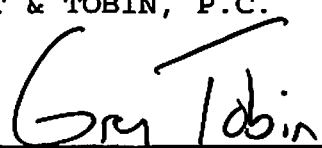
WHEREFORE, Plaintiff, RAYMOND P. KEELING, JR., prays for judgment against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, in the sum of TWO MILLION DOLLARS (\$2,000,000.00), and for costs of suit and for judgment against the Defendant, T. K. GROUP, INC., in the sum of TWO MILLION DOLLARS (\$2,000,000.00) and for costs of suit and for judgment against the Defendant, QUALITY SERVICES, INC., in a sum of TWO MILLION DOLLARS (\$2,000,000.00), and for costs of suit.

DATED this 16 day of March, 2000.

Respectfully submitted,

PRATT & TOBIN, P.C.

BY:

  
GREGORY M. TOBIN - VSB No. 26571  
ROBERT W. SCHMIEDER - Illinois  
License No. 2493292  
Route 111 at Airline Drive  
P. O. Box 179  
East Alton, IL 62024  
Telephone: (618) 259-8011  
(800) 851-5562

and

LENDEN A. EAKIN  
RIDER, THOMAS, CLEVELAND,  
FERRIS & EAKIN, P.C.  
22 Luck Avenue, S.W.  
P. O. Box 1791  
Roanoke, VA 24008  
Telephone: (540) 344-3233

ATTORNEYS FOR PLAINTIFF

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING, JR.

Plaintiff,

v.

Law No.: CL96-925

NORFOLK AND WESTERN RAILWAY  
COMPANY, et al.,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16 day of  
MARCH, 2000, the foregoing Motion To Amend  
Motion For Judgment and Amended Motion For Judgment were served  
upon all counsel of record via facsimile and by mailing true copies  
of same through the United States mail to:

Mr. Temple W. Cabell  
SCHAFER & CABELL  
100 West Franklin Street, Suite 200  
P. O. Box 507  
Richmond, VA 23218  
Counsel for Norfolk & Western Railway Company  
and T.K. Group, Inc.

Mr. David E. Boelzner  
WRIGHT, ROBINSON, OSTHIMER & TATUM  
411 East Franklin Street - 4<sup>th</sup> Floor  
Richmond, VA 23218  
Counsel for Quality Services, Inc.

  
GREGORY M. TOBIN

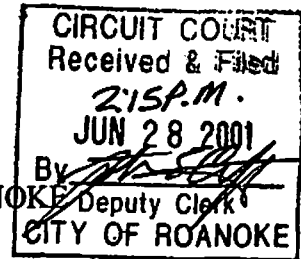
GREGORY M. TOBIN - VSB No. 26571  
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East Alton, IL 62024  
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and

LENDEN A. EAKIN  
RIDER, THOMAS, CLEVELAND,  
FERRIS & EAKIN, P.C.  
22 Luck Avenue, S.W.  
P. O. Box 1791  
Roanoke, VA 24008  
Telephone: (540) 344-3233

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE



RAYMOND P. KEELING,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY  
COMPANY, a corporation,  
T. K. GROUP, INC., a corporation,  
and QUALITY SERVICES, INC.,  
a corporation,

Defendant.

96.925  
Law No. CL94-000870

**RESPONSIVE PLEADING OF DEFENDANT**

For its answer and grounds of defense to Plaintiff's Amended Motion for Judgment, defendant, Norfolk and Western Railway Company ("N&W") comes by counsel and states:

**COUNT I**

1. Paragraph 1 of Count I of the Motion for Judgment is admitted.
2. As to paragraph 2 of Count I, defendant admits that plaintiff was employed by defendant on or about August 16, 1994, but denies that he was injured as alleged.
3. As to paragraph 3 of Count I, defendant admits only that it is engaged in interstate commerce as a common carrier, and that part of plaintiff's duties in furtherance of his employment with defendant was in furtherance of interstate commerce.
4. As to paragraph 4, defendant admits that in the course of his employment, plaintiff was directed to take a pulmonary function test but denies that plaintiff was injured as a

result of the pulmonary function test, or as the result of any of the other allegations asserted by plaintiff.

5. Paragraphs 5 and 6 and all subparts thereof of Count I of the Motion for Judgment are denied.

## COUNT II

6. Paragraph 1 of Count II of the Motion for Judgment is admitted.

7. As to paragraph 2 of Count II, defendant admits that plaintiff was an employee of defendant on August 16, 1994, but denies that plaintiff was injured as alleged.

8. As to paragraph 3 of Count II of the Motion for Judgment, defendant admits only that it is engaged in interstate commerce as a common carrier, and that a part of plaintiff's duties in furtherance of his employment with defendant was in furtherance of interstate commerce.

9. As to paragraph 4 of Count II, defendant admits that plaintiff was directed to take a pulmonary function test but denies that plaintiff was injured as a result of the pulmonary function test, or as a result of any of the other allegations asserted by plaintiff.

10. Paragraphs 5 through 7 and all subparts thereof of Count II of the Motion for Judgment are denied.

## COUNTS III AND IV

11. Defendant, Norfolk and Western Railway Company, is not called upon to answer the allegations contained in Counts III and IV, as they are directed at other parties. To the extent that these counts contain any allegations about Norfolk and Western Railway Company, the defendant denies such allegations.



12. Defendant, Norfolk and Western Railway Company, denies that it is indebted to plaintiff for the amount alleged in the Motion for Judgment or for any other sum whatsoever, and calls upon plaintiff for strict proof of each and every item of alleged injury and damage alleged in the Motion for Judgment.

13. All allegations in the Motion for Judgment not expressly admitted herein are denied.

14. Defendant denies that it violated any legal duty owed plaintiff, or that caused the accident and injuries alleged in the Motion for Judgment.

15. Defendant denies that any negligence on its part resulted in injury or damage to plaintiff.

16. Defendant alleges that plaintiff was guilty of negligence and/or contributory negligence which caused or contributed to the accident in question and which will bar or limit any recovery by plaintiff in this case.

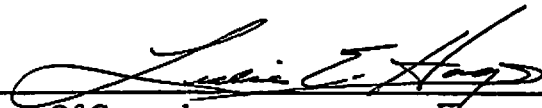
17. Defendant alleges that plaintiff has failed to mitigate any damages which he may have suffered as a result of this injury.

18. Defendant alleges that some or all of the injuries and damages alleged by plaintiff were not caused by the incident described in the Motion for Judgment.

19. Defendant alleges that the injuries and damages alleged by plaintiff are the result of circumstances for which defendant was not responsible and over which it had no control.

20. Defendant alleges that plaintiff's cause of action is barred by the applicable statute of limitations.

NORFOLK AND WESTERN RAILWAY COMPANY

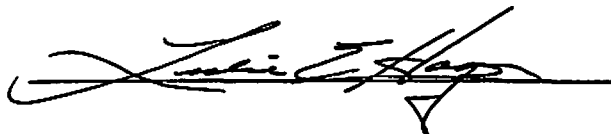
By   
Of Counsel

Leslie E. Hagie (VSB #28805)  
WOODS, ROGERS & HAZLEGROVE, P.L.C.  
First Union Tower, Suite 1400  
10 South Jefferson Street  
P.O. Box 14125  
Roanoke, Virginia 24038-4125  
(540) 983-7600  
Facsimile (54) 983-7711

Counsel for Defendant

CERTIFICATE OF SERVICE

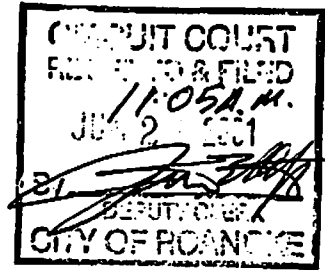
I hereby certify that a true copy of the foregoing was mailed to Gregory M. Tobin, Esquire, and Robert Schmieder, Esquire, Pratt & Tobin, P.C., Route 111 at Airline Drive, Post Office Box 179, East Alton, IL 62024 and Lenden Eakin, Esquire, Rider, Thomas, Cleaveland, Ferris & Eakin, P. C., 22 Luck Avenue, S.W., Post Office Box 1791, Roanoke, Virginia 24008, counsel for plaintiff; Temple W. Cabell, Esquire, Schaffer & Cabell, Post Office Box 507, Richmond, Virginia 23281, counsel for T.K. Group, Inc.; and, Charles F. Midkiff, Esquire, Midkiff, Muncie & Ross, P.C., Suite 160, Stony Point Parkway, Richmond, Virginia, 23235-1939, counsel for Quality Services on this 25<sup>th</sup> day of June, 2001.



WOODS, ROGERS  
HAZLEGROVE  
Attorneys at Law

*Attorneys at Law*

**LESLIE E. HAGIE**  
**540 983-7693**  
**INTERNET: [hagie@woodsrogers.com](mailto:hagie@woodsrogers.com)**



**June 25, 2001**

**Arthur B. Crush, Clerk  
Circuit Court, City of Roanoke  
Post Office Box 2610  
Roanoke, Virginia 24016**

**In Re:      Law No. CL96-925**  
**Raymond P. Keeling v. Norfolk and Western Railway Company et al.**

**Dear Bert:**

Enclosed for filing in the above-styled case please find the Responsive Pleading of Defendant. By copy of this letter the same has been forwarded to all counsel of record.

**Thank you for your assistance.**

Very truly yours,

**WOODS, ROGERS & HAZLEGROVE, P.L.C.**

  
Leslie E. Hagie

**Enclosure**

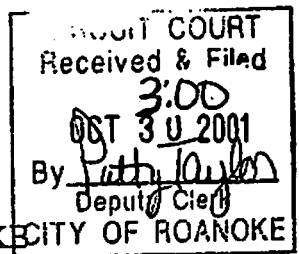
cc: Richard W. Schmieder, Esquire (w/enc.)  
Lenden A. Eakin, Esquire (w/enc.)  
Charles F. Midkiff, Esquire (w/enc.)  
Temple W. Cabell, Esquire (w/enc.)

**RKE# 0704538.WPD**  
**C/M: 069558-00442-01**

**P. O. Box 14125 / Roanoke, Virginia 24038-4125**  
**10 South Jefferson Street, Suite 1400 / Roanoke, Virginia 24011**  
**540 983-7600 / Fax 540 983-7711**  
**Internet – mail@woodsrogers.com**

---

**Offices also in Charlott                      Richmond, Virginia**



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY  
COMPANY, a corporation, and  
T. K. GROUP, INC., a corporation,

Defendants.

Law No. CL96-000925

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

Defendant, Norfolk and Western Railway Company ("NW"), by counsel, submits this memorandum in support of its motion to strike plaintiff's insufficient responses to court-ordered discovery and to support its request that this court sanction the plaintiff in accordance with Rule 4:12(b) of the Rules of the Supreme Court of Virginia. At the last hearing in this case, the Court ordered plaintiff to provide answers to NW's interrogatories, signed under oath, by October 23, 2001. Plaintiff has failed to do so, given that plaintiff's Objections and Responses to Defendant, Norfolk and Western Railway Company's, Interrogatories and Request for Production to Plaintiff are unsigned by the plaintiff under oath and are otherwise wholly insufficient responses to the information requested. Examples of plaintiff's inadequate responses are as follows:

7. Identify all evidence upon which you will rely to prove a connection between blood pressure and the occurrence of a perilymphatic fistula during the administration of a pulmonary function test.

WOODS, ROGERS  
& HAZLEGROVE  
Attorneys at Law

RKE# 0722631.WPD-

ANSWER: Dr. Kohut and Dr. Rudy Thallman.

\* \* \*

9. For each Request for Admissions filed herewith that you have denied, state the basis of your denial, citing all authorities, evidence or circumstances that support your denial.

ANSWER: Dr. Kohut and Dr. Hippensteel.

(Plaintiff's Objections and Responses to Defendant, Norfolk and Western Railway Company's Interrogatories and Requests for Production to Plaintiff, attached as Exhibit A.) The remainder of the interrogatory answers and responses to the requests for documents are similarly inadequate.

Plaintiff's discovery responses fail to comply with this Court's order to provide discovery. Plaintiff's responses also are in violation of plaintiff's duty to supplement his previous responses to NW's discovery requests which sought the identity of plaintiff's expert witnesses and the substance of their expected testimony. Finally, plaintiff's responses are in violation of this Court's pre-trial scheduling order dated July 31, 2001 with respect to the disclosure of expert witnesses and their expected testimony.

As a result, NW has been severely prejudiced. With just two weeks left before trial, NW still does not know what plaintiff's expert witness testimony will be with respect to the crucial issue of the relationship between plaintiff's blood pressure and the development of an alleged perilymphatic fistula. This causes NW, the innocent party, to face the Hobson's choice of seeking a continuance of the trial or putting its pretrial preparation efforts into double-time. Pursuant to the Rules of Court and the abundant case law dealing with abuses of discovery, NW asks that this Court: (1) Enter the attached order, *nunc pro tunc*, regarding this Court's ruling

from the bench at the October 9, 2001 hearing; and (2) Enter an order finding that plaintiff has failed to comply with this Court's October 9, 2001 order regarding discovery; granting NW's motion to strike plaintiff's discovery responses; ordering that NW's requests for admissions are deemed admitted; and granting the relief requested by NW, including but not limited to, granting NW's Motion in Limine to Exclude Evidence of Blood Pressure, granting summary judgment to NW, and awarding costs and attorney's fees to NW.

#### ARGUMENT AND AUTHORITIES

##### I. PLAINTIFF HAS FAILED TO COMPLY WITH THIS COURT'S DISCOVERY ORDER OF OCTOBER 9, 2001.

Since the filing of plaintiff's Amended Motion for Judgment, NW has been trying unsuccessfully to have plaintiff identify the evidence that supports his allegation that plaintiff's blood pressure reading of 158/102 had anything to do with the development of plaintiff's alleged perilymphatic fistula. On July 13, 2001, NW filed requests for admissions, interrogatories and a request for production, designed to develop this information. Plaintiff responded with denials to the request for admissions, but filed no response to the interrogatories and request for production. NW then filed a motion to compel a full response to the discovery requests, and noticed a hearing for September 9, 2001.

At that hearing on September 9, this Court showed NW a supplemental response from plaintiff to the requests for admissions that the Court had received the previous evening, ruled that the requests for admissions were sufficient, but indicated that defendants would have the right to ask for sanctions if later developments demonstrated that plaintiff's denials to the requests were not well taken. (NW did not receive his copy of plaintiff's responses until

September 11, 2001, even though the certificate of service indicated that they had been sent on September 6, 2001.) At the same time, NW also received plaintiff's objections to the interrogatories had that had been served on July 13, 2001. (Plaintiff did not object or respond to the request for production that was filed by NW at the same time as the requests for admissions and interrogatories.)

At a subsequent hearing on October 9, 2001, this Court overruled plaintiff's objections to NW's interrogatories as being untimely, and ordered plaintiff to respond to this discovery, with the interrogatory answers signed under oath by plaintiff, by October 23, 2001. (Transcript of portion of October 9, 2001 hearing attached as Exhibit B.)<sup>1</sup> By requiring plaintiff to answer this discovery, plaintiff was ordered to specifically set forth his evidence of a relationship between blood pressure and perilymphatic fistulas.

Plaintiff served answers to the interrogatories on October 23, 2001, attached as Exhibit A, but these answers failed to comply with this Court's order. First, the interrogatory answers are unsigned by the plaintiff under oath. For this reason alone, they should be struck.

Second, the interrogatory answers contain certain new objections by the plaintiff. This Court has already overruled plaintiff's objections to these interrogatories. Therefore, these objections are improper. The objections also are untimely, having been raised for the first time some three months after NW served this discovery and after this Court has already held that plaintiff must answer these interrogatories.

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<sup>1</sup>Plaintiff has not returned the order that defendant has circulated setting forth this Court's ruling of October 9, 2001, a copy of which was attached to NW's motion to strike and is attached herewith as Exhibit C. NW now requests that this Court enter that order *nunc pro tunc*.

Third, the interrogatory answers fail to provide the crucial information requested by NW and ordered by the Court. In the answer to interrogatory No. 7, plaintiff fails to identify any evidence upon which he will rely to prove a connection between blood pressure and the occurrence of a perilymphatic fistula. Instead, plaintiff merely identifies by name only "Dr. Kohut and Dr. Rudy Thallman." The reference to Dr. Thallman is quite a surprise to NW, given that plaintiff has never previously identified Dr. Thallman as a fact or expert witness in this case. NW has no idea who Dr. Thallman is.

As for Dr. Kohut, plaintiff does not identify what Dr. Kohut's expected testimony will be with respect to any connection between blood pressure and the occurrence of a perilymphatic fistula. Dr. Kohut's deposition was taken back in April 1998, at which time the following exchange took place:

Q. Would his history of hypertension alone have anything to do with developing a perilymphatic fistula?

A. Nobody has looked at that to see, "Are the hypertensive more prone to get this?" I see patients with this, and it hasn't struck me; but I have not done a study at all. Are the hypertensive more prone to get this? I don't know.

(Deposition of Robert I. Kohut, M.D. at 24, Exhibit D.) Dr. Kohut later admitted that he was not an expert on hypertension. (Id. at 72-73.)<sup>2</sup>

Similarly, plaintiff's answers to interrogatories are insufficient with respect to basis for his denial of NW's requests for admissions. When asked to identify the authorities and evidence

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<sup>2</sup> Dr. Kohut then proceeded to state what no jury needs an expert to know, that "when [blood pressure is] real high, it's dangerous." Dr. Kohut further undermines plaintiff's allegations of a causal relationship between blood pressure and a perilymphatic fistula when queried about whether uncontrolled blood pressure could cause a recurrence of a perilymphatic fistula. On page 75 of his deposition, Dr. Kohut responded, "No. No. No. It will just aggravate the symptoms that he might have related to a recurrence."



supporting his denial, plaintiff cites again to Dr. Kohut, and this time to Dr. Hippensteel, but without any explanation of their expected testimony to support the denial. (Ans. Interrog. No. 9.) Dr. Hippensteel's deposition has been taken, but he did not identify any alleged relationship between high blood pressure and the development of perilymphatic fistulas. Blood pressure measurements, according to Dr. Hippensteel, have no direct relevance to pulmonary function tests, but are used as precautions against the risk of cardiovascular problems such as stroke, heart arrhythmia or a rupture of a blood vessel. (Deposition of Kirk Hippensteel M.D., at 17, Exhibit E.) Therefore, these interrogatory answers fail to provide the information requested and do not support the plaintiff's denial of NW's requests for admissions.<sup>3</sup>

In the same pleading, plaintiff finally answered NW's requests for production of documents which NW had served contemporaneously with its requests for admissions. However, plaintiff failed to produce any documents whatsoever. (Exhibit A.) Plaintiff instead relies on objections in response to the requests for documents. (Response to RPD's Nos. 2, 3, Exhibit A.) However, plaintiff has waived these objections by failing to respond to this discovery in a timely manner in the first place. NW can only assume that plaintiff has failed to find any literature or documentation to support the allegations of linkage between blood pressure and perilymphatic fistulas.

Plaintiff's inadequate responses to NW's interrogatories and requests for production of documents demonstrate that plaintiff's responses to NW's requests for admissions are not well

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<sup>3</sup>The testimony of these physicians fails to comply with the standards for admissibility of expert witness testimony set forth in Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) and Kuhmo Tire Co., Ltd. v. Carmichael, 119 S. Ct. 1167 (1999). See, e.g., Black v. Food Lion, Inc., 171 F.3d 308 (5<sup>th</sup> Cir. 1999)(applying these standards and holding that physician's testimony regarding causation of an illness was not sufficiently reliable).

taken. (Copies of plaintiff's original and supplemental responses to NW's requests for admissions attached as Exhibit F.)

II. PLAINTIFF'S DISCOVERY RESPONSES ALSO ARE IN VIOLATION OF THE PRE-TRIAL SCHEDULING ORDER AND PLAINTIFF'S DUTY TO SUPPLEMENT HIS PRIOR ANSWERS TO DISCOVERY.

In September 1996, NW served standard discovery requests to plaintiff seeking the identification of plaintiff's expert witnesses and the substance of their expected testimony. Plaintiff failed to respond to this discovery until February 1997, at which time he identified his expert witnesses as follows:

26. Have you and/or your attorneys retained an expert to testify on your behalf at trial? If yes, for each such witness state his or her name, business name and address, field of expertise, credentials as an expert, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

ANSWER: No retained experts at this time but Plaintiff may call treating doctors as experts. See their records and reports for the substance of their testimonies. Other supplemental reports may be filed.

(Answers to Interrogatories to Plaintiff, Exhibit G.)

Three years later, plaintiff served "Plaintiff's Disclosure of Experts" which identified Drs. Hippensteel and Kohut, but did not provide the substance of their testimony and the basis for that testimony. (Plaintiff's Disclosure of Experts, Exhibit H.) Plaintiff supplemented that disclosure on February 28, 2000 by identifying Dr. Burch, but again did not provide the substance of his testimony and the basis for that testimony.<sup>4</sup> (Plaintiff's Supplemental Disclosure

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<sup>4</sup>Plaintiff indicated that Dr. Burch was expected to testify in accordance with his deposition taken on June 24, 1999, and to the care and treatment he provided plaintiff. The deposition and his medical records do not include any evidence that blood pressure was linked to the development of the fistula.

of Expert, Exhibit I.) Finally, on April 20, 2000, plaintiff supplemented his expert witness designation with a report from Dr. Hippensteel. (Supplementation to Plaintiff's Disclosure of Experts, Exhibit J.) However, Dr. Hippensteel's report failed to link hypertension with the development of perilymphatic fistulas.

This Court entered a pretrial scheduling order on July 31, 2001, establishing September 13, 2001, as the deadline for plaintiff to identify his experts, and to provide the substance, opinions and grounds for the expert's opinions as set forth in Rule 4:1(b) (4) (A) (1) of the Rules of the Supreme Court of Virginia. (Scheduling Order, Exhibit K.) This Order went on to note that experts ordinarily would not be permitted to express any nondisclosed opinions at trial. Despite this deadline, plaintiff failed to make any additional expert witness disclosures prior to this September 13, 2001 deadline.

Therefore, two weeks before trial, plaintiff has provided no opinions from any experts addressing the linkage of blood pressure to perilymphatic fistulas. This is a violation of the scheduling order and plaintiff's duty to supplement his discovery responses.

**III. DUE TO THE FAILURE TO COMPLY WITH THIS COURT'S ORDER REGARDING DISCOVERY, AND DUE TO THE FAILURE TO COMPLY WITH THE PRETRIAL SCHEDULING ORDER AND DUTY TO SUPPLEMENT, THIS COURT SHOULD STRIKE PLAINTIFF'S ANSWERS TO DISCOVERY AND OTHERWISE SANCTION PLAINTIFF.**

Virginia law gives this Court broad discretion in determining the appropriate sanction for failure to comply with an order relating to discovery. Walsh v. Bennett, 260 Va. 171, 171, 530 S.E.2d 904, 907 (2000). Under Rule 4:12(b), if a party fails to obey a Court's order to provide

or permit discovery, the Court may make such orders in regard to the failure as are just, and among others the following:

a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

Rule 4:12(b)(2).

Several courts have sanctioned parties for less egregious violations of the discovery rules. For example, in Woodbury v. Courtney, 239 Va. 651 (1990), the Supreme Court of Virginia found that the trial court did not abuse its discretion when it granted summary judgment due to the plaintiff's failure to identify expert witnesses as required by the pre-trial scheduling order.<sup>5</sup> And, in a recent trial court opinion, Kirk Timber & Farming Co. v. Union Camp Corp., 5 Cir. CL97170 (Suffolk Co. Cir. Ct. 2001)(attached as Exhibit L), the court addressed a defendant's failure to provide requested expert witness disclosures under a scheduling order

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<sup>5</sup>In two recent cases, the Supreme Court of Virginia addressed the issue of sanctions under Rule 4:12(b). Walsh v. Bennett, 260 Va. 171, 530 S.E.2d 904 (2000); Brown v. Black, 260 Va. 305, 534 S.E.2d 727 (2000). The Court noted that the rules of court give a trial court broad discretion to tailor its sanctions to the particular conduct of a party in a given case. Brown, 260 Va. at 311. Neither case is dispositive here, however, because in both cases, the majority found that the trial court sanctioned the offending party before it had violated a court order compelling discovery. Such is not the case here.

which, like the one in the case at hand, warned that experts “will not ordinarily be permitted to express any non-disclosed opinions at trial.” The court stated:

Because the timing of the duty to supplement frequently creates insufferable arguments over who knew what when, and why it took so long to disclose it, courts use pretrial orders to mark the outer boundaries of the duty to supplement. *See Civil Discovery in Virginia* § 9.3, at 187 (Virginia Law Foundation 2000). Rule 1:18 authorizes trial courts to issue pretrial orders that, among other things, set deadlines on the duty to supplement expert interrogatories. The Uniform Pretrial Order requires not merely the identification of the expert by name — but also the specifics of the expert's opinions and a summary of the factual grounds underlying these opinions. *See* Form 3 of Va. Sup. Ct. Rule 1:18(B); Va. Sup. Ct. Rule 4:1(b)(4)(A)(ii); *see generally Woodbury v. Courtney*, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990) (“The purpose of the order was to allow the litigants to discover the expert witnesses' opinions in preparation for trial.”).

Kirk Timber & Farming Co. v. Union Camp Corp., 5 Cir. CL97170 at 4 (2001). The party in

Kirk Timber had disclosed some of his expert witnesses by name only, failing to provide the specifics of the experts' opinions and a summary of the factual grounds underlying those opinions. In determining that it was appropriate to exclude these witnesses testimony, the court stated:

Rule 1:18's Uniform Pretrial Order, used in this case, warned that experts “will not *ordinarily* be permitted to express any non-disclosed opinions at trial.” Pretrial Order of Dec. 29, 2000 (Delk, J.) (emphasis added). This admonitory advice tracks the trial court's authority to prohibit parties in breach of the discovery rules from “introducing designated matters in evidence.” Va. Sup. Ct. Rules 4:12(b)(2)(B) & 4:12(d)(2). To determine if this is an ordinary case (where the non-disclosed opinion should be excluded) or the extraordinary case (where it should not), at least five factors should be taken into account:

- (i) the “surprise” to the other party;
- (ii) the ability of the offending party to “cure that surprise”;
- (iii) the possibility that the “testimony would disrupt the trial”;
- (iv) the party's “explanation” for not providing a timely disclosure; and

(v) the alleged "importance" of the testimony.

Id. at 6 (citing Rambus, Inc. v. Infineon Technologies AG, 145 F. Supp. 2d 721, 726-27 (E.D. Va. 2001) and Adalman v. Baker, Watts & Co., 807 F.2d 359, 369-70 (4th Cir. 1986)).

Application of these factors indicates that this is the ordinary case and that, at the very least, the non-disclosed expert witness opinions relating to the relationship between blood pressure and perilymphatic fistulas should be excluded. First, there will be tremendous surprise to the defendants whenever plaintiff finally discloses what his expert witnesses are expected to testify to on this point. Despite the great lengths NW has gone to in an attempt to force plaintiff to identify what evidence plaintiff has relating blood pressure to perilymphatic fistulas, plaintiff continues to refuse to produce any documentation or to identify any specific information. Plaintiff apparently hopes to bring Dr. Kohut and/or Dr. Hippensteel to trial and ambush the defendants with this testimony and the basis for that testimony. And, with respect to the still unknown Dr. Thallman, surprise remains the order of the day.

Under the second factor, plaintiff has been given ample opportunity by this Court to cure any surprise testimony, but has consistently refused to take advantage of that opportunity. Plaintiff apparently feels justified to wait until the middle of trial to spring whatever evidence it may have on the defendants who lack the opportunity to properly prepare for and counter the unknown evidence. The Kirk Timber court acknowledged the almost impossible situation a party faces when it has to prepare to defend against unknown evidence:

In cases where, as here, the ostensible cure comes after the discovery cutoff, the innocent party faces the Hobson's choice of seeking a continuance or putting its pretrial preparation efforts into double-time. In this case, the first option disrupts the trial scheduled for August 27, and the second option throws Kirk Timber into a costly, last-minute "full-court press" during the "last few days" of the pretrial period. Thibeault v.

Square D Co., 960 F.2d 239, 247 (1st Cir. 1992). Either option could easily generate motions for expert depositions, motions to compel more specific disclosures, as well as any number of other hurried legal contests over the admissibility of their opinions. Union Camp's cure, therefore, puts the trial date as well as the orderly nature of the pretrial schedule in jeopardy.

Id. at 7.

Under the third factor, if this court allows plaintiff to cure, the disruption to the trial schedule will be monumental. Plaintiff's actions will require extensive voir dire and hearing of testimony outside the presence of the jury in order to determine the admissibility of whatever expert witness testimony plaintiff finally decides to release during the trial. Given all the witnesses identified for trial, and given that there are three parties who will be examining each witness during the trial, the trial schedule does not allow sufficient time for the parties to conduct the necessary voir dire and still finish the trial anytime near the scheduled time for completion.

Under the fourth and fifth factors, plaintiff has simply refused to comply with either the standards for discovery set forth under the Rules of the Supreme Court of Virginia or this Court's specific ruling on October 10, 2001. The evidence is extremely important to the defendants given that the relevance of blood pressure underlies the entire theory of plaintiff negligence claim – that the technicians did not properly comply with the Railroad's protocol for monitoring blood pressure prior to a pulmonary function test. That is a separate issue, but certainly if there is no relationship between blood pressure and the alleged harm, i.e., the development of a perilymphatic fistula, whether or not the technicians violated the protocol is of no relevance.

In numerous other cases, trial courts have sanctioned parties for failing to comply with discovery obligations. Ellerbe v. Lowe's Home Center, Inc., 13 Cir. LC26634 (Cir. Ct. Richmond 1998)(dismissing lost profit claim because of plaintiff's untruthful responses to discovery); Thompson v. Inger, 19 Cir. 93246 (Fairfax Co. Cir. Ct. 1995)(dismissing suit for, inter alia, failing to provide adequate responses to discovery); Stauffer & Abraham v. Peterson, 19 Cir. L136391 (Fairfax Co. Cir. Ct. 1995)(striking defenses and excluding certain evidence for failure to comply with discovery order)(copies of these opinions attached as Exhibit M.) Similar action is mandated here.

NW has taken numerous actions in an attempt to determine plaintiff's evidence on this crucial issue and bring it before the Court prior to trial for an orderly ruling. NW and the co-defendant have been severely prejudiced by plaintiff's failure to follow the rules of discovery and comply with the discovery order. Accordingly, NW respectfully requests that this Court: (1) Enter the attached order, *nunc pro tunc*, regarding this Court's ruling from the bench at the October 9, 2001 hearing; and (2) Enter an order finding that plaintiff has failed to comply with this Court's October 9, 2001 order regarding discovery; granting NW's motion to strike plaintiff's discovery responses; ordering that NW's requests for admissions are deemed admitted; and granting the relief requested by NW, including but not limited to, granting NW's Motion in Limine to Exclude Evidence of Blood Pressure, granting summary judgment to NW, and awarding costs and attorney's fees to NW.

Respectfully submitted,

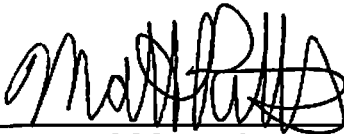
WOODS, ROGERS  
& HAZLEGROVE  
*Attorneys at Law*

RKE# 0722631.WPD-

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NORFOLK AND WESTERN RAILWAY COMPANY

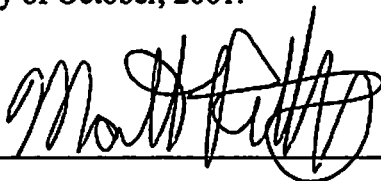
By:   
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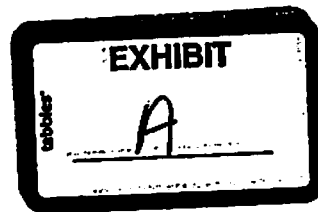
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent via overnight mail to Gregory M. Tobin, Esquire, and Robert Schmieder, Esquire, Pratt & Tobin, P.C., Route 111 at Airline Drive, Post Office Box 179, East Alton, IL 62024, and hand-delivered to Lenden Eakin, Esquire, Rider, Thomas, Cleaveland, Ferris & Eakin, P. C., 22 Luck Avenue, S.W., Post Office Box 1791, Roanoke, Virginia 24008, counsel for plaintiff; and sent via overnight mail to Temple W. Cabell, Esq., Shaffer & Cabell, P.O. Box 507, Richmond, Virginia 23281, counsel for defendant T.K. Group, Inc., on this 30<sup>th</sup> day of October, 2001.



WOODS, ROGERS  
& HAZLEGROVE  
*Attorneys at Law*

RKE# 0722631.WPD-



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING,

Plaintiff,

v.

Law No. CL96-000295

NORFOLK AND WESTERN RAILWAY  
COMPANY, a corporation; T. K. GROUP,  
INC., a corporation; and QUALITY  
SERVICES, INC., a corporation,

Defendants.

PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANT,  
NORFOLK AND WESTERN RAILWAY COMPANY'S, INTERROGATORIES  
AND REQUEST FOR PRODUCTION TO PLAINTIFF

COMES NOW plaintiff. Raymond P. Keeling, by and through his undersigned attorneys, and hereby objects to the Interrogatories propounded by defendant, Norfolk And Western Railway Company, on or about July 13, 2001, as they relate to the Request For Admission of Fact, and as grounds for said objections, plaintiff states as follows:

1. Supreme Court Rule 4:11 essentially is the same as the Federal Rules of Civil Procedure, Rule 36.
2. In the case of Doe v. Mercy Health Corp., 1993, WL 377064 (E.D. Pa.), the Court stated at page 73:

"However this court has previously noted that interrogatories such as defendant seeks to compel here are not proper discovery. The limit of a responding party's duty to set forth reasons for its answers is that, when a party can neither admit nor deny the RFA, it should set forth in detail the reasons why. . . . However, there is no requirement that a party attach, or even identify all sources referenced in answering an RFA. Indeed, compelling such an explanation would be contradictory to the primary purpose of Rule

36, which is to narrow the scope and number of issues which must be proved at trial. . . . Importantly, I note that such factual basis is required by the Rule *only* when a party pleads an inability to admit or deny an RFA, and not for a denial or qualified admission."

"Plaintiff need not rely on any one opinion of his experts, or even rely on his experts at all since the RFAs seek admissions as to the medical community as a whole."

In Lakehead Pipe Line Company, Inc. v. American Home Assurance Company, 177

F.R.D. 454 (1997 U.S. District Court, D. Minn.), the court stated at page 63.

"Requests for Admission are not a discovery device. . . . More importantly, Rule 36(a) does not authorize a Court to prospectively render determinations concerning the accuracy of a denial to a Request for Admission, or to order that the subject matter of the request be admitted because the opposing party's unequivocal denial is asserted to be unsupported by the evidence."

3. Plaintiff objects to answering these interrogatories since they are improperly tied or connected to Requests to Admit and, thus, are beyond the intent and scope of the Supreme Court Rules. Subject to these objections, plaintiff answers as follows.

### ANSWERS TO INTERROGATORIES

1. Identify by name and address, all providers of medical services that you have seen since January, 1996, and for each such provider, state the reason for which you were seen, the type of treatment received, to include but not limited to identification of names and doses of any medications prescribed.

ANSWER: Plaintiff objects to this interrogatory as being too burdensome. Plaintiff has given the defendant medical authorizations in which this information has been provided and has produced all medical reports in his possession.

Dr. J. Gordon Burch  
2601 Franklin Road, SW  
Roanoke, VA 24014

Dr. Robert I. Kohut  
2729 Bartram Road  
Winston-Salem, NC 27106

2. State in detail all evidence upon which you intend to rely at trial to prove that it was negligent to establish a blood pressure reading of 200/110 above which pulmonary function tests would not be given.

ANSWER: Dr. Kirk E. Hippensteel                      Dr. Robert I. Kohut  
Pulmonary Occupational &                      2729 Bartram Road  
Research Consultants, LLC                      Winston-Salem, NC 27106  
1026-B First St.  
Roanoke, VA 24016

Norfolk Southern "Maneuver Protocol".

3. Please identify all evidence upon which you will rely in trial to prove an industry standard, mandatory requirement, or standard of care requiring blood pressure to be measured prior to administering a pulmonary function test.

ANSWER: The Norfolk Southern Railway Company's documents which discuss the "maneuver protocol"; Dr. Hippensteel; and Dr. Kohut.

4. Identify all recognized risks associated with the administration of pulmonary function tests, and identify the sources from which these risks were obtained.

ANSWER: Plaintiff objects to the term "recognized risk" as being vague and too general. Without waiving said objection, plaintiff responds to answer would require a medical degree. Risks associated with pulmonary function tests are dizziness, passing out, and the risks generally associated with straining, valsava. See depositions taken in the case.

5. Identify which recognized risks, listed in your answer to interrogatory number 4, are intended to be prevented by the taking of a blood pressure measurement prior to administering a pulmonary function test.

ANSWER: Objection. There are many risks, some of which are stroke, cardiovascular problems, rupture of vessel, etc. Common medical sense indicates that when

blood pressure exceeds a certain level, a physician and not a technician should make the determination that the pulmonary function test should proceed.

6. List in specific detail all evidence that plaintiff has which indicated that a perilymphatic fistula is a known or recognized risk associated with pulmonary function tests.

ANSWER: Objection. "Known or recognized" is too vague. Recognized by whom? Dr. Hippensteel, Dr. Burch and Dr. Kohut state that there is a causal relationship between the perilymphatic fistula and the pulmonary function test.

7. Identify all evidence upon which you will rely to prove a connection between blood pressure and the occurrence of a perilymphatic fistula during the administration of a pulmonary function test.

ANSWER: Dr. Kohut and Dr. Rudy Thallman.

8. Identify the standard of care in regard to acceptable blood pressure readings prior to administration of a pulmonary function test, and identify all evidence upon which you tend to rely at trial in establishing this standard of care.

ANSWER: Pulmonary function tests are generally taken in a hospital on request of a treating or attending physician. The railroad and the technicians are not treating physicians. All physicians weigh risk vs. benefits, which was not done in Raymond Keeling's case. Dr. Kohut and Dr. Hippensteel.

9. For each Request for Admissions, filed herewith, that you have denied, state the basis of your denial, citing all authorities, evidence or circumstances that support your denial.

ANSWER: Dr. Kohut and Dr. Hippensteel.

10. For each Request for Admission filed herewith that you have claimed lack of information, list all attempts and steps you have undertaken to obtain such information.

ANSWER: Dr. Kohut and Dr. Hippensteel.

RESPONSE TO REQUEST FOR PRODUCTION

1. Produce records of all treating physicians that you have seen since January, 1996, including, but not limited to, records of Dr. Kohut, Dr. Burch, and Dr. Chen.

RESPONSE: Authorizations have been provided and plaintiff has produced all records in his possession.

2. Produce copies of all literature, documents, or information referred to in your answers to defendant's interrogatories and/or Request for Admissions that are filed herewith.

RESPONSE: Objection. See Doe v. Mercy Health Corp., 1993, WL 377064 (E.D. Pa.), page 73.

3. Produce copies of all documents, authorities, or information that you have referred to in denying any of defendant's Request for Admissions that are filed herewith.

RESPONSE: Objection. See Doe v. Mercy Health Corp., 1993, WL 377064 (E.D. Pa.), page 73.

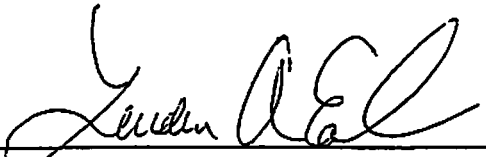
PRATT & TOBIN, P.C.

  
By: \_\_\_\_\_

Robert W. Schmieder  
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East Alton, IL 62024-0179  
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and

**RIDER, THOMAS, CLEAVELAND, FERRIS & EAKIN**

By: 

Lenden A. Eakin - VSB #23885

22 Luck Ave., S.W.

P.O. Box 1791

Roanoke, VA 24008-1791

Telephone: 540/344-3233

Facsimile: 540/344-3510

**ATTORNEYS FOR PLAINTIFF**

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY  
COMPANY, a corporation; T. K. GROUP,  
INC., a corporation; and QUALITY  
SERVICES, INC., a corporation,

Defendants.

Law No. CL96-000295

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Plaintiff's  
Objections and Responses to Defendant, Norfolk and Western Railway Company's,  
Interrogatories and Request for Production to Plaintiff have been mailed to:

Temple Cabell  
Schaffer & Cabell  
Chesterman Place, Suite 200  
100 W. Franklin St.  
P.O. Box 507  
Richmond, VA 23218-0507

Charles F. Midkiff  
Midkiff, Muncie & Ross  
9030 Stony Point Parkway  
Suite 160  
Richmond, VA 23235

Mr. Leslie E. Hagie  
Woods, Rogers & Hazelgrove  
First Union Tower Building  
10 S. Jefferson St.  
P.O. Box 14125  
Roanoke, Va 24038-4125

this \_\_\_\_ day of October, 2001.



PRATT & TOBIN, P.C.

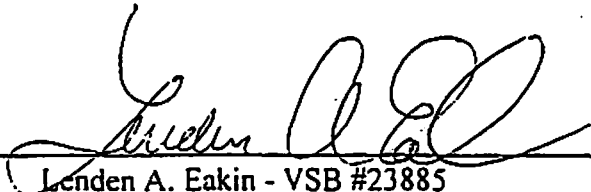


By: \_\_\_\_\_

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ATTORNEYS FOR PLAINTIFF

ORIGINAL

EXHIBIT

B

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

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RAYMOND P. KEELING,

Plaintiff

vs.

NORFOLK AND WESTERN RAILWAY  
COMPANY, et al.,

Defendants  
-----

LAW NO. CL96-000925

OCTOBER 9, 2001  
3:30 P.M.

HEARD BEFORE:

THE HONORABLE CLIFFORD R. WECKSTEIN

CENTRAL VIRGINIA REPORTERS  
P. O. BOX 12628  
ROANOKE, VA 24027  
(540) 380-5017

1     APPEARANCES:

2  
3             PRATT & TOBIN  
4             East Alton, Illinois  
5             By: ROBERT W. SCHMIEDER, ESQ.

6  
7                     Counsel on behalf of the Plaintiff

8             WOODS, ROGERS & HAZLEGROVE  
9             Roanoke, Virginia  
10            By: LESLIE E. HAGIE, ESQ.

11                     Counsel on behalf of Defendant Norfolk  
12                     and Western Railway

13             SCHAFFER & CABELL  
14             Richmond, Virginia  
15             By: TEMPLE W. CABELL, ESQ.

16                     Counsel on behalf of Defendant T. K.  
17                     Group

18  
19                     \* \* \* \* \*

1                   The following are excerpts of the  
2                   hearing held in the above-styled cause on the 9th day of  
3                   October, 2001, before the Honorable Clifford R.  
4                   Weckstein, Judge of the Circuit Court for the City of  
5                   Roanoke, sitting at Roanoke, Virginia, when the  
6                   following proceedings were had:

7  
8                   (The court reporter, Shirley S. Bassett,  
9                   RPR, was duly sworn.)

10  
11                   \* \* \* \* \*

12  
13                   THE COURT: The Court will direct that  
14                   the plaintiff respond to the interrogatories  
15                   propounded contemporaneously with the defendant  
16                   Norfolk and Western's second request for  
17                   admission, thereby overruling the objection to  
18                   those interrogatories. And the Court would  
19                   direct that that response under oath be --

20                   I interrupt my direction. You're not  
21                   going to be back in the office until next week,  
22                   Mr. Schmieder?

23                   MR. SCHMIEDER: That's correct, Your  
24                   Honor. I have to head to Iowa after here.

1 THE COURT: The trial is set for the  
2 November 13th?

3 MR. HAGIE: The 13th through the 16th,  
4 Your Honor.

5 THE COURT: Today is October 9th, I  
6 think. You'll be back in the office along  
7 about Monday, October 15th?

8 MR. SCHMIEDER: Get in probably  
9 Saturday.

10 THE COURT: Can you have the answers  
11 signed under oath and in the hands of counsel  
12 for the defense by the close of business on  
13 Tuesday, October 23rd?

14 MR. SCHMIEDER: Yes, Your Honor.

15 THE COURT: Is that satisfactory,  
16 Mr. Cabell, Mr. Hagie?

17 MR. HAGIE: Judge, if they're going to  
18 be the same type of answers we've had before,  
19 which basically says, "Well, I've talked to a  
20 doctor and he's told me this," those are not  
21 satisfactory.

22 We're approaching the trial --

23 THE COURT: I can't rule on whether the  
24 answers are satisfactory until I see the

1                   answers.

2                   MR. HAGIE: Well, I understand that,  
3                   Judge. The concern I have is, if they are not  
4                   satisfactory, what the time frame is. If we  
5                   could perhaps set another pretrial hearing at  
6                   this point today so that we've got something on  
7                   the books and we don't have to wait until  
8                   October 23rd to try to squeeze into an already  
9                   crowded court docket.

10                  THE COURT: Certainly we can.

11

12                               \* \* \* \* \*

13

14                  THE COURT: Okay. Now, the question, as  
15                  I understand it, on the motion in limine is  
16                  whether any evidence relating to Raymond P.  
17                  Keeling's blood pressure is admissible, the  
18                  defendants contending that the plaintiff's  
19                  blood pressure has no relationship to the  
20                  occurrence, if any, of a perilymphatic fistula.  
21                  Is that the question, Mr. Hagie?

22                  MR. HAGIE: It is, Your Honor.

23                  THE COURT: Mr. Cabell?

24                  MR. CABELL: Yes, Your Honor. But a

1           little bit beyond that is essentially to  
2           preclude the plaintiff from presenting evidence  
3           that Mr. Keeling should not have been tested  
4           because he has high blood pressure.

5           THE COURT: If evidence of his blood  
6           pressure is inadmissible, doesn't that  
7           encompass what you just said?

8           MR. CABELL: I would hope so, Your  
9           Honor, but I just wanted to elaborate that as  
10          really where we're going with the exclusion of  
11          the blood pressure.

12          MR. HAGIE: Judge, if I could just make  
13          one comment. So we don't mislead you, there is  
14          a contraindication of giving pulmonary function  
15          tests with high blood pressure. But the  
16          relationship between the blood pressure and the  
17          perilymphatic fistula is the essence of our  
18          question.

19          THE COURT: And I understand that, and I  
20          understand that it will be your contention that  
21          at the time of the testing Mr. Keeling's blood  
22          pressure was within acceptable limits at any  
23          rate.

24          But to be sure I'm clear and Mr. Keeling

1 and his attorneys are clear, it is your  
2 position, both defendants' position, that no  
3 evidence of Mr. Keeling's blood pressure can  
4 assist the trier of fact in deciding any issue  
5 in this case. Is that your position?

6 MR. CABELL: Yes, Your Honor.

7 MR. HAGIE: It is, Your Honor.

8 THE COURT: Mr. Schmieder, is the  
9 question then as I have phrased it, whether any  
10 evidence concerning Raymond P. Keeling's blood  
11 pressure should be excluded because no evidence  
12 about his blood pressure can assist the trier  
13 of fact in resolving any issue in this case?

14 MR. SCHMIEDER: That is the issue as I  
15 see it.

16

17 \* \* \* \* \*

18

19

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21

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4  
VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

RAYMOND P. KEELING, )

Plaintiff, )

v. )

Law. No. CL96-925

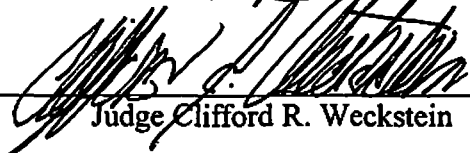
NORFOLK AND WESTERN )  
RAILWAY COMPANY, et al., )

Defendants. )

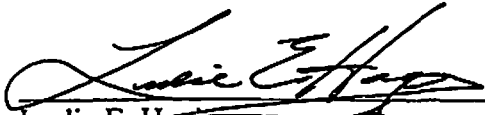
ORDER REGARDING DISCOVERY

On October 9, 2001, counsel for Norfolk and Western Railway Company (NW), T. K Group and plaintiff appeared before this Court on defendants' motions in limine to exclude evidence of plaintiff's blood pressure at trial. After hearing the arguments by counsel for both defendants and plaintiff, this Court hereby overrules plaintiff's objections, filed on September 6, 2001 in response to defendant NW's interrogatories and request for production filed on July 13, 2001, and plaintiff is directed to respond to defendant's interrogatories and request for production by October 23, 2001. Plaintiff's responses must be signed under oath and his response must identify and include <sup>any</sup> documentation that supports his contention that plaintiff's blood pressure has some relevance to the allegation that the administration of a pulmonary function test caused plaintiff to suffer a perilymphatic fistula. Defendants' motions in limine are taken under advisement pending plaintiff's compliance with this order.

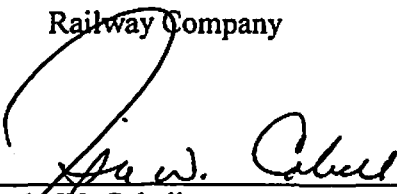
ENTER this 1<sup>st</sup> day of November, 2001, now pro tempore as  
of October 9, 2001

  
Judge Clifford R. Weckstein

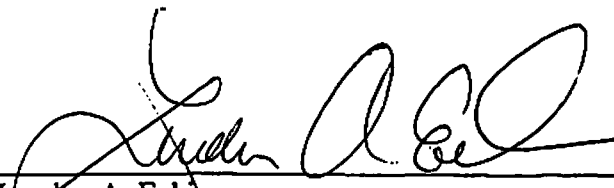
Seen:

  
Leslie E. Hagie  
Woods, Rogers & Hazlegrove, P.L.C.  
First Union Tower, Suite 1400  
Post Office Box 14125  
10 South Jefferson Street  
Roanoke, Virginia 24038-4125

Counsel for Norfolk and Western  
Railway Company

  
Temple W. Cabell  
Schaffer & Cabell  
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Counsel for T.K. Group, Inc.

  
Lenden A. Eakin  
Rider, Thomas, Cleaveland, Ferris & Eakin, P.C.  
Post Office Box 1791  
Roanoke, Virginia 24008

Robert Schmieder  
Pratt & Tobin, P.C.  
Route 111 at Airline Drive  
Post Office Box 179  
East Alton, IL 62024

Counsel for Plaintiff

VIRGINIA:

100 70170 000

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING, JR.

Plaintiff,

v.

Case No.: CL 96-925

NORFOLK and WESTERN RAILWAY  
COMPANY, a corporation  
and  
T.K. GROUP, INC.  
and  
QUALITY SERVICES, INC.


ORDER OF DISMISSAL FOR QUALITY SERVICES, INC.

This day came the plaintiff and defendant Quality Service, Inc., by counsel, and represented to the Court that all matters of controversy between the plaintiff, Raymond P. Keeling, Jr., and the defendant, Quality Services, Inc., have been resolved and jointly moved the Court for an Order dismissing all claims against defendant Quality Services, Inc., in the above-styled civil action with prejudice.

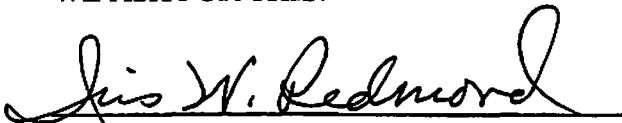
Having considered the matter, and hearing no objection, it is hereby **ADJUDGED, ORDERED, and DECREED** that all claims filed against defendant Quality Services, Inc., in the above-styled matter are dismissed, with prejudice.

The Clerk is directed to send a certified copy of this Order to all counsel of record.


ENTERED, this 7<sup>th</sup> day of November, 2001.

  
Judge

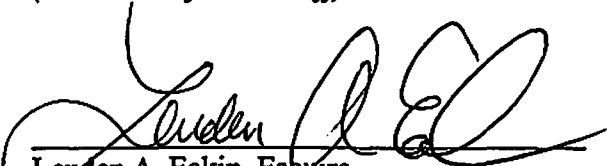
WE ASK FOR THIS:



Charles F. Midkiff, Esquire  
Iris W. Redmond, Esquire  
Midkiff, Muncie & Ross, P.C.  
9030 Stony Point Parkway, Suite 160  
Richmond, VA 23235-1939  
(Attorneys for Defendant Quality Services, Inc.)

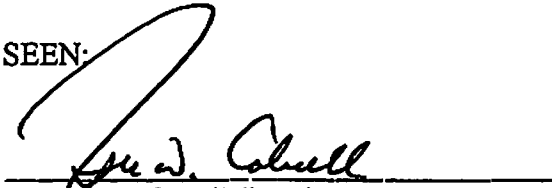


Robert W. Schmieder, Esquire  
Pratt & Tobin, P.C.  
Route 111 at Airline Drive  
P.O. Box 179  
East Alton, IL 62024  
(Co-counsel for Plaintiff)



Lenden A. Eakin, Esquire  
Rider, Thomas, Cleveland, Ferris & Eakin, P.C.  
22 Luck Avenue, S.W.  
Roanoke, Virginia 24008  
(Co-counsel for Plaintiff)

SEEN:

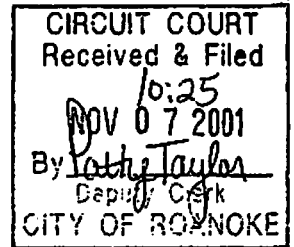


Temple W. Cabell, Esquire  
Schaffer & Cabell  
P.O. Box 507  
Richmond, Virginia 23218  
(Counsel for T.K. Group)



Leslie E. Hagle, Esquire  
Woods Rogers & Hazelgrove  
P.O. Box 14125  
Roanoke, Virginia 24038-4125  
(Counsel for Defendant Norfolk & Western Railway)

STATE OF VIRGINIA     )  
  ) ss.  
COUNTY OF ROANOKE    )



**AFFIDAVIT**

96-925

RAYMOND P. KEELING, JR., being sworn and under oath, states:

1. I have read the attached **Amended Response to Second Request For Admissions.**
2. I am familiar with the contents thereof, and they are true and correct to the best of my knowledge and belief.

x Raymond P. Keeling, Jr.  
Raymond P. Keeling, Jr.

SIGNED AND SWORN TO before me this 7th day of November, 2001.

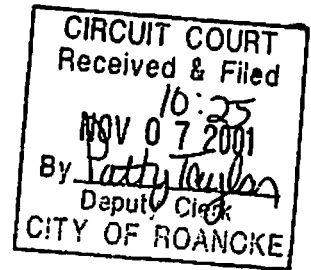
[Signature]  
Notary Public

My Commission Expires:

12-31-04

PRATT & TOBIN, P.C.  
Route 111 at Airline Drive  
P.O. Box 179  
East Alton, IL 62024  
Telephone: 618/259-8011  
800/851-5562

STATE OF VIRGINIA     )  
                                      ) ss.  
COUNTY OF ROANOKE    )



**AFFIDAVIT**

RAYMOND P. KEELING, JR., being sworn and under oath, states:

1. I have read the attached Amended Answers to Interrogatories.
2. I am familiar with the contents thereof, and they are true and correct to the best of my knowledge and belief.

x Raymond P. Keeling Jr.  
Raymond P. Keeling, Jr.

SIGNED AND SWORN TO before me this 7<sup>th</sup> day of November, 2001.

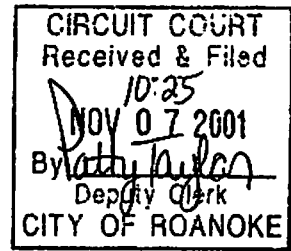
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STATE OF VIRGINIA     )  
  ) ss.  
COUNTY OF ROANOKE    )



**AFFIDAVIT**

RAYMOND P. KEELING, JR., being sworn and under oath, states:

1. I have read the attached **Amended Response to Request For Production**.
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x Raymond P Keeling Jr  
Raymond P. Keeling, Jr.

SIGNED AND SWORN TO before me this 7th day of November, 2001

[Signature]  
Notary Public

My Commission Expires:

12-31-04

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Route 111 at Airline Drive  
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East Alton, IL 62024  
Telephone: 618/259-8011  
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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY  
COMPANY, a corporation; and T. K.  
GROUP, INC., a corporation,

Defendants.

Law No. CL96-000925

ORDER OF VOLUNTARY NON-SUIT

On this \_\_\_\_ day of ~~November, 2001~~, came the plaintiff, through his counsel of record,  
and moved for a voluntary non-suit herein against defendant, T. K. GROUP. INC., only.  
pursuant to Section 8.01-380 of the Code of Virginia.

UPON CONSIDERATION WHEREOF, it is ORDERED that this matter is non-suited  
against defendant, T. K. GROUP, INC., only, without prejudice to the re-filing by plaintiff  
*to the extent permitted and authorized by law.*  
~~within six (6) months of the date of the entry of this Order.~~

ENTER this 13<sup>th</sup> day of November, 2001.

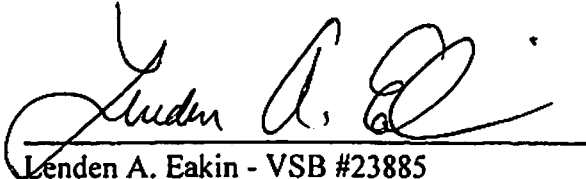
  
\_\_\_\_\_  
Judge



WE ASK FOR THIS:



Robert W. Schmieder  
PRATT & TOBIN, P.C.  
Route 111 at Airline Drive  
P.O. Box 179  
East Alton, IL 62024-0179  
Counsel for Plaintiff



Lenden A. Eakin - VSB #23885  
RIDER, THOMAS, CLEVELAND,  
FERRIS & EAKIN, P.C.  
22 Luck Ave., S.W.  
P.O. Box 1791  
Roanoke, VA 24008-1791  
Counsel for Plaintiff


SEEN AND AGREED TO:



Leslie E. Hagie, Esquire  
WOODS, ROGERS & HAZELGROVE  
First Union Tower Building  
10 S. Jefferson St.  
P.O. Box 14125  
Roanoke, VA 24038-4125  
Counsel for Norfolk & Western Railway Company

*The court dispenses with endorsement by Mr. Cabell, pursuant to Rule 1:13. The Court has filed copies showing the draft order was filed and sent by overnight delivery to Mr. Cabell, who is not present for the first day of trial, indicating to the Court that he is aware of the motion and expects his client to be represented.*

Temple Cabell, Esquire  
SCHAFFER & CABELL  
Chesterman Place, Suite 200  
100 W. Franklin St.  
P.O. Box 507  
Richmond, VA 23218  
Attorneys for T. K. Group, Inc.



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY  
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GROUP, INC., a corporation,

Defendants.

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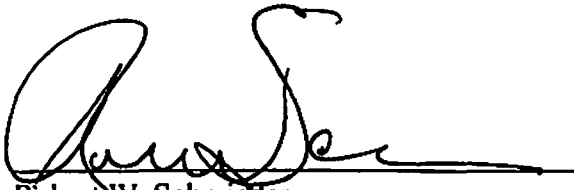
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ENTER this \_\_\_\_ day of November, 2001.

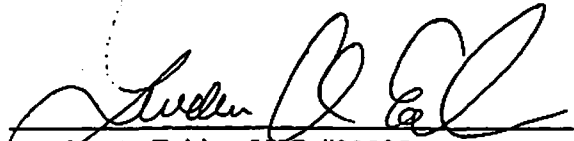
\_\_\_\_\_  
Judge

*File this order, which  
is fully endorsed. I entered  
it, with Mr. Calabrese's endorsement,  
on the first day of trial.*  
*[Signature]*  
Judge

WE ASK FOR THIS:

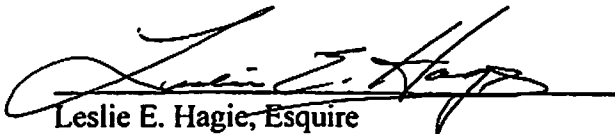


Robert W. Schmieder  
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East Alton, IL 62024-0179  
Counsel for Plaintiff

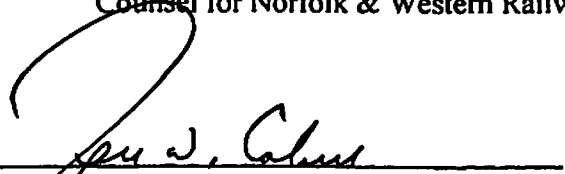


Lenden A. Eakin - VSB #23885  
RIDER, THOMAS, CLEVELAND,  
FERRIS & EAKIN, P.C.  
22 Luck Ave., S.W.  
P.O. Box 1791  
Roanoke, VA 24008-1791  
Counsel for Plaintiff

SEEN AND AGREED TO:



Leslie E. Hagie, Esquire  
WOODS, ROGERS & HAZELGROVE  
First Union Tower Building  
10 S. Jefferson St.  
P.O. Box 14125  
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Counsel for Norfolk & Western Railway Company



Temple Cabell, Esquire  
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P.O. Box 507  
Richmond, VA 23218  
Attorneys for T. K. Group, Inc.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

RAYMOND P. KEELING,

Plaintiff,

v.

NORFOLK AND WESTERN  
RAILWAY COMPANY, et al.,

Defendants.

Law. No. CL96-925

PRETRIAL ORDER ON DEFENDANTS' MOTIONS

On November 1, 2001, counsel for the parties were heard in oral argument on various pre-trial motions brought by the defendants. After hearing argument of counsel, this Court issues the following rulings:

1. This Court grants defendant Norfolk and Western Railway Company's motion to strike plaintiff's answers to discovery that previously were ordered by this Court to be filed by October 23, 2001, as being inconsistent with this Court's order and unresponsive to defendant's requests, and orders that such responses be signed under oath and provided to defendant by November 8, 2001.

2. This Court orders that plaintiff file amended responses to defendant Norfolk and Western Railway Company's Second Request for Admissions by close of business on Tuesday, November 6, 2001, in accordance with the responses as articulated by this Court on the record during this hearing.

3. This Court, based on the proffer of plaintiff's counsel, is unable to make a preclusion decision at this time on defendants' motions in limine to exclude evidence of plaintiff's blood pressure, and will hear testimony of witnesses outside the presence of the jury, if it appears appropriate to do so, on the issue of whether it was a deviation of the acceptable standards of care to administer a pulmonary function test to an individual in plaintiff's situation, to which ruling defendants' objections are noted.

4. Defendant Norfolk and Western Railway Company's motion to strike plaintiff's allegations that the blood pressure parameters in the Railroad's maneuver protocol were negligently set too high for the pulmonary function test is granted.

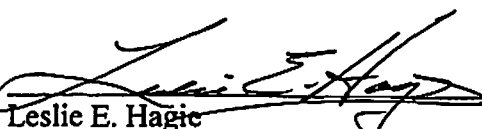
5. Defendant Norfolk and Western Railways Company's motion for sanctions is denied without prejudice to the rights of any party to make a future motion for sanctions which might be based in part on the facts that were argued in support of the motion during this hearing.

6. By stipulation of the parties, plaintiff will furnish a written summary of Dr. Kohut's proposed testimony as soon as is reasonably practical.

ENTER this 7<sup>th</sup> day of December, 2001, *none pro time as of 11/1/2000. the case has now been tried and not this motion one paper.*

  
Judge Clifford R. Weckstein

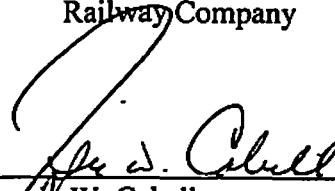
Seen:



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Leslie E. Hagie  
Woods, Rogers & Hazlegrove, P.L.C.  
First Union Tower, Suite 1400  
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Roanoke, Virginia 24038-4125


Counsel for Norfolk and Western  
Railway Company



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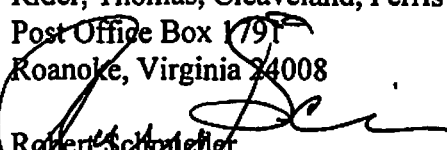
Temple W. Cabell  
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Post Office Box 507  
Richmond, Virginia 23218

Counsel for T.K. Group, Inc.



---

Lenden A. Eakin  
Rider, Thomas, Cleaveland, Ferris & Eakin, P.C.  
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Roanoke, Virginia 24008



---

Robert Schmittler  
Pratt & Tobin, P.C.  
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East Alton, IL 62024

Counsel for Plaintiff

TWENTY-THIRD JUDICIAL CIRCUIT  
OF VIRGINIA



CLIFFORD R. WECKSTEIN, JUDGE  
ROANOKE CITY COURTHOUSE  
315 CHURCH AVENUE, S. W.  
P. O. BOX 211  
ROANOKE, VIRGINIA 24002-0211  
(540) 853-2435  
FAX (540) 853-1040  
E-MAIL: CLIFFRKE@AOL.COM

CIRCUIT COURT FOR THE COUNTY OF ROANOKE  
CIRCUIT COURT FOR THE CITY OF ROANOKE  
CIRCUIT COURT FOR THE CITY OF SALEM

COMMONWEALTH OF VIRGINIA

December 17, 2001

Robert W. Schmieder, Esquire  
Pratt & Tobin, P.C.  
P.O. Box 179  
East Alton, Illinois 62024

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Lenden A. Eakin, Esquire  
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Leslie E. Hagie, Esquire  
Matthew P. Pritts, Esquire  
Woods, Rogers & Hazlegrove, P.L.C.  
P.O. Box 14125  
Roanoke, Virginia 24038-4125

*Raymond P. Keeling, Jr. v. Norfolk and Western Railway Company*, CL96000925  
Circuit Court of the City of Roanoke

Dear counsel:

Raymond P. Keeling, Jr. sued the Norfolk & Western Railway Company (N&W) under the provisions of the Federal Employers Liability Act (FELA), 45 U.S.C. § 51, *et seq.* After a five-day trial in which N&W strongly contested liability, the jury awarded Keeling \$350,000. The defendant immediately asked the court to set aside the verdict and to enter final judgment in its favor, contending that the verdict is contrary to the evidence and without support in the evidence. *See Virginia Code § 8.01-430.*

During the trial, I overruled the railroad's motions to strike the evidence, citing two cases in which the Supreme Court of Virginia spoke of the high cost to the administration of justice if the trial court strikes the evidence, the plaintiff is successful on appeal, and a new trial is required. *See Higgins v. Bowdoin*, 238 Va. 134, 380 S.E.2d 904 (1989) and *Brown v. Koulizakis*, 229 Va. 524, 331 S.E.2d 440 (1985). In these and other cases, the Court admonished trial judges to strike a plaintiff's evidence only

when it is conclusively apparent that the plaintiff cannot prevail. When I overruled the motion made at the conclusion of the plaintiff's evidence, however, I said that I was doing so *dubitante*—with doubts about the correctness of my decision.

Post-trial reflection has shown me another advantage to submitting this case to the jury: “[T]he motion to strike is made in the heat of the trial, while the jury is waiting to receive the instructions and to hear the argument of counsel. Hence the court has but little time in which to consider the evidence. However, on a motion to set aside the verdict the trial court has ample time to give due consideration to, and weigh the evidence.” *Walton v. Walton*, 168 Va. 418, 422-23, 191 S.E. 768 (1937).

Although this is the time for me “to give consideration to, and weigh the evidence,” *Id.*, I must view that evidence in the light most favorable to the party for whom the jury found, the plaintiff. *T.L. Garden & Associates v. First Savings Bank*, 262 Va. 28, 29, 546 S.E.2d 705 (2001). Furthermore,

If there is a conflict in the testimony on a material point, or if reasonable [persons] may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury. The weight of a jury's verdict, when there is credible evidence upon which it can be based, is not overborne by the trial judge's disapproval.

In addition, ‘when conflicting inferences have been resolved by a jury and those necessarily underlying the conclusion reflected in the verdict are reasonably deducible from the evidence, a trial judge should not set the verdict aside.’”

*Kim v. Douval Corp.*, 259 Va. 752, 755-56, 529 S.E.2d 92 (2000)(citations omitted). When trial courts grant motions to set aside verdicts, the Supreme Court views the evidence in the light most favorable to the party for whom the jury found. When it reviews trial court decisions to deny motions to set aside verdicts, it likewise views the evidence in the light most favorable to the party who received the jury's verdict. The trial judge must perforce follow the same standard. Compare, e.g., *Norfolk Southern Railway Co. v. Trimiew*, 253 Va. 22, 25, 480 S.E.2d 104, cert. denied, 520 U.S. 1265, 138 L. Ed. 2d 195, 117 S.Ct. 2434 (1997) with *Stover v. Norfolk and Western Railway Co.*, 249 Va. 192, 455 S.E.2d 238, cert. denied, 516 U.S. 868, 133 L.Ed. 2d 123, 116 S.Ct. 186 (1995).

Although there were few material points on which there was not a conflict in the evidence, the jury's verdict has settled those conflicts. I must now “recite the facts and all reasonable inferences in the light most favorable to [the plaintiff], the recipient of the jury verdict.” *T.L. Garden & Associates v. First Savings Bank*, *supra*, 262 Va. at 29.

The parties and court agreed that I would decide N&W's posttrial motion without transcript, posttrial briefs, or further argument, though I would of course consider the memoranda previously filed, and all of the arguments previously made. Therefore, my summary of salient facts comes from my memory and trial notes, supplemented by the case file and exhibits.



On August 16, 1994, Keeling reported, as directed by his employer, Norfolk and Western (N&W), for a pulmonary function test (PFT). The test was given on railroad property in Roanoke. N&W gives PFT's to employees to determine whether they safely can wear respirators on the job. Pulmonary function testing (also called spirometry) measures volumes and capacities of the lungs and the flow rate of air that the subject exhales. The test subject, seated, breathes into a mouthpiece that is attached to a plastic tube. The person administering the test tells him first to "load" his lungs with as much air as possible, and then to "blast" the air out, as hard and as fast as he can, and to keep doing so until he is told to stop. The subject is expected to exert maximal effort to try to empty his lungs.

Keeling's PFT was administered for N&W by employees of a subcontractor. The jury was instructed, without objection, that, in this case, negligence of the subcontractor or its employees was negligence of the railroad.

N&W contracted for blood pressure tests to be administered for the railroad at the same time PFT's were given. In accordance with the railroad's written protocol, blood pressure readings were taken before the PFT's were performed. Although PFT's should not be given to persons with certain medical conditions or histories, no medical, industrial, or legal "standard of care" requires that blood pressure be measured before a pulmonary function test.

Blood pressure readings are expressed in terms of fractions. The numerator (upper number) represents the systolic blood pressure; the denominator (lower number), the diastolic blood pressure. N&W's written protocol stated that PFT's were not to be administered to anyone whose blood pressure reading was greater than 200/115. There was testimony that if either the systolic or the diastolic blood pressure was higher than the "cutoff" number, the PFT was not to be administered. The technicians who took the plaintiff's blood pressure and administered his PFT's on August 26, 1994 believed that the N&W "cutoff" was 200/110, rather than the higher 200/115.

When first monitored on August 26, 1994, Keeling's blood pressure measurement was higher than was acceptable. The technicians did not record this reading; their practice was to write down only those blood pressure readings that fell into the "acceptable" range. Any reading of 200/110 or higher, they perceived, was above the acceptable range. One of them told Keeling that, because his blood pressure was too high, he would have to sit and relax for a few minutes.

N&W's written protocol said that, if an employee's blood pressure reading was above the acceptable range, the pulmonary function test was not to be given to that employee, and "the supervisor and medical director will be advised." However, neither supervisor nor medical director (a physician) was notified on August 26, 1994, when the plaintiff's blood pressure monitoring resulted in a reading above the acceptable range. After Keeling rested for a few minutes, a technician again measured his blood pressure. This time, the reading was within the acceptable range, the blood pressure reading was recorded, and pulmonary function testing began.

The technicians administering PFT's tried to obtain three "good readings" from each test subject. A "good reading" is one in which the amount of air exhaled demonstrates that the subject has exerted maximum effort. Keeling's first reading was not a good one; he was exhorted to exhale with more vigor,

and responded with "a real good effort" on his second try. He then experienced extreme dizziness, became short of breath, and felt chest pains. The technician told him to sit quietly. After resting, he left the area without further testing. Later that day, he went to the emergency room. A few days later, he saw a neurologist, who sent him to an otolaryngologist, an ear, nose and throat specialist. He thereafter saw and was treated by a number of physicians and other health care professionals.

Within a week after the pulmonary function test a physician diagnosed a perilymph fistula (also called a perilymphatic fistula) in the plaintiff's left ear. The inner ear contains fluids, one of which is called perilymph. A perilymph fistula is a tiny and abnormal opening that allows communication between the fluid-filled inner ear and the air-filled middle ear. Extreme changes in pressure can cause inner ear trauma, to the point where perilymph can leak out of the inner ear into the middle ear—a perilymph fistula.

Keeling received substantial medical treatment for the perilymph fistula from which he suffered, and which recurred. He underwent complex surgery, and suffered pain, suffering, discomfort and difficulty. As a result of the perilymph fistula, he was unable to return to his job at the railroad, although there were other jobs that he could have held in the national economy, the earnings from which would have reduced his total wage loss. Since April of 2000, he has been totally disabled due to the ravages of an unrelated disease, multiple sclerosis.

According to expert medical testimony and the testimony of the technicians who administered the tests, it is reasonably foreseeable that a patient will be physically harmed or injured if a PFT is administered when the patient's blood pressure is too high. The jury heard testimony that if, as here, a patient's blood pressure was 200/110 shortly before the PFT, physical injury or harm from administration of the test reasonably would be foreseeable. Stroke and cardiovascular accident are among the known risks of administering PFT's to persons with high blood pressure, but there is no evidence that this specific injury—creation of a perilymph fistula—is considered a risk of pulmonary function testing.

The jury heard expert testimony that a prudent person who had obtained a blood pressure reading of higher than 200/110 would not administer a PFT to that patient on the day of that reading. A physician testified that the reasonably prudent procedure to be followed by a person exercising ordinary care in Keeling's situation would have been to stop the test, notify the railroad's medical director, and not administer a PFT until discussing the matter with the medical director. This witness testified that this was *his* understanding of the procedure specified in N&W's written protocol, and that, if N&W and its technicians had proceeded in accordance with the same understanding of the protocol, they would have met the applicable standard of care. However, according to expert testimony, what actually happened—allowing the patient to rest, then giving him the pulmonary function test when his blood pressure fell into the "acceptable" range, i.e., below 200/110—deviated from the standard of care. Such a procedure fell below the acceptable standard of care because of the potential of physical harm to the patient.

The sort of forceful expiration of air required to perform a pulmonary function test is, functionally, a valsalva maneuver. A valsalva or valsalva-like maneuver can produce, or contribute to

producing, a perilymph fistula. A valsalva (or valsalva maneuver) is a forceful or explosive exhalation of breath, sometimes an attempt to forcefully exhale while nose and mouth are shut. (A cough or sneeze can be akin to a valsalva maneuver, and also can cause a perilymph fistula.)

The jurors heard testimony about the effect of various activities on blood pressure, about the dynamic nature of blood pressure, about how it is measured, and about the relationship between venous pressure and spinal fluid pressure, and the effects of venous and spinal fluid pressure on inner ear pressure.

In FELA cases, the courts of Virginia “apply federal decisional law, because whether negligence has been established for purposes of the FELA is a federal question.” *Norfolk Southern Railway Co. v. Trimiew, supra*, 253 Va. at 24. Under the FELA, a railroad is liable to an employee “if his injuries were caused in whole or in part by the railroad’s negligence.” *Chesapeake and Ohio Railway Co. v. Richmond*, 217 Va. 258, 261, 227 S.E.2d 707 (1976). A plaintiff in an FELA case is entitled to have his case submitted to the jury—and to have a verdict in his favor upheld—if “the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury.” *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493 (1957); *Norfolk and Western Railway Co. v. A.R. Johnson*, 251 Va. 37, 43, 465 S.E.2d 800 (1996). “[T]he standard of proof in a F.E.L.A. action is more lenient than in a common law action, [but] the plaintiff nevertheless is still required to establish some act of negligence in order to prevail.” *Norfolk and Western Railway Co. v. Hughes*, 247 Va. 113, 116, 439 S.E.2d 411 (1994), *cert. denied*, 511 U.S. 1128, 128 L. Ed. 2d 866, 114 S. Ct. 2136 (1994). “Under FELA the quantum of evidence sufficient to present a jury question of causation is less than it is in a common law tort action.” *Claar v. Burlington Northern Railroad Co.*, 29 F.3d 499, 503 (9th Cir. 1994). Reasonable foreseeability of harm is an essential ingredient of FELA negligence. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 117, 9 L. Ed. 2d 618, 83 S. Ct. 659 (1963); *N&W v. A.R. Johnson, supra*, at 43-44. “However, ‘the particular and exact manner of the accident need not be foreseen.’ The test of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. Rather it is sufficient if the negligent person might reasonably have foreseen that *an* injury might occur.” *Green v. River Terminal Railway Co.*, 763 F.2d 805, 808 (6th Cir. 1985).

“A rehash of all the evidence [I] have just summarized is unnecessary to support the conclusion [I] now reach that a jury question was presented on the issues of negligence, causation, and foreseeability.” *N&W v. A.R. Johnson, supra*, 251 Va. at 44. The jurors could have concluded from the evidence that the railroad was negligent in administering the PFT after it obtained a blood pressure measurement of higher than 200/110. Having so determined, they could have found from the evidence that this negligence led in whole or in part to the plaintiff’s valsalva-like maneuver as he tried to perform the PFT satisfactorily, and that this caused or contributed to causing the perilymph fistula.

In presenting its case and in argument, N&W made much of the fact that no standard required it to test Keeling’s blood pressure at all. Especially in light of the jury’s verdict, the proposition that N&W would not have been negligent if it had given a PFT to the plaintiff without measuring his blood pressure is irrelevant: His blood pressure *was* taken. The railroad also argued (in many ways similarly to the argument that it unsuccessfully advanced in this court and in the Supreme Court in *N&W v. A.R.*

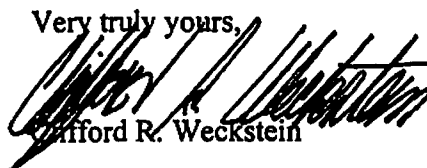
*Johnson, supra*, at 43-45) that, because no one has ever before postulated that perilymph fistula is a foreseeable risk of a pulmonary function test, N&W should escape liability in this case, even if the jury found that the PFT caused or contributed to causing Keeling's perilymph fistula. The FELA rule—that the negligent actor need not have foreseen the specific injury, as long as *some* injury was foreseeable—also “is well-grounded in Virginia law, and is appropriate where a defendant has breached a duty owed to a plaintiff resulting in an unanticipated injury. In those circumstances, it prevents the defendant from arguing that he should incur no liability for his negligent conduct because he could not reasonably be expected to have foreseen the precise injury which occurred. His liability may nevertheless be established if a reasonably prudent person in the same circumstances ought to have foreseen that some injury might probably result.” *Blondel v. Hays*, 241 Va. 467, 475, 403 S.E.2d 340 (1991).

Regardless of the doubts I expressed when I overruled the motion to strike, I have neither right nor prerogative to substitute my judgment for that of the jurors, who saw and heard the witnesses, evaluated their credibility, weighed and considered their testimony, deliberated together, and arrived at a decision for which there is evidentiary support. “A jury verdict fairly rendered is entitled to great respect. The judge may have rendered a different verdict if he had been upon the jury, but this is not sufficient justification for setting it aside. The verdict may have been against the preponderance of the evidence, but this is not a sufficient reason for disturbing it. Where there is conflict in the evidence upon a material point, or if reasonably fair-minded [persons] may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given to the testimony, in such cases the verdict is final and conclusive and cannot be disturbed either by the trial court or the appellate court, and where the verdict has been improperly set aside by the trial court, this court will reinstate it.” *Wilkins v. Davis*, 158 Va. 753, 769, 164 S.E. 649 (1932).

The defendant's attack on the verdict focuses on the liability determination. Everything that needs to be said about damages can be said quite simply: “a jury's award of damages may not be set aside by a trial court as inadequate or excessive unless the damages are so excessive or so small as to shock the conscience and to create the impression that the jury has been influenced by passion or prejudice or has in some way misconceived or misinterpreted the facts or the law which should guide them to a just conclusion.” *Downer v. CSX Transportation, Inc.*, 256 Va. 590, 594, 507 S.E.2d 612 (1998). Given a finding of liability, a damage award of \$350,000 in this case in no way shocks the conscience of the court.

For the reasons stated, the court will deny the defendant's motion to set aside the jury's verdict. Will Mr. Ferris please prepare and tender a duly-endorsed order, incorporating this letter opinion, preserving the defendant's objections, entering judgment on the verdict, and providing for the judgment to bear interest at the judgment rate until satisfied? At this holiday season, I send best wishes to each of you, and to your loved ones.

Very truly yours,



Clifford R. Weckstein

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

RAYMOND P. KEELING, JR.

Plaintiff,

v.

Case No. CL96-925

NORFOLK AND WESTERN RAILWAY  
COMPANY

Defendant.

FINAL JUDGMENT ORDER

On the 13<sup>th</sup> day of November 2001, came the parties to this action, in person and by counsel, and both sides announced that they were ready for trial.

Thereupon came a panel of sixteen jurors at the conclusion of *voir dire*, from which the following jury of eight (8) persons were seated as jurors for the trial of this action: George McPhatter, Amos Fair, Patryce M. Hampton, Robin V. Eades, Ella F. Law, Stacey L. Clark, Curtis L. Cochran and Shirley K. Hudson. These selected jurors were sworn to well and truly try the issues joined and return a true verdict according to the law and the evidence. Thereupon, with agreement of counsel, the Court drew the name of George McPhatter by lot to serve as an alternate juror.

Thereupon, plaintiff presented his evidence, and at the conclusion of Plaintiff's evidence, out of presence of the jury, Defendant, by counsel, moved the Court to strike Plaintiff's evidence and to enter a judgment for the Defendant on the grounds stated into the Record by Defendant's counsel. After consideration of the motion and argument of

counsel, the Court overruled the Defendant's motion.

Thereupon, the defense presented its evidence in chief and rested.

At the conclusion of all evidence, Defendant renewed its motion to strike plaintiff's evidence on the grounds stated into the Record, and the Court again overruled the motion.

All parties having rested, the jury received the instructions of the Court, heard the argument of counsel on November 19, 2001, and thereafter returned to the jury room to consider its verdict. By agreement of counsel, the alternate juror, George McPhatter, was not identified or excused. The alternate juror remained a member of the jury and *and as the parties agreed, the case was decided by all eight sworn jurors.* In due course, the jury returned the following verdict:

We, the jury, on the issues joined, unanimously find our verdict in favor of the Plaintiff, Raymond P. Keeling, Jr. and fix his damages in the sum of \$350,000.00.

November 19, 2001      /s/ Patryce M. Hampton, Foreman

The Court polled the jury, and each juror, in turn, acknowledged that the foregoing was his or her verdict, and the jury was discharged.

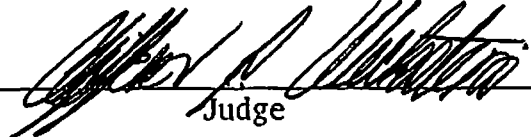
Thereupon, Defendant, by counsel, moved to set aside the verdict of the jury as being contrary to the law and the evidence, which motion the Court took under advisement. The parties and the Court agreed that the Court would rule on defendant's Motion to set aside the verdict without transcript, posttrial briefs or further argument.

For the reasons stated in the Court's written opinion dated December 17, 2001, and incorporated herein by reference, it is hereby ORDERED that the Defendant's motion to set


aside the jury's verdict is denied, with all of the defendant's objections noted and preserved, and accordingly the Court ADJUDGES and ORDERS that judgment be entered on the jury's verdict in favor of the Plaintiff in the sum of Three Hundred Fifty Thousand and 00/100 Dollars (\$350,000.00) with interest at the judgment rate from the 19<sup>th</sup> day of November, 2001, until paid.

All matters in controversy having been resolved and it appearing to the Court that nothing further remains to be done in this cause, it is further hereby ORDERED that this cause be stricken from the docket and placed among the ended law cases. The Clerk is directed to certify copies of this Order to counsel of record for the parties.

ENTER this 8<sup>th</sup> day of January, 2002 *cl*

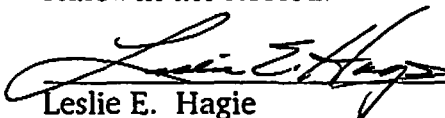
  
\_\_\_\_\_  
Judge

We ask for entry of this Order:

  
\_\_\_\_\_  
Raphael E. Ferris, VSB # 21973  
RIDER, THOMAS, CLEVELAND,  
FERRIS & EAKIN, P.C.  
P.O. Box 1791  
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540-344-6608 (fax)  
Co-counsel for plaintiff

Gregory M. Tobin, VSB # 26571  
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P.O. Box Box 179  
East Alton, Illinois 62024-0179  
(618) 259-8011  
(618) 259-6793 (fax)  
Co-counsel for plaintiff

Seen and Objected to for the reasons  
stated in the Record:

  
\_\_\_\_\_  
Leslie E. Hagie  
Matthew P. Pritts  
Woods Rogers & Hazlegrove  
P.O. Box 14125  
Roanoke, Virginia 24038-4125  
983-7693  
983-7711 (fax)  
Counsel for defendant

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

RAYMOND P. KEELING,

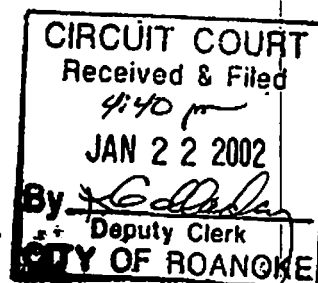
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY  
COMPANY,

Defendant.

Law No. CL96-000925



JAN28'02-PG 095

NOTICE OF APPEAL

COMES NOW defendant, Norfolk and Western Railway Company, by counsel, pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, and hereby gives notice of appeal to the Supreme Court of Virginia from the Judgment Order of this Court entered January 8, 2002. Defendant certifies that it has ordered the transcripts of the trial testimony of November 13 through November 19, 2001, from Central Virginia Court Reporters.

NORFOLK AND WESTERN RAILWAY COMPANY

By

Of Counsel

Leslie E. Hagie (VSB #25079)  
Matthew P. Pritts (VSB #34628)  
WOODS, ROGERS & HAZLEGROVE, P.L.C.  
First Union Tower, Suite 1400  
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Counsel for Defendant

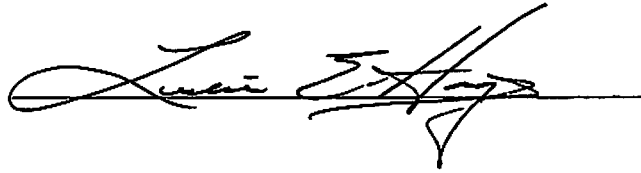
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C/M: 069558-00442-01

WOODS, ROGERS  
& HAZLEGROVE  
Attorneys at Law



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was mailed to Gregory M. Tobin, Esquire, and Robert Schmieder, Esquire, Pratt & Tobin, P.C., Route 111 at Airline Drive, Post Office Box 179, East Alton, IL 62024, and Lenden Eakin, Esquire, Rider, Thomas, Cleaveland, Ferris & Eakin, P. C., 22 Luck Avenue, S.W., Post Office Box 1791, Roanoke, Virginia 24008, counsel for plaintiff, on this 18<sup>th</sup> day of January, 2002.



### ASSIGNMENTS OF ERROR

- I. The Trial Court Erred in Denying NW's Motion for a Directed Verdict Where There Was No Evidence of NW Negligence in Conducting the Pulmonary Function Test upon Keeling.
- II. The Trial Court Erred in Denying NW's Motion for a Directed Verdict Where Keeling Failed to Establish That His Injury Was Foreseeable.
- III. After Finding That NW's Expert, Grant, Was Qualified on the Subjects for Which His Testimony Was Proffered and That He Possessed Specialized, Technical Knowledge That Would Assist the Trier of Fact, the Trial Court Erred in Ruling That it was Constrained under *Combs v. Norfolk and Western Railway Co.*, 256 Va. 490, 507 S.E.2d 355 (1998), to Exclude Grant's Testimony Because He Was a Non-Medical Doctor (Even Though Grant Did Not Address Medical Causation Issues).

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

Raymond P. Keeling, Jr.,

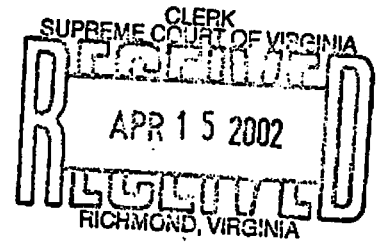
Plaintiff,

v.

Norfolk and Western Railway  
Company, a corporation, and  
T.K. Group, Inc., and  
Quality Services, Inc.,

Defendants.

Civil Action  
No. CL 96-925



COPY

Deposition of, AARON DAVIS, called as a witness by and on behalf of the Plaintiff, pursuant to Rule 4:5 of the Supreme Court Rules of Virginia, taken before Marlo D. Farnsworth, Notary Public within and for the State of Virginia, at Large, at the offices of Cowan & Owen, 1930 Huguenot Road, Richmond, Virginia, on Wednesday, the 24th day of September, 1997, commencing at 2:16 p.m., pursuant to notice and agreement of Counsel.

APPEARANCES:

David A. Hylla, Esquire  
Pratt & Tobin, P.C.  
Route 111 at Airline Drive  
P.O. Box 179  
East Alton, IL 62024-0179,

on behalf of Plaintiff;

Leslie E. Hagie, Esquire  
Woods, Rogers & Hazlegrove, P.L.C.  
10 South Jefferson Street, Suite 1400  
Roanoke, VA 24011,

on behalf of Defendant  
Norfolk and Western Railway Company,  
a corporation;

\* \* \*

1           Q     Okay. And between September of 1993 and  
2     the date of this incident we're here about is August  
3     of 1994, how many pulmonary function tests do you  
4     think you did?

5           A     Maybe a thousand.

6           Q     Okay. How many would have been the most  
7     you ever did in one day?

8           A     To present day?

9           Q     Between '93 and '94.

10          A     Oh, at that time? Maybe 75 to 100.

11          Q     Okay. And that was by yourself or with an  
12     assistant?

13          A     That would be with an assistant.

14          Q     Okay. Have you ever received any emergency  
15     medical training?

16          A     No.

17          Q     Okay. Have you ever received any training  
18     for pulmonary function testing outside of this course  
19     in September of 1993?

20          A     None other than, you know, the people I  
21     work with which are respiratory therapists and  
22     registered nurses and so forth.

23          Q     Okay. You are not a respiratory therapist,  
24     correct?

25          A     No.

1           Q     And when you say you learn from working  
2     with these other people was this on-the-job training  
3     where you just observed them working or did they ever  
4     take a day just to show you things?

5           A     Absolutely.

6           Q     Okay.

7           A     Yeah. We took days where we've looked at  
8     the blackboard to look at obstructive, restrictive  
9     diseases. You know, we went over the same things  
10    that we had actually looked at at the -- this hygiene  
11    company.

12          Q     Okay. And who helped you learn things out  
13    there on the job or with Quality Services? Who were  
14    the people that helped show you things?

15          A     Basically Rhonda Rapinac, Linda Thacker.

16          Q     Okay. Can you explain to me what a  
17    pulmonary function test is?

18          A     A pulmonary function test? It's a test to  
19    tell the volume of lungs a particular person has to  
20    tell if they have obstructive or restrictive diseases  
21    for their age, height, and weight.

22          Q     Do you know the purpose the railroad -- do  
23    you know what purpose the railroad had in having  
24    their employees given a pulmonary function capacity  
25    test?

1           A     My understanding was to see if they were  
2 physically fit to wear respirators.

3           Q     Looking at August 16, '94, the day in  
4 question, with Mr. Keeling.

5           A     Uh-huh.

6           Q     Do you know how many tests you did on that  
7 date?

8           A     Per person?

9           Q     No. How many -- no. I mean, how many  
10 people did you test on that day?

11          A     How many people did we test that day. I'm  
12 not positive, but I would say 70 people. That's a  
13 ways back.

14          Q     And did you have an assistant with you at  
15 that time or someone working with you?

16          A     Yes.

17          Q     And who was that?

18          A     Jim Suedmeyer.

19          Q     Were you considered his assistant or were  
20 you on an equal footing with the company or was he  
21 your assistant?

22          A     Just an equal basis.

23          Q     Okay. You didn't take orders from him?

24          A     Not really.

25          Q     Okay. And you didn't give orders to him.

\* \* \*

\*

\*

\*

1 Did you do any follow-up questioning  
2 of Mr. Keeling on that day?

3 MS. O'TOOLE: Could you be more  
4 specific about follow-up questioning?

5 MR. HYLLA: Okay.

6 MS. O'TOOLE: Specifically what you're  
7 referring to.

8 BY MR. HYLLA:

9 Q Okay. First of all, regarding what you  
10 personally did, did you speak to Mr. Keeling at all  
11 on that date regarding his medical history?

12 A I think I would have spoke to him about his  
13 blood pressure because I think it was taken a couple  
14 of times.

15 Q Okay. Now, well, you say you think you  
16 would have. Do you remember if you did or not?

17 A Yes, I'm sure I talked to him about it.

18 Q Okay. And what did you say to him and what  
19 did he say to you?

20 A In this instance, and I believe I remember  
21 this, Jim had taken his blood pressure. It was too  
22 high to do the testing.

23 He had sat him down because he had  
24 already had his paperwork and everything filled out.  
25 We had him sit there for a while for his blood

1 pressure to regulate. I took it again and found it  
2 to be 158 over 102 or Jim took it again. I don't  
3 remember which one of us took it again.

4 Q Okay. Looking at --

5 A It looks like his writing.

6 Q -- the spirometer quality control  
7 worksheet, the blood pressure reading --

8 A That's Jim's writing.

9 Q Okay.

10 A So, evidently, he took it a second time.  
11 It was within our ranges to do the pulmonary, and I  
12 went ahead and did it.

13 Q Okay. And what is your range to allow you  
14 to do the pulmonary?

15 A 200 over 110. Any variance over those two  
16 ranges, vice versa, and we stop.

17 Q Okay.

18 A We just don't do the test.

19 Q Do you know how long Mr. Keeling sat in the  
20 trailer before his blood pressure was rechecked?

21 A I couldn't answer that.

22 Q Okay. Is it common when there's more than  
23 one blood pressure test done to only have one reading  
24 written down on this form?

25 A They're all recorded on every test. Every



1 test that we do we do a blood pressure on.

2 Q Okay. Is every blood pressure reading

3 recorded?

4 A Yes, sir.

5 Q Okay. And where is that kept?

6 A Right here. (Indicating.)

7 Q Okay. Well, looking at Exhibit Number 2,

8 I'll turn it around.

9 A Right there. (Indicating.)

10 Q Okay. I'm sorry. Where did you point to?

11 A "Comments."

12 Q Okay. So, there's only one. There's only

13 one result, blood pressure test result, on this form,

14 158 over 102.

15 A That's correct.

16 Q So, does that mean there was only one blood

17 pressure test done?

18 A No, sir.

19 Q Okay. Well, my question was where are

20 these other results kept?

21 A We didn't write them down.

22 Q Okay. Is that ordinary procedure is to not

23 write them all down?

24 A It just depends on who's doing the blood

25 pressures. If it's within range, we can do the test,

1 we enter the one that we can go with.

2 If it's out of range and we have to  
3 report it to the medical officers, we record that,  
4 turn it into our office. They in turn call the  
5 corporate office of Norfolk Southern, and they decide  
6 what to do with the patient.

7 Q On Exhibit Number 1 Mr. Suedmeyer  
8 identified that as a test result sheet from 1993 --

9 A Correct.

10 Q -- for Mr. Keeling.

11 A Correct.

12 Q Do you agree with that?

13 A Let me verify a couple of things.

14 Q Sure.

15 A (Witness perusing.) I could go with it,  
16 yes.

17 Q Okay. On that one Exhibit Number 3 from  
18 1993 there is nothing under "Comments."

19 A That's true.

20 Q Okay. Well, where is the blood pressure  
21 reading for that date?

22 A That could possibly be written on this  
23 sheet from 1993.

24 Q Okay.

25 A Depending on who's doing the paperwork.

Q And "this sheet" being -- would you  
identify that?

A That's a Norfolk Southern protection  
medical questionnaire.

Q Okay.

A I'd also --

Q Go ahead.

A This test was not done -- performed by me  
or Jim either.

Q Okay. I understand. Going back to this --  
the test date of August 16th, 1994, did anyone from  
Quality Services explain any risks that might be  
involved in taking this test to Mr. Keeling?

A I don't believe so.

A Unless it was explained to him the reason  
we wouldn't do this test right off the bat, and Jim  
may or may not have explained it to him. I don't  
know that I did.

But usually if we have a high blood  
pressure, we'll explain to them why we're not doing  
the test until we can get it down to under those  
parameters.

Q And what would you tell them?

A I tell them that there would be a risk of

1 stroke.

2 Q Okay. And do you recall having that  
3 conversation with Mr. Keeling?

4  
5 Q Okay. If a person indicates that he has  
6 high blood pressure on his questionnaire form is it  
7 your practice to ask him if he's on any medication?

8 A If the blood pressure is high and did you  
9 take your medication this morning?

10 Q Okay. What did you discuss, if you recall,  
11 with Mr. Keeling about his blood pressure?

12 A I didn't have that problem because his  
13 is -- his was down to where we could do the testing.  
14 So, I didn't have a reason to ask him about his  
15 medication personally.

16 Q Okay. But his first test was high, right,  
17 his first blood pressure test?

18 I believe so.

19 Q Okay.

20 A Then that, I think Jim, being as he was  
21 doing the blood pressures, he'd have to answer that  
22 for you.

23 Q Okay. Okay. Is it your recollection that  
24 you were the technician giving the test to  
25 Mr. Keeling?

1 A Yes, sir.

2 Q Okay. Can you recall in anymore  
3 specificity than you already have the course of that  
4 actual test for him?

5 A The test that day I believe when I asked  
6 him, I explained how to blow through the tube. He  
7 blew out once, but it was a very, very light  
8 expiratory or expiration movement.

9 Q Okay. And why do you say that?

10 A It was just, you know, after watching  
11 thousands of them, you can tell. And also from the  
12 demographics from the computer you can tell if a  
13 person is putting out any air or not. So, you  
14 explain it to them again.

15 Q Okay.

16 A And try to get them to blow out a little  
17 harder up to their -- up to their performance for who  
18 they are; for their height, age, and weight.

19 The second time he gave me a real good  
20 effort. I know he complained he was dizzy. I asked  
21 him to sit down, and that was the end of that.

22 Q Okay. I'm showing you Exhibit Number 2.  
23 Could you identify that? Just, I mean, tell us --

24 A Yes.

25 Q -- what that is. (Proffered.)

1           A     (Witness perusing.) This is the actual  
2 test from 8-16-94 that I performed on Mr. Keeling.

3           Q     Okay. And what are those test results on  
4 that document?

5           A     FVC is his forced vital capacity. He's at  
6 95 percent for his height. His numbers are good. He  
7 went for three seconds which is not very long.

8           Q     What do you mean went for three seconds?

9           A     He blew air out for three seconds.

10          Q     Okay. Was this the first test?

11          A     This was the second test.

12          Q     Okay.

13          A     The first one was not even legible, and  
14 it's not on here.

15          Q     Okay. And what do you mean by it not being  
16 legible?

17          A     Evidently, it didn't record. He didn't get  
18 enough air out to even start the machine in this  
19 instance.

20          Q     Okay. Is it true that anytime there's an  
21 attempt made in the machine it will record the  
22 numbers no matter how low they are?

23          A     Something.

24          Q     It will record something, right?

25          A     Yeah. It might be a big whirlwind. No

1 matter even if you move the thing through the air,  
2 you'll get something.

3 Q Okay. And won't that machine spit out  
4 those numbers when it generates the report unless  
5 somebody actually removes the numbers?

6 A That's correct.

7 Q Okay. Did you remove the numbers?

8 A I would say if it was an instance where the  
9 time line had kept going or if I had a bunch of  
10 garbled -- if the test wasn't worth putting on there,  
11 yes, I would have erased it.

12 Q Okay. In this case did you erase the  
13 numbers?

14 A I would say that I must have or it didn't  
15 even register. I would say I probably just took it  
16 off. I just erased it off, that one effort.

17 Q Well, it will record anything, right?

18 A True.

19 Q So, if he blew twice and there's only one  
20 test result, would you agree that you had to remove  
21 one of the test results?

22 A I would.

23 Q Okay. Did you write those down anywhere?  
24 Do you know what those scores were?

25 A There wouldn't be any reason to, and I'll

1 tell you why.

2                   What I would have been going for, and  
3 after removing that first test, knowing that I could  
4 get a better test from the man. I mean, there's a  
5 certain area there when somebody just doesn't  
6 understand what to do, and you'd explain it again to  
7 them. And this was just a bad trial.

8                   You don't even want that on his report  
9 for the gentleman because that's what I'm there for  
10 is to get the best test I can for him. And after the  
11 second blow where he got dizzy, that's where we  
12 stopped. And that's the only recordable good test I  
13 had. I kept it.

14           Q     Okay.

15           A     And didn't go any further.

16           Q     Okay. All right.

17           A     Normally, I would have three trials.

18           Q     That was my next question.

19           A     Consistent trials.

20           Q     Is that the right way to do a test is to  
21 have three columns filled?

22           A     Three consistent trials.

23           Q     Okay. And those three consistent trials  
24 would be recorded on a document like Exhibit Number  
25 2, under the second and third one would be under the



1 second and third columns, right?

2 A Correct.

3 Q Okay.

4 A The computer puts the best test as the  
5 best, second percentage as second, and third the  
6 lowest percentage as the third.

7 Q Okay.

8 A The doctors that read these read the best  
9 one out of three.

10 Q Okay.

11 A And that's the reason for getting three  
12 trials.

13 Q If Mr. Keeling blew for three seconds on  
14 this test that was recorded in August of '94, how  
15 long did he blow on the other test?

16 A I would have probably stopped him seconds  
17 after he started.

18 Q Okay. Shorter or longer than this one?

19 A Probably shorter.

20 Q Okay. After you stopped him on the first  
21 attempt, did you say -- did you coach him?

22 A Yes.

23 Q Or say anything to him?

24 A (Nodding head.)

25 Q Okay. And what did you tell him?

1           A     I went right back through the same  
2 procedure; you need to blast your air out forcefully.

3           Q     Okay. Did he say anything to you?

4           A     Not at that point.

5           Q     Okay.

6           A     You know.

7           Q     Did he --

8           A     Just acted like he, you know, I was giving  
9 him -- like he was getting it through his head what  
10 he was supposed to do.

11          Q     Okay. And did you take any break or did  
12 you go right back at it on the second try?

13          A     Right back to it.

14          Q     Okay.

15          A     You know, so it's fresh.

16          Q     And then there was another attempt.

17          A     Well, now, let me go back. There is a  
18 break in between because you have to re-trigger the  
19 computer. So, the man has ten; ten, fifteen seconds  
20 in between each trial and even more.

21          Q     Okay.

22          A     Depending on how he looks. And if  
23 everything is going fine with him, you just pop right  
24 through them. But if he's having problems, you stop  
25 and, you know, take a look at him, make sure

1 everything is okay, and move along.

2 Q Okay. Did you do that; did you take a look  
3 at him?

4 A Yeah, he looked fine after the first one.

5 Q Okay. And then what happened?

6 A And then we did it again, and that's when  
7 he -- he complained of being dizzy. We sat him down.

8 Q How did he look then?

9 A He looked like he was dizzy.

10 Q Okay. Was he sweating?

11 A I don't recall him sweating.

12 Q Okay. Then you said you sat him down.

13 A We sat him down.

14 Q And how long did he sit there?

15 A Two, three minutes.

16 Q Okay. And then what happened?

17 A That's when he stood up and said --

18 Q Made his comments.

19 A -- "F this," and shot out the door.

20 Q Okay. Did you say anything to him to try  
21 to stop him or talk to him?

22 A I tried to say a few words. I don't know  
23 what, but like, "Hey, you know, talk to me here."  
24 And he just -- he was on his way.

25 Q Okay. Then what did you do?

\* \* \*

~~...on that.~~  
Q Okay. If there was a blood pressure test  
3 done --

A An extra --

Q -- prior, a second one done that day, then  
6 that first blood pressure test reading had to exceed  
7 those limits, right?

8 A For us to sit him down, yes, they would  
9 have.

10 Q Which were 200 over 110.

11 A Uh-huh.

12 Q Okay. Do you ever have available during  
13 any pulmonary testing with any company baseline  
14 pulmonary test results to assist you in your testing?

15 A Not with me. It's in our database at the  
16 office.

17 Q Okay. You never took those out to the  
18 actual testing.

19 A No, sir.

20 Q Okay. They were, as far as you knew, those  
21 were only used at a later time as a comparative --  
22 for comparative purposes.

23 A Correct.

24 Q Okay. Have you ever heard of respiratory  
25 therapists using baselines to assist them in doing

\*

\*

\*

1 A None.

2 MR. HYLM: Okay. That's all I have.

3 Thanks.

4 THE WITNESS: Uh huh. Scared would be  
5 the word, the appropriate word.

6 MS. O'TOOLE: Wait a minute. Mr. Hagie  
7 has --

8 CROSS-EXAMINATION

9 BY MR. HAGIE:

10 Q Mr. Davis, I'm Leslie Hagie. I represent  
11 Norfolk and Western Railroad Company in this lawsuit.

12 Just a couple of very quick questions.

13 You mentioned that on the sheet that you filled out  
14 after the test that he had -- was dizzy and had been  
15 coughing. Had you noticed any coughing before he  
16 took the test?

17 A No, sir.

18 Q Have you ever heard of perilymphatic  
19 fistulas before?

20 A No, sir.

21 Q How many of these tests have you performed?

22 A I'd just have to guess, 10,000 to 15,000.

23 Q Have you ever had any complaints similar to  
24 what the complaints in this case are?

25 A No, sir.

1 Q You mentioned that if someone had glaucoma,  
2 that's something that you do not test people or --  
3 what's the danger of glaucoma?

4 A I think you've got pressure in the eyes.  
5 And if you strain real hard, it could probably cause  
6 a problem.

7 Q Have you ever heard of any of these PFT's  
8 causing any problems with the ears?

9 A No, sir. Aside from maybe an ear popping  
10 from just pressure change in your head, you know,  
11 that would be it. No other ear problems.

12 MR. HAGIE: I have no further  
13 questions.

14 CROSS-EXAMINATION

15 BY MR. CABELL:

16 Q Yes, Mr. Davis, I'm Temple Cabell. I'm  
17 with the T.K. Group, okay? I just have some very few  
18 follow-up questions and that is you've been with the  
19 Quality Services for how many years now?

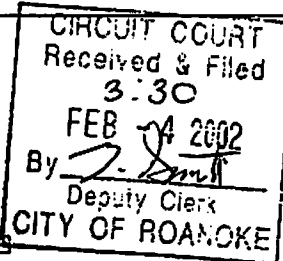
20 A Five years.

21 Q Okay. And in the five years have you ever  
22 worked side by side with a representative of the T.K.  
23 Group in performing any type of pulmonary function  
24 tests?

25 A At occasion I think a couple of your people

\* \* \*

ORIGINAL



V I R G I N I A:

IN THE CIRCUIT COURT FOR THE

CITY OF ROANOKE

-----  
RAYMOND P. KEELING,

Plaintiff

vs.

CASE NO. CL96-925

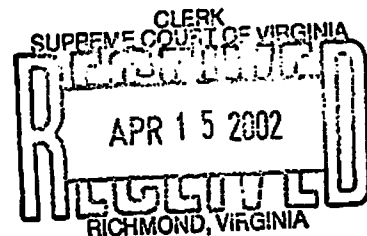
NORFOLK AND WESTERN RAILWAY  
COMPANY, a Coporation,

Defendant  
-----

Volume I  
November 13, 2001  
9:30 A.M.

HEARD BEFORE:

THE HONORABLE CLIFFORD R. WECKSTEIN



CENTRAL VIRGINIA REPORTERS  
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MATTHEW P. PRITTS, ESQ.  
Counsel on behalf of the Defendant

\* \* \* \* \*

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\* \* \* \* \*

\* \* \* \* \*

1           The following cause came on to be heard on the  
2   13th day of November, 2001, before the Honorable Clifford R.  
3   Weckstein, Judge of the Circuit Court of the City of  
4   Roanoke, and a Jury of seven and one alternate, sitting at  
5   Roanoke, Virginia, at 9:30 a.m.

6           Mary J. Butenschoen, RPR, Court Reporter, was  
7   duly sworn.

8  
9           THE COURT: Good morning, ladies and  
10   gentlemen. Madam clerk, would you like to call the  
11   case, please.

12           THE CLERK: Yes, sir. We now have Case  
13   CL96-925, Raymond P. Keeling, Jr., versus N&W Railway  
14   Company. Plaintiff ready?

15           MR. SCHMIEDER: Plaintiff is ready, Your  
16   Honor.

17           THE CLERK: Defendant ready?

18           MR. HAGIE: Defendant is ready, Your Honor.

19           THE COURT: Defendant T.K. Group, what is the  
20   status of that case?

21           MR. SCHMIEDER: We have taken a voluntary  
22   nonsuit, Your Honor, on that.

23           THE COURT: No, you haven't.

24           MR. SCHMIEDER: Pardon?

1 THE COURT: No, you haven't.

2 MR. SCHMIEDER: I have an order here tendered,  
3 and I had to get it circulated around for everybody,  
4 but I don't have a signed copy back from -- you have  
5 got a copy of this?

6 MR. HAGIE: I saw a copy of that, yes.

7 MR. SCHMIEDER: Your Honor, I gave a copy to  
8 Temple, but I didn't have his signed copy back.

9 THE COURT: Does that mean he was here this  
10 morning?

11 MR. SCHMIEDER: I apologize, Your Honor.

12 THE COURT: Does that mean he was here this  
13 morning when you say you gave a copy to him?

14 MR. SCHMIEDER: I gave a copy to him Thursday,  
15 Thursday night, and I faxed a copy to him because he  
16 was going out of town.

17 THE COURT: I see.

18 MR. SCHMIEDER: May I approach?

19 THE COURT: Yes, sir. Probably the sort of  
20 thing, when you know that much in advance, you could  
21 tell the judge, too. All right. So the case  
22 proceeds only against Norfolk & Western Railway  
23 Company?

24 MR. SCHMIEDER: That is correct, Your Honor.

\* \* \*

\* \* \*

1 present, but his attorney asked in the presence of  
2 counsel for the defendant if he needed to be here,  
3 and the Court said no.

4 MR. HAGIE: This Court is aware that we have  
5 had many hearings prior to trial on the evidentiary  
6 -- or the evidence that may or may not be coming in.  
7 We have filed a trial brief which sets forth what we  
8 think are the major decisions that this Court has to  
9 make in regard to the expert witnesses the plaintiff  
10 has identified.

11 We were concerned that this afternoon  
12 plaintiff was going to try to read in some of the  
13 depositions which are implicated in these objections.  
14 And, to the extent that they also affect the  
15 openings, we were looking to the Court for some  
16 guidance in terms of whether or not these specific  
17 witnesses will be allowed to testify or how far  
18 beyond the issues that we have already discussed we  
19 need to go before having openings.

20 Specifically, we noted that plaintiff has  
21 responded with a request for admissions that go  
22 beyond that which was agreed to at the time of the  
23 hearing. We have a motion to strike the additional  
24 language that was added to their request for

1 admissions.

2 We have requests for rulings upon whether or  
3 not, in the depositions that we have, Doctor Burch is  
4 going to be allowed to opine to various conclusions  
5 or opinions that we have objected to during his trial  
6 deposition.

7 We have -- in regard to Doctor Kohut, we have  
8 been provided a witness report that says there is a  
9 possibility of something happening which we do not  
10 feel qualifies for -- to meet the threshold of  
11 credibility in Virginia state courts, and the same  
12 goes for Doctor Hippensteel and what he has testified  
13 to.

14 I don't know if this is something the Court  
15 would simply prefer to wait until we get the witness  
16 here to take outside of the jury or if there is some  
17 way we can do this.

18 I am trying to streamline this without having  
19 the jury coming in and going back out and waiting and  
20 then coming back in, and I am not exactly certain  
21 what the plaintiff's lineup of witnesses are and how  
22 we can go through and work on each of these in kind  
23 of a consolidated manner.

24 THE COURT: Mr. Schmieder, your response to

1           what Mr. Hagie has said is?

2                   MR. SCHMIEDER: Yes, Your Honor. First of  
3 all, Your Honor, with regard to Doctor Hippensteel,  
4 his opinions that he expressed in his deposition were  
5 that to a reasonable degree of medical certainty  
6 might or could this have caused or contributed to the  
7 injury. I don't know the exact words, but if the  
8 Court needs it, I can find it. Therefore, I don't  
9 believe that this is the speculation or conjecture or  
10 possibilities that counsel is alluding to.

11                   Secondly, in this particular case, what Doctor  
12 Kohut has done -- everything that he has elaborated  
13 on, except when I was asked to go further in that  
14 regard, I did, but it can be found someplace in his  
15 deposition if his deposition is read carefully in  
16 this particular case.

17                   Finally, Your Honor, in an FELA case, with all  
18 due respect to counsel here, the standard that is a  
19 lot lower than the rules of evidence of the State of  
20 Virginia are the Supreme Court of Virginia. In the  
21 case of Sentilles, S-E-N-T-I-L-L-E-S, which is, I  
22 believe, a 1958 United States Supreme Court case, the  
23 Court there basically stated that there is no magic  
24 formula or words that are to be used in this when you

1           were dealing -- that case was the Jones Act case,  
2           which is a part of the thing.

3                       So I disagree with what counsel is saying  
4           here. In this particular case is the fact that when  
5           a doctor gets on the stand and says I have an opinion  
6           to a reasonable degree of medical certainty that this  
7           might or could have been caused in whole or in part  
8           or contributed to the injury, I think that's  
9           sufficient, although that Supreme Court case of  
10          Sentilles basically says you don't even have to use  
11          the words "to a reasonable degree of medical  
12          certainty".

13                      And so I feel that what the physicians have  
14          stated in their reports and in their depositions is  
15          in compliance with what the United States Supreme  
16          Court has said that is applicable to an FELA case.

17                      I mean, I don't want to go point by point and  
18          down every aspect of this thing here, but I think  
19          what Doctor Hippensteel and what Doctor Kohut have  
20          said in this particular case is certainly admissible  
21          under FELA standards.

22                      THE COURT: Mr. Schmieder?

23                      MR. SCHMIEDER: Yes, Your Honor.

24                      THE COURT: It is -- here is my understanding

1 of the law.

2 MR. SCHMIEDER: Okay.

3 THE COURT: Any negligence, however slight,  
4 that caused or contributed to causing injury to the  
5 employee is a basis upon which you may recover.  
6 However, the burden is upon the plaintiff to prove  
7 negligence and causation, however slight, by a  
8 preponderance of the evidence.

9 In order for a physician, for example, to  
10 testify to causation, although no magic words are  
11 necessary, the physician's testimony must still be in  
12 terms of probabilities. I know of no precedentially  
13 binding decision, nor do I know of any other reported  
14 decision in which the standard is expressed as might  
15 or could. Can you give me any such cases?

16 MR. SCHMIEDER: I believe I can, Your Honor,  
17 but I don't think I can do it right here at this  
18 moment.

19 THE COURT: Do you agree with me that the  
20 burden is upon the plaintiff to prove negligence and  
21 causation by the greater weight of the evidence?

22 MR. SCHMIEDER: I agree.

23 THE COURT: If a physician gives an opinion  
24 about causation, must not that opinion be phrased in



1 terms of probabilities, reasonable probabilities,  
2 medical probabilities, more likely than not, or  
3 similar such language?

4 MR. SCHMIEDER: And included in that, the  
5 courts have allowed the terminology of do you have an  
6 opinion to a reasonable degree of medical certainty  
7 as to whether or not such and such might or could  
8 have in whole or in part caused the injury or  
9 contributed to the injuries. That type of  
10 terminology has been allowed, Your Honor, but I am  
11 going to have Virginia case law now.

12 THE COURT: Subject to being educated by the  
13 case law you will give me, I am of opinion, as I  
14 said, that the law of Virginia and the law of FELA  
15 are identical in requiring such evidence to be about  
16 probabilities. That doesn't, however, address  
17 specifically any of the things that Mr. Hagie raised.

18 Specifically, I believe the last time a  
19 similar question was raised I concluded, based upon  
20 the differing perceptions expressed by plaintiff and  
21 defendant, that the only practical way to do this was  
22 the perhaps cumbersome method of taking the witnesses  
23 out of the presence of the jury first. I understood,  
24 as I recall, that the witnesses would be present for

1           that purpose.

2                   Mr. Hagie alluded to the deposition of Doctor  
3 Hippensteel. Will Doctor Hippensteel be only by  
4 deposition?

5                   MR. SCHMIEDER: No, Your Honor. He will be  
6 here tomorrow morning.

7                   THE COURT: Is there any witness who you  
8 expect to present this afternoon whose testimony fits  
9 in the categories that Mr. Hagie was talking about?

10                  MR. SCHMIEDER: There are none, Your Honor.

11                  THE COURT: I don't know a way to base a  
12 preliminary decision on the representations by  
13 counsel unless counsel agree on that. I do think  
14 that it would be possible -- is Doctor Burch going to  
15 be live?

16                  MR. SCHMIEDER: He is by deposition, but I am  
17 probably not going to read him, Your Honor. I  
18 haven't made up my mind, but right now I am thinking  
19 of not reading him.

20                  THE COURT: I do think that the Court and  
21 counsel can resolve objections made during the  
22 deposition, if he is going to be offered at all, at  
23 some time when the jury is gone for the day or  
24 before the jury comes in in the morning.

1 Mr. Hagie --

2 MR. SCHMIEDER: Your Honor --

3 THE COURT: Excuse me. Go ahead.

4 MR. SCHMIEDER: Here is where I am at a loss.  
5 Doctor Hippensteel was asked two questions by myself.

6 Do you have an opinion to a reasonable degree  
7 of pulmonary specialty and certainty as to whether or  
8 not the pulmonary function test performed on Ray  
9 Keeling when his initial blood pressure revealed that  
10 it was higher than 200/115 was negligent on the part  
11 of the people administering the test? And he  
12 answered, Yes. And what is your opinion? He  
13 answered, My opinion is yes.

14 And, Doctor, do you have an opinion to a  
15 reasonable degree of medical and pulmonary certainty  
16 as to whether the pulmonary function test caused or  
17 contributed in whole or in part to the perilymphatic  
18 fistula? Answer: I think the evidence says that it  
19 did.

20 THE COURT: Those answers standing by  
21 themselves meet the standard that would be required.  
22 Mr. Hagie contends in this memorandum that there is  
23 an insufficient factual basis to support Doctor  
24 Hippensteel rendering an opinion.

1 I can't rule on that without having some  
2 evidence about what the factual basis was and from  
3 the witness about what he, as a pulmonologist, if  
4 that's what he is, perceives to be the necessary  
5 factual basis upon which to render an opinion.

6 Mr. Hagie, do I correctly articulate your  
7 objections to Doctor Hippensteel?

8 MR. HAGIE: Yes, sir. There is no evidence  
9 that we know of in this case that supports the fact  
10 that Mr. Keeling's blood pressure ever reached or  
11 exceeded 200/115.

12 THE COURT: Doctor Keeling is going to be  
13 here. Do you believe it necessary to take Doctor  
14 Keeling out of the presence of the jury, or do you  
15 believe that objection at some point if he indeed  
16 fails to establish a factual predicate and perhaps  
17 sending the jury out at that point would be the  
18 better way to do it?

19 MR. HAGIE: Doctor Hippensteel?

20 THE COURT: Yes. Did I say Doctor Keeling?  
21 I'm sorry.

22 MR. HAGIE: I would like to voir dire him  
23 outside of the presence of the jury, Your Honor.

24 There are several issues that I have laid out

1           that affect the basis of his opinions and I think are  
2           -- to even go into the -- pervade the responsibility  
3           of the jury part, he bases -- he, as a pulmonologist,  
4           bases an opinion on a protocol based upon testimony  
5           of Linda Thacker, which I do not think he is entitled  
6           to do, which I don't think he has any basis for  
7           doing.

8                     And I think if the jury hears Ms. Thacker's  
9           deposition, they are in as good a position as Doctor  
10          Hippensteel to testify as to whether or not a  
11          protocol that Doctor Hippensteel is not familiar with  
12          was violated.

13                    THE COURT: Mr. Schmieder, do you want to  
14          respond right now to the question of Doctor  
15          Hippensteel out of the presence of the jury versus  
16          Doctor Hippensteel in the jury's presence since he is  
17          not going to be here until tomorrow?

18                    MR. SCHMIEDER: I would prefer it to be in the  
19          presence of the jury, because I think he meets all  
20          the criteria as an expert testifying in this case and  
21          what he has reasonably relied upon, but --

22                    THE COURT: I see here attached to defendant's  
23          brief a report from Doctor Kohut, and I don't believe  
24          I have Doctor Hippensteel's deposition.

1 MR. HAGIE: Not with that memorandum, Judge.

2 THE COURT: I will -- has it been filed? I  
3 don't think so.

4 MR. HAGIE: Certainly portions of it have been  
5 in a previous memorandum.

6 THE COURT: I will reserve judgment on which  
7 way to approach Doctor Hippensteel.

8 MR. HAGIE: I might just point out, Judge,  
9 that Doctor Hippensteel also based his opinion on  
10 Doctor Kohut's opinion, which is another layer of  
11 that foundation that we certainly don't think is  
12 qualified to come in.

13 THE COURT: We will see.

14 MR. HAGIE: Yes, sir.

15 THE COURT: Now, Mr. Schmieder, Mr. Hagie also  
16 said that the Court needs to address before opening  
17 differences, Mr. Hagie says, between the written  
18 responses to requests for admission and the responses  
19 to requests for admission as discussed in the  
20 courtroom. Are you ready to talk about that?

21 MR. SCHMIEDER: Well, I haven't seen that, but  
22 let me say this to the Court if this can clarify  
23 this. What I did was -- to give you a background,  
24 when I came here for the motion last week, the motion

\* \* \*

1                   At the end of the trial, they will be  
2                   destroyed. And if any of you wants to tell me that  
3                   that will interfere with the book you are going to  
4                   write about this trial, I will be glad to discuss it  
5                   then.

6                   Renee, after you have finished handing these  
7                   out, if you would like to assist Mr. Schmieder if he  
8                   wants to turn the lectern anymore.

9                   MR. SCHMIEDER: The witness is going to be  
10                  there. I think this is okay.

11                  THE COURT: Call your first witness, please.

12                  MR. SCHMIEDER: Your Honor, at this time I  
13                  would like to call the plaintiff, Raymond Keeling, to  
14                  the stand.

15

16                               RAYMOND P. KEELING

17

18                  was called as a witness, and after having first been duly  
19                  sworn to tell the truth, the whole truth and nothing but the  
20                  truth, was examined and testified as follows:

21

22

23

24

## DIRECT EXAMINATION

BY MR. SCHMIEDER:

Q Would you tell the Court and jury your name, please.

A My name is Raymond Keeling, Jr.

Q And, Mr. Keeling, where do you live?

A 1814 Fremont Circle, Roanoke, Virginia.

MR. SCHMIEDER: Your Honor, can I -- would it be better if I tip that microphone up a little bit?

THE COURT: Can everybody hear Mr. Keeling? You can tip it up a little bit if you would like. I can attempt to turn it up.

MR. SCHMIEDER: I don't know if it does or not.

THE WITNESS: There, you got it.

BY MR. SCHMIEDER:

Q And where is that located, your home?

A It's in Roanoke.

Q All right. And can you tell us basically -- what is your date of birth?

A 5/21/48.

Q And that should make you approximately how



1 old, sir?

2 A 53.

3 Q And can you tell the jury how far you went in  
4 school?

5 A Twelve, twelfth grade.

6 Q And did you graduate?

7 A Yes.

8 Q And where?

9 A I graduated from Cave Spring, Roanoke County.

10 Q Cave Spring High School; is that correct?

11 A Yes, sir.

12 Q After you graduated, where did you go, sir?

13 A I went in the service.

14 Q In what branch of the service?

15 A I went into the Army.

16 Q And where were you stationed?

17 A I was stationed at Fort Bragg, North Carolina.

18 Q And what did you do there at Fort Bragg?

19 A Worked in the weapons and storehouse.

20 Q And were you given an honorable discharge?

21 A Yes.

22 Q Sir, before I go any further, during closing  
23 -- during opening statement Mr. Hagie said about your blood  
24 pressure medication. Were you on blood pressure medication

1 from 1992 up until the time of your injury?

2 A Yes, I was.

3 Q Were you on -- also on MS medication?

4 A I was on MS medication.

5 Q Okay. And there was also some mention about a  
6 lawyer and stuff like that. Do you recall that? When did  
7 you first contact a lawyer, do you recall?

8 A I talked to one, but I done forgot who it was.

9 Q Was it anybody here in this courtroom?

10 A No.

11 Q Was it anybody from my law firm or Lenden's  
12 law firm?

13 A No, sir.

14 Q Okay. Now let's go back. So you came out of  
15 the Army. Basically, what did you do then, sir? After the  
16 Army, what did you do?

17 A I went back to work for Roanoke County School  
18 Board.

19 Q And what did you do for Roanoke County School  
20 Board?

21 A Worked on the maintenance.

22 Q And how long did you work for them?

23 A Three years, and then I --

24 Q All right. And then what did you do?

1           A       Then I went to the railroad in '70.

2           Q       All right. And do you recall what month you  
3 went to the railroad?

4           A       March of '70.

5           Q       And where did you go to work?

6           A       At Shaffer's Crossing.

7           Q       And for what railroad?

8           A       Norfolk & Western.

9           Q       Okay. Norfolk & Western is Norfolk & Southern  
10 today; is that correct?

11          A       That's correct.

12          Q       All right. And when you went to work out  
13 there -- before I go any further, do you have any children,  
14 sir?

15          A       Yes.

16          Q       How many children do you have?

17          A       I have two of my own and I have two  
18 stepchildren.

19          Q       Okay. And are they all adults?

20          A       Yes.

21          Q       All right. So then you go to work as a  
22 laborer out at Shaffer's Crossing; is that correct?

23          A       That's correct.

24          Q       How long do you work as a laborer?

1           A       I think about seven, eight months.

2           Q       Okay. And then what do you do?

3           A       Then I went on to apprenticeship as an  
4   electrician.

5           Q       And how long were you an apprentice  
6   electrician?

7           A       Four years.

8           Q       And then what was the next progress that you  
9   made?

10          A       Then they moved me up to be electrician.

11          Q       All right. And when did you become  
12   electrician?

13          A       '75.

14          Q       Can you tell the jury basically what an  
15   electrician does at Shaffer's Crossing for the Norfolk &  
16   Western or Norfolk & Southern?

17          A       Yes. We prepare the units when it comes in.  
18   Like if something is burnt up, we repair all the wiring.  
19   Like if batteries are bad, we change it, or starter motors,  
20   we change it. Trucks and motors, we check all of them,  
21   replace the brushes, like that.

22          Q       Some of the equipment that you work with out  
23   there or some of the batteries and that, how much do they  
24   weigh? Do you have any idea approximately?

1           A       75 pounds, something like that.

2           Q       And you have to lift them, is that correct, as  
3 an electrician?

4           A       Have to lift -- some lifting.

5           Q       Sir, as working as electrician out there, in  
6 1983, if I recall correctly, you suffered from multiple  
7 sclerosis; is that correct?

8           A       That's correct.

9           Q       That's when you were first diagnosed with it?

10          A       Yes.

11          Q       And do you remember the physician who made  
12 that diagnosis?

13          A       Doctor Burch.

14          Q       And, essentially, were you off from work  
15 during that period of time in 1983 when this diagnosis was  
16 being made?

17          A       Yes.

18          Q       And how long were you off from work, sir?

19          A       I think it's about a year, I think it was, or  
20 less than that. I don't remember.

21          Q       That's okay. And then did you go back to  
22 work?

23          A       Yes, I did.

24          Q       Did you go back to your job as a electrician

1 out there?

2 A Yes.

3 Q Does your job as electrician require you to  
4 climb on engines?

5 A Yes, it do.

6 Q And does it -- did it require you back then to  
7 go up on top of those engines and go underneath the engines  
8 and bend and twist?

9 A That's true.

10 Q And were you able to do that back in 1984,  
11 '85, '86?

12 A Yes.

13 Q And then as I understand it, sir, you had  
14 another relapse or problem in 19 -- what was it? 1989; is  
15 that correct?

16 A Yes.

17 Q And then how long were you off from work at  
18 that particular time?

19 A About six months, eight months, something like  
20 that.

21 Q And then did you go back to work for the  
22 railroad?

23 A Yes, I did.

24 Q Did you go back to the same job that you had

1 out there?

2 A Same job, yes, sir.

3 Q All right. And then, essentially, let's say  
4 from 1989 up until -- let's go to 1992. What problems or  
5 symptoms were you faced with with regard to your multiple  
6 sclerosis?

7 A Just the balance and stuff like that. That's  
8 all.

9 Q Were you still able to go out there and do  
10 your job?

11 A Yes.

12 Q Now, as I understand it, in 1994, essentially,  
13 you were still working at Shaffer's Crossing; is that  
14 correct?

15 A That's correct.

16 Q Do you recall when was the last time that you  
17 had seen Doctor Burch before August 16, 1994?

18 A '92, I think it was.

19 Q Okay. Something around April or something  
20 like that of '92?

21 A Yeah.

22 Q Now, from April of '92 up until August of '94,  
23 you had not seen any physicians; is that correct?

24 A No, because I was on medication.

1 Q Okay. But I am correct?

2 A That's correct.

3 Q And what medications were you taking at this  
4 particular time, sir?

5 A I was taking Valiums and Ves -- I can't  
6 pronounce it. Vestic, something like that. It's all MS  
7 medicine.

8 Q What was the Valium for?

9 A For balance.

10 Q And what did you take for blood pressure?

11 A I can't think of the name of it. Hydro  
12 something.

13 Q Okay. And, now, how often would you take this  
14 medication, let's say, in 1994?

15 A Take it in the morning and at night, twice a  
16 day.

17 Q Twice a day?

18 A Twice a day.

19 Q Was that both the Valium and the high blood  
20 pressure medication?

21 A Yes.

22 Q Now, let me direct your attention -- there was  
23 some time, I think -- in fairness, there would be occasions  
24 where -- did you not have a time when you were doing your



1 lawn or something like that and you slipped and fell or you  
2 fell because of dizziness? Is that correct?

3 A Yes.

4 Q Was that '90, '91, '92, or do you recall?

5 A '92, I think it was.

6 Q Okay. Now, let me direct your attention to  
7 August 16, 1994 at Shaffer's Crossing, okay? Do you recall  
8 what day of the week that was?

9 A That was on a Tuesday.

10 Q Had you worked that Monday?

11 A Yes.

12 Q What were your days off out there at Shaffer's  
13 Crossing during that period of time?

14 A Thursday and Friday.

15 Q All right. And on that evening, August 15,  
16 1994, when you left, did you have any conversation with your  
17 boss out there that evening, Jimmy Bray?

18 A Yes.

19 Q What, if anything, did he say to you?

20 A He said we have a portable test the next  
21 morning and I will be the first one to go.

22 Q Okay. What time did you get up on August 16,  
23 19 --

24 A Five o'clock.

1           Q       And tell the jury what you normally do when  
2 you get up in the morning.

3           A       First thing I do, I get up, put the coffee on.  
4 Then I take a shower. Then I take my medicine. Then I put  
5 my clothes on. Then I pack my lunch. Then I go to work. I  
6 get to work about 6:30.

7           Q       Okay. What hours was your wife working at  
8 this period of time?

9           A       3-to-11 shift and 11-to-7 shift. She has a  
10 double shift:

11          Q       Now, when you got to work -- by the way, did  
12 you take your high blood pressure medication that morning?

13          A       Yes, I did.

14          Q       Did you take your Valium that morning?

15          A       Yes, I did.

16          Q       Now, when you got to work, what time did you  
17 arrive at Shaffer's Crossing?

18          A       At 6:30.

19          Q       What, if anything, did you do at that time?

20          A       I talked to the boys outside working on the  
21 locomotive on third shift. I always check with them when I  
22 come in because I park in the back. They say if the unit is  
23 okay. If it's not, I got to fix it.

24          Q       What, if anything, did they say to you?

1           A       They said they had a problem with it.

2           Q       So what is the next thing that you did?

3           A       I just went inside and talked to the guys  
4       until 7 o'clock. Then I seen Jimmy, and Jimmy said I had to  
5       go take the test.

6           Q       Who is Jimmy?

7           A       Jimmy Bray. He is the boss, foreman.

8           Q       And did you go take the test that morning?

9           A       Yes, I did.

10          Q       And how far was it from where you were when he  
11       told you to take the test to where you were to take the  
12       test?

13          A       About 20 feet, I think. Not far.

14          Q       And so when you got there, did you walk there  
15       by yourself?

16          A       Yes.

17          Q       Did you have any trouble walking there that  
18       morning?

19          A       No.

20          Q       When you got to the trailer, were you the  
21       first one there, or did you meet other people there at the  
22       trailer?

23          A       When I got to the trailer, I met two more  
24       electricians from down below coming behind me.

1           Q       What was your line out there at Shaffer's  
2 Crossing? What were you working?

3           A       I worked -- I am the last person to let the  
4 unit go.

5           Q       What do they call that?

6           A       Just the maintenance, last maintenance, you  
7 know.

8           Q       Where do these other gentlemen come from?

9           A       They came from the bull gang.

10          Q       Bull gang?

11          A       Yes.

12          Q       What is your gang?

13          A       Mine is the test line.

14          Q       Okay. So when you got there, you met -- who  
15 did you met?

16          A       J.T. Ellis and Mullins, Larry Mullins.

17          Q       And where were they coming from, what gang?

18          A       They were coming from electrical. They are  
19 electricians, too.

20          Q       What gang?

21          A       Bull gang.

22          Q       So did you go inside the trailer?

23          A       Yes.

24          Q       And what, if anything -- what is the first

1 thing you did once you got inside the trailer?

2 A We got in, the guy spoke to us, and he said,  
3 Sign in.

4 Q Did you sign it?

5 A And we signed it.

6 Q What is the next thing?

7 A And he told us to fill out a sheet, sit down  
8 and fill out a sheet.

9 Q Did you do that?

10 A We did that. Then he said, We check the blood  
11 pressure.

12 Q Okay. Did they check your blood pressure?

13 A Yes.

14 Q And what, if anything, happened at that time?

15 A Checked my blood pressure. He said, Your  
16 blood pressure is high, so he told me to sit down.

17 Q And did you sit down?

18 A Yes, I did.

19 Q Did they go on to work with the other people  
20 at that time?

21 A Yes. They went over to JT to check his.

22 Q And then how long did you sit there, sir,  
23 before they came back to you?

24 A About five or ten minutes.

1           Q       All right. And then did they check your blood  
2 pressure a second time?

3           A       Yes. He said, You are all right. Go on and  
4 take the test. Go on up there.

5           Q       So can you describe the gentleman that was  
6 doing the blood pressure? Was he an older gentleman or a  
7 younger gentleman, if you know?

8           A       (Witness shakes head.)

9           Q       All right. So did you go on up and take the  
10 test?

11          A       Yes, I did.

12          Q       And could you tell us basically what you were  
13 told to do and what you did?

14          A       Yes. He told us to pick up a cup and put it  
15 on the thing that -- put it on top and blow in it. Then he  
16 said, Then we will start. So he told me to blow, and I  
17 blowed. He said, Do it real hard, and then I did it. He  
18 said, No, that's wrong. Do it again. So --

19          Q       Did you do it again?

20          A       I did it again. He said, Still wrong. Do it  
21 again. Then when I did it that time, I started sweating, my  
22 chest started hurting, and I just got -- my head got all  
23 dizzy. So I just stopped. I didn't do the test no more.

24          Q       Okay. Did you sit down, or did they have to

1 help you?

2 A Somebody -- I think he told me to sit.  
3 Somebody grabbed me. I remember that. Somebody grabbed me  
4 and set me down. Then I just -- you know, after I got all  
5 right, I got up and went on back to the office back where I  
6 -- where my test line is, and I told Jimmy, my boss, that I  
7 didn't feel good.

8 Q What, if anything, did Jimmy say to you at  
9 that time?

10 A Jimmy said, You don't look good. And I said,  
11 Can I go up and see Solesbee?

12 Q Who is Solesbee?

13 A Solesbee is our boss on the test line. He is  
14 on the maintenance line. I went up to see him. He looked  
15 at me, and he said, You sick. And I said, Yeah. Can I go  
16 home and take a blood pressure pill? I think I will be all  
17 right.

18 And he said, Will you be back? And I told  
19 him, Yeah. And he said, You ain't driving. I said, No?  
20 Why? He said, Get somebody to take you home because you  
21 don't look good. So he got Caldwell to take me home, Leon  
22 Caldwell.

23 Q Did he drive you home?

24 A He drove me home.

1           Q       All right. And so when you got home, what, if  
2 anything, did you do?

3           A       When I got home, I sit down, took my blood  
4 pressure pills again, and I waited. Then all at once it got  
5 worse. The pain started hurting again and I started  
6 sweating more. Then my head was going around and around.

7                   So then I went upstairs and woke my wife up.  
8 And she asked me what was I doing home, and I said, I am  
9 sick. And she took me -- I said, Can you take me on to  
10 Lewis-Gale? And she said, Yes. So we went up to Lewis-Gale  
11 to the emergency room.

12           Q       Why did you decide -- how much blood pressure  
13 pills that morning did you take?

14           A       I took two. That made two I would have took  
15 that morning.

16           Q       Okay. And so you went over to Lewis-Gale; is  
17 that correct?

18           A       That's correct.

19           Q       And what, if anything, did they do for you  
20 over at Lewis-Gale?

21           A       Apparently went to see the company doctor. He  
22 wouldn't see me, so they sent me over to the emergency room,  
23 came over with a wheelchair. The girl checked my blood  
24 pressure, and she said, Something is wrong.



1                   Next thing I knew they had me back on the  
2 table with tubes running everywhere, and they told me not to  
3 move, just lay there. I laid there four hours. Then the  
4 doctor came in, and he looked at me. He said, I have to go  
5 call Doctor Burch. And I told him, I said, I know that,  
6 before you give me any medicine.

7                   So he called Doctor Burch, and he said, I'm  
8 going to give you some medicine and I am going to send this  
9 back to the railroad. You out of service for three days.  
10 And I told him, All right. Then I called Doctor Burch and  
11 got an appointment with him that Tuesday.

12               Q       Okay. Let me ask you this: How long were you  
13 there at the emergency room?

14               A       I think it was three to four hours, I think,  
15 because they had me on that table. I couldn't move.

16               Q       Were they giving you medication for your blood  
17 pressure the whole time you were there?

18               A       Yes, and plus they had that machine on me.

19               Q       So now -- then after you go home and you are  
20 off from work there, do you go see Doctor Burch at any time?

21               A       I seen him that Tuesday, that Monday or  
22 Tuesday.

23               Q       What, if anything, did Doctor Burch do for  
24 you?

1           A       All he did was looked inside my ear and said,  
2       Oh, and then he said, Have a seat. He went and called  
3       Doctor Chen. He asked me did I know Doctor Chen, and I  
4       said, No. Did I know where his place was? And I said, I do  
5       not know. And I said, All right. So he got an appointment  
6       with Doctor Chen, and I went to see him the next day.

7           Q       Okay. And then what, if anything, did Doctor  
8       Chen do for you at that time?

9           A       I went over to see Doctor Chen. He looked and  
10      he said, You are going to have to have surgery right now.

11          Q       Okay. And did they do surgery that day?

12          A       No, they couldn't. They had to wait until the  
13      next morning to do it because it was outpatient. It was  
14      outpatient. It was full.

15          Q       Did you have surgery the next morning?

16          A       I had it the next morning.

17          Q       At this time what, basically, were your  
18      complaints or your problems that you were experiencing when  
19      you were seeing Doctor Chen?

20          A       No balance at all. My equilibrium was off,  
21      completely off. I didn't have no balance at all.

22          Q       Had you ever experienced this before prior to  
23      August 16, 1994?

24          A       No.

1           Q       Now, you had experienced dizziness before; is  
2       that right?

3           A       Right, but not this long.

4           Q       You had also experienced, if I'm not mistaken,  
5       a time where you had fallen; is that correct?

6           A       Right.

7           Q       Was this entirely different?

8           A       All the way different.

9           Q       Can you describe to the jury and tell how it  
10       was different?

11          A       See, when I -- this feeling was everything was  
12       going around. And after surgery I bent over, and I couldn't  
13       get up. I couldn't get back up. I got to do everything  
14       slow when I get back up now. I just can't jump up, you  
15       know, like a regular person do. I can't do it. That's the  
16       way it felt like.

17          Q       Before August 16, 1994, could you bend over?

18          A       Yes.

19          Q       Could you twist and bend and go underneath the  
20       engines?

21          A       I went all over the unit.

22          Q       And after this, could you bend over, after the  
23       pulmonary function test?

24          A       No.

1           Q       Now, when you do bend over, what happens to  
2     you?

3           A       Got light-headed.

4           Q       Now, so you see Doctor Chen and he operates on  
5     you, if my memory serves me correct, about September 1,  
6     1994; is that correct?

7           A       That's correct.

8           Q       And shortly thereafter, within a month or two,  
9     do you notice any improvement in your condition at that  
10    time?

11          A       It started feeling fine.

12          Q       And how long -- how often would you see Doctor  
13    Chen?

14          A       I see him every three or four weeks.

15          Q       Okay. And how long were you treating with  
16    Doctor Chen, do you recall?

17          A       Probably a year.

18          Q       And then what happened a year after that?

19          A       I was in the house and I fell, and so I called  
20    Doctor Chen and asked him can I come and see him. He said,  
21    Yeah. And I said, Something is wrong. He said, What do you  
22    mean? I said, I ain't got no balance at all. And so he  
23    checked my balance, and he said, You do not have no balance.  
24    So he said he got to send me to another doctor.

1 Q And did he refer you to another doctor?

2 A Yes. He referred me to Doctor Kohut.

3 Q Before I get too far off, before we go on to  
4 Doctor Kohut, can you tell the jury basically back in 1994  
5 what your hourly rate was at that time?

6 A \$14.97 an hour.

7 Q And do you know what the hourly rate is today?

8 A \$18.72.

9 Q And I take it that you belong to a union; is  
10 that correct?

11 A Correct, electrical union, IBEW.

12 Q So, now, Doctor Chen does make a referral to  
13 Doctor Kohut; is that correct?

14 A That's correct.

15 Q And then what, if anything -- you do see  
16 Doctor Kohut?

17 A Yeah. Wife and I went down to see him.

18 Q And do you know when was the first time that  
19 you saw Doctor Kohut? Was that in '95?

20 A It was in '95.

21 Q And what, if anything, did Doctor Kohut do for  
22 you at that time?

23 A Went to see him that morning. He checked me  
24 out, and he said, We are going to run some tests on you.

1     Okay. I told him okay. And we ran the tests and he checked  
2     my ear, and the next thing I know he said, You are going to  
3     surgery, another surgery.

4                     So I told him I couldn't do it because my wife  
5     couldn't get back to Roanoke. She didn't know how to get  
6     down there. He said, All right. Come back the next morning  
7     and we will do the surgery.

8             Q       How did you get back there the next morning?

9             A       My brother took me back there at 7 o'clock.

10            Q       Did Doctor Kohut do surgery on you?

11            A       Yes, he did. I was down there for seven long  
12     days.

13            Q       Okay. And after that, sometime thereafter,  
14     did you notice any improvement after the surgery?

15            A       Yes.

16            Q       And tell me this: When Doctor Chen referred  
17     you down to Kohut, what symptoms were you having or what  
18     were you experiencing insofar as your condition was  
19     concerned?

20            A       Falling.

21            Q       And then after Doctor Kohut did his surgery,  
22     did there come a time when you noticed some improvement from  
23     the surgery?

24            A       Yes.

1           Q       And then, basically, how long did you -- how  
2 long were you treating with Doctor Kohut?

3           A       On up to '99, I think it was.

4           Q       Okay. And how often would you see him?

5           A       See him every three to four to five months.

6           Q       So let's see if I got this correctly. After  
7 you leave Doctor Chen, you don't go back to Doctor Chen  
8 anymore; is that correct?

9           A       No. Haven't referred me back to him yet.  
10 Have to be referred back.

11          Q       Chen refers you to Kohut, and you were seeing,  
12 I guess, Doctor Burch and Doctor Kohut during this period of  
13 time; is that correct?

14          A       That's right.

15          Q       And then, as I understand it, Doctor Kohut has  
16 retired; is that correct?

17          A       That's correct.

18          Q       And who took his place, do you know?

19          A       Doctor May.

20          Q       And were you seeing any other physicians down  
21 in that area at that time?

22          A       Yes. I am seeing Doctor Jeffries.

23          Q       And Doctor May is, what, same type of doctor  
24 as Doctor --

1           A       Kohut.

2           Q       Who is Doctor Jeffries?

3           A       Doctor Jeffries is my MS doctor.

4           Q       And he is located where?

5           A       Down in Winston-Salem.

6           Q       Okay. Now, at the present time, have --  
7           during this period of time, did Doctor -- that you were  
8           treating with Doctor Chen, were you kept off from work?

9           A       Yes.

10          Q       And did Doctor Kohut keep you off from work?

11          A       Yes.

12          Q       Has any physician ever released you to go back  
13          to work?

14          A       No.

15          Q       Can you tell the jury approximately what you  
16          were making in 1993 and 1994? I know you didn't work the  
17          whole year in '94, but could you tell the jury what you were  
18          making at that time?

19          A       What, a year?

20          Q       A year, approximately.

21          A       35.

22          Q       Okay. And, essentially, had you not had this  
23          injury or something like this, how long had you planned to  
24          work, sir?



1           A       I was going to work until retirement, 65.

2           Q       Did you enjoy your job out there at the  
3 railroad?

4           A       Yes.

5           Q       What problems are you experiencing today, if  
6 any, with regard to your condition?

7           A       Just my balance still, off and on.

8           Q       Okay. Is there anything that you do or that  
9 causes the balance to come on or imbalance to come on?

10          A       Just a certain way I move.

11          Q       Okay. I noticed that you have a cane there,  
12 but then I also notice that you sometimes don't walk with a  
13 cane; is that correct?

14          A       That's correct.

15          Q       Can you tell us when you use the cane and when  
16 you don't use the cane?

17          A       On a long distance, I have to use the cane  
18 because my equilibrium -- I lose my balance. On a short  
19 distance, I am okay, but a long walk I don't have no -- my  
20 balance just goes.

21          Q       What are you able to do today around your  
22 home, sir? Can you tell the jury what you are able to do?

23          A       Yeah. If I take my time, I can clean house,  
24 mow the yard. Everything have to be self-propelled -- I

1 can't push -- or ride the riding mower.

2 Q Are all the days the same, or is there any  
3 days different from other days, sir?

4 A I have good days and bad days.

5 Q Do you have more good days or more bad days?

6 A I have more good days, sometimes.

7 Q Was there any weight restriction that was  
8 placed on you by the physicians in this particular case,  
9 that is, lifting restrictions?

10 A Yes. Doctor Kohut put ten pounds on me that  
11 one time.

12 Q Okay. And the problems with imbalance and  
13 dizziness, did you ever experience anything like that prior  
14 to August 16, 1994?

15 A No.

16 MR. SCHMIEDER: Your Honor, I have no further  
17 questions.

18 THE COURT: You may cross examine, Mr. Hagie.

19

20 CROSS-EXAMINATION

21

22 BY MR. HAGIE:

23 Q Mr. Keeling, you have had a diagnosis of  
24 multiple sclerosis since 1983?

1           A       That's right.

2           Q       And is it your understanding there is no cure  
3 for that disease?

4           A       Yes, sir, no cure.

5           Q       And following that diagnosis from 1983 up to  
6 1994, during that period of time, you had symptoms of  
7 dizziness that would come and go, kind of wax and wane?

8           A       Yeah.

9           Q       And, in fact, you were on Valium for that  
10 problem with vertigo, were you not?

11          A       Right. Took care of it.

12          Q       And you -- excuse me, sir?

13          A       I said it takes care of it.

14          Q       Okay. As long as you are taking it, it takes  
15 care of it, doesn't it?

16          A       Yeah.

17          Q       But you had other symptoms in there, too. One  
18 time you lost your eyesight in your left eye?

19          A       (Witness nods.)

20          Q       And your left leg was paralyzed or your left  
21 foot was paralyzed for a while?

22          A       Right. That's when I started on steroids.

23          Q       And in 1989 you were off work for about six  
24 months when you had a problem?

1 A Uh-huh.

2 Q And after you came out of that problem, you  
3 actually tried to go on disability at that time, did you  
4 not, sir?

5 A Yeah.

6 Q And you were denied that request?

7 A Right.

8 Q Now, the symptoms that you were having prior  
9 or during that time when you were having these symptoms that  
10 came and went with multiple sclerosis, you experienced  
11 dizziness during that time?

12 A Sometimes, but not all the time.

13 Q Well, it would come and go?

14 A Right, yeah.

15 Q And I think you said you got dizzy and fell in  
16 1992?

17 A Yeah.

18 Q In 1990 you were diagnosed with high blood  
19 pressure?

20 A Yes.

21 Q And that was when you were put on medication  
22 for high blood pressure?

23 A Right.

24 Q Now, prior to August of 1994, sir, you had

1 taken pulmonary function tests before that day, hadn't you?

2 A Yes, I had.

3 Q The railroad had given you one before?

4 A Yes.

5 Q And one time you went down and met with some  
6 lawyers in a motel here in Roanoke and took one?

7 A That's correct.

8 Q And nobody there took your blood pressure, did  
9 they, sir?

10 A . Yes. I don't remember. I don't think -- I  
11 don't remember. I don't remember. It has been so long.

12 Q You don't recall anybody taking your blood  
13 pressure when you were down at the motel with some lawyers?

14 A I don't remember.

15 Q On the day of the test, Mr. Keeling, you said  
16 the first man who measured your blood pressure told you to  
17 sit down, that your blood pressure was high?

18 A Yes.

19 Q He didn't say it was way high, did he?

20 A He said it was too high.

21 Q Well, kind of high was what he said, wasn't  
22 it?

23 A He said it was high. It was high.

24 Q But he didn't say it was way high. He didn't

1 tell you what it was, did he?

2 A No, he did not.

3 Q Do you know what it was the second time?

4 A No, I do not. He just told me, he said, You  
5 are all right. Go on and take the test.

6 Q Now, Mr. Keeling, you have testified here  
7 today that you were taking your blood pressure medication on  
8 the day of the test and before that?

9 A Uh-huh.

10 Q Let me show you, sir, a copy of some medical  
11 records from the emergency room at Lewis-Gale Hospital. I  
12 have highlighted something there. Would you read -- first  
13 of all, take a look at the name that's on that emergency  
14 room report. Is that your name up at the top, Raymond  
15 Keeling?

16 MR. SCHMIEDER: Judge, let me object. I don't  
17 think he should be cross-examined on medical  
18 records.

19 THE COURT: Would you like to respond to the  
20 objection?

21 MR. HAGIE: Your Honor, I have a right to show  
22 Mr. Keeling some records and have him review them  
23 at this point.

24 THE WITNESS: I am no doctor.

1                   THE COURT: You have the right to show him  
2                   some records and have him review them. Do you have  
3                   the right to question him about contents of them?

4                   MR. HAGIE: I believe I do, Your Honor.

5                   THE COURT: On what basis?

6                   MR. HAGIE: I believe I can ask him if this is  
7                   consistent with his testimony, Your Honor.

8                   THE COURT: Are you offering it -- well, it is  
9                   a fact not in evidence, which is part of the  
10                  objection that I perceive the plaintiff's counsel  
11                  is making.

12

13 BY MR. HAGIE:

14                  Q           Let me ask you this: Is that your name on  
15                  this document, Mr. Keeling?

16                  A           I never got a chance to finish looking at it.

17                  Q           If you look at the top where it says, Name, is  
18                  that your name on the --

19                  A           Yes.

20                  Q           Mr. Keeling, do you know why an emergency room  
21                  doctor would report that you --

22                  THE COURT: I sustain the objection.

23

24

1 BY MR. HAGIE:

2 Q Mr. Keeling, when you went into the emergency  
3 room, did you tell the emergency room doctor that you were  
4 not taking any medication?

5 A No.

6 Q Did you tell any nurse out there that you were  
7 not taking any medication?

8 A No.

9 Q Have you had an opportunity, sir, in this  
10 trial -- you know that Doctor Burch has already given his  
11 deposition in this case?

12 A That's what he told me this morning.

13 Q Have you reviewed that deposition, sir?

14 A No.

15 Q Did you ever tell your doctor, sir, that you  
16 had quit taking your medication several weeks before the  
17 date of the pulmonary function test?

18 A No.

19 Q You never told Doctor Burch that?

20 A No.

21 Q Do you know where he would get an idea like  
22 that, sir?

23 MR. SCHMIEDER: Well, objection, Your Honor.

24 THE COURT: Overruled, subject to linking up



1 by offering such evidence.

2 MR. HAGIE: The objection was overruled, Your  
3 Honor?

4 THE COURT: I overruled the objection subject  
5 to you being able to link that up. The question  
6 was: Do you know where Doctor Burch would get such  
7 an idea, Mr. Keeling?

8  
9 BY MR. HAGIE:

10 Q Let me have you just look at something,  
11 Mr. Keeling. If you would, just read to yourself down here  
12 the questioning that was taking place. Don't read this out  
13 loud, but if you would just read the deposition there, sir.

14 A Yeah. I don't remember.

15 Q You don't remember telling Doctor Burch that  
16 you had quit taking your medication several weeks before?

17 A No, I don't remember that.

18 Q No doctor ever told you to stop taking the  
19 medication, did they, sir?

20 A No.

21 Q And, in fact, you have not seen Doctor Burch  
22 for a couple of years; is that correct?

23 A That's right.

24 Q And one reason for that is that Doctor Burch



1 had dropped you as a patient, had he not, sir?

2 MR. SCHMIEDER: Your Honor, I object to that.

3 This has something to do with insurance and the  
4 like, and I think it's highly prejudicial and  
5 irrelevant.

6 THE COURT: Are you going to make it relevant,  
7 Mr. Hagie?

8 MR. HAGIE: I think this is relevant, Your  
9 Honor, as to the fact that Doctor Burch had dropped  
10 Mr. Keeling during a two-year period where he says  
11 he had not gone to see a doctor.

12 THE COURT: I will allow you to demonstrate  
13 the relevancy, allow Mr. Schmieder to inquire  
14 further into the areas raised by you, and take up  
15 any objections or motions as they may be admitted.  
16 Would you repeat the question, please.

17

18 BY MR. HAGIE:

19 Q Mr. Keeling, Doctor Burch had actually dropped  
20 you as a patient during that two-year period of time, had he  
21 not?

22 A I did not know that. I was still taking the  
23 medicine. He was still filling my prescriptions. He gave  
24 me a year prescription.

1           Q       Did you ever receive a letter from Doctor  
2 Burch informing you that he was dropping you as a patient,  
3 sir?

4           A       No.

5           Q       Who is that addressed to, sir?

6           A       It's addressed to me.

7           Q       And what is the address there?

8           A       3208 Lancelot Drive, Northwest.

9           Q       Is that where you were living in 1994?

10          A       Yes.

11          Q       And has that got a signature block there with  
12 a signature on it identifying Doctor J.G. Burch, M.D.?

13          A       Yes, sir.

14          Q       And does that indicate that he was dropping  
15 you as a patient?

16          A       That's what it says, but he never did.

17          Q       You never received a copy of this,  
18 Mr. Keeling?

19          A       No, I did not.

20          Q       The date of October 16, Mr. Keeling --  
21 August 16, I'm sorry, you indicated that the third time that  
22 you blew into this apparatus that you started feeling  
23 sweaty, your chest started hurting, and you got dizzy.

24          A       Got dizzy, start breathing hard.

1           Q       Then you went home after that, and you took a  
2 blood pressure pill at that time?

3           A       Yes.

4           Q       And the symptoms came back?

5           A       Yes.

6           Q       And when you went in and saw the doctor at the  
7 emergency room, they gave you some medication for your  
8 dizziness?

9           A       They gave me something. They put me on the  
10 table. That's all I know. They was doing something to me.  
11 They told me to lay still and don't say nothing.

12          Q       Now, after you saw the emergency room doctor,  
13 you testified that you were off work for three days and then  
14 you actually went back to work for a couple days, did you  
15 not?

16          A       Yes.

17          Q       Before you went and saw Doctor Burch?

18          A       Right. I was just there.

19          Q       And he looked in your ear and told you you had  
20 a hole in your ear?

21          A       Right.

22          Q       And so he sent you over to see Doctor Chen?

23          A       Doctor Chen.

24          Q       And you testified, sir, that you went in and

1 saw Doctor Chen, and then Doctor Chen operated on you the  
2 next morning?

3 A That's correct.

4 Q But did you not go to see Doctor Chen on  
5 August 25, 1994?

6 A August? No, I don't remember.

7 Q Well, if you first saw Doctor Chen on  
8 August 24 or on August 25, he did not operate on you for  
9 another week, did he, sir?

10 A I don't remember. I don't remember.

11 Q So when you testified today that you were  
12 operated on the very next day by Doctor Chen, that might not  
13 be correct?

14 A I don't remember, but I still got in my mind  
15 it was the next day.

16 Q You testified that you were operated on on  
17 September 1, 1994; is that correct?

18 A You got me confused right now.

19 Q Well, let's go on and leave that issue for  
20 just a moment, Mr. Keeling, because I want to talk about  
21 another issue. You were asked whether or not you had  
22 contacted Mr. Schmieder's firm sometime prior, but you had  
23 talked to a lawyer, had you not?

24 A Yes.

1           Q       That was before you were operated on by Doctor  
2       Chen?

3           A       Talked to somebody.

4           Q       Well, let me show you a document and ask you  
5       if that's your signature on the document, sir.

6           A       Yes.

7           Q       And that's dated August 31, 1994?

8           A       Yes.

9           Q       And that was authorizing a lawyer out in  
10       Minneapolis to get your medical records?

11          A       Right.

12          Q       Okay. And that was in conjunction with seeing  
13       Doctor Chen?

14          A       Yes.

15          Q       And this was before you were operated on?

16          A       That lawyer came to me for something else. I  
17       can't remember what it was. It was a union lawyer, whatever  
18       it was. I forgot. It has been so long.

19          Q       Well, you have a good memory on some of these  
20       things, but not some of the others; is that right?

21                   MR. SCHMIEDER: I object to that, Your Honor.  
22                   That's argumentative.

23                   THE COURT: Sustain the objection. Ladies and  
24       gentlemen of the jury, you will please ignore the

1 lawyer's comment.

2

3 BY MR. HAGIE:

4 Q Mr. Keeling, what were you seeing another  
5 lawyer for at this time if it was not in conjunction with  
6 this operation?

7 A I done forgot. I tell you, that's been so  
8 long ago. I done been through enough.

9 MR. HAGIE: Your Honor, I would like to have  
10 this marked and entered as Defendant's Exhibit Number  
11 1.

12 THE COURT: Show it to Mr. Schmieder, please.

13 MS. SCHMIEDER: I don't see the relevance,  
14 Your Honor. I object to it.

15 THE COURT: Do you want to be heard outside  
16 the jury's presence on this?

17 MR. SCHMIEDER: I would like to.

18 THE COURT: Ladies and gentlemen of the jury,  
19 I will ask you please to go with the sheriff to the  
20 jury room. There are many things in the law that the  
21 judge is supposed to rule on without you knowing what  
22 they are.

23

24 (The jury left the courtroom.)



1                   THE COURT: May I see the document? Anytime  
2                   any lawyer is welcome to bring anything up. Are you  
3                   planning to show this medical -- for the Record, I am  
4                   looking at what purports to be a medical  
5                   authorization addressed to J. Gordon Burch, M.D.,  
6                   dated August 31, 1994 for the law offices of -- first  
7                   name is spelled H-U-N-E-G-S, Stone, Koenig,  
8                   K-O-E-N-I-G, & Dolan, P.A., of Minneapolis,  
9                   Minnesota, signed by Raymond P. Keeling, Jr., his  
10                  date of birth shown as 8/31/94, which is a dubious  
11                  proposition, to authorize any physician or surgeon  
12                  who has examined or treated Mr. Keeling to furnish  
13                  the above-named attorneys and/or the bearer of this  
14                  authorization with complete medical information and  
15                  copies of medical and hospital records and bills.  
16                  Conversations by the bearer of this authorization  
17                  with medical personnel are authorized by this  
18                  release.

19                 We will pause a moment and let the court  
20                 reporter mark it as Defendant's Exhibit Number 1 as  
21                 Mr. Hagie asked.

22  
23                 (Defendant's Exhibit 1 was marked for  
24                 identification.)

1                   THE COURT: Mr. Hagie, once you show it to  
2                   Mr. Keeling and assuming he identifies it, the  
3                   purpose of offering it in evidence is?

4                   MR. HAGIE: To show, Your Honor, that we have  
5                   an individual that has a mindset that he has --  
6                   believes, first of all, under a misimpression that he  
7                   has a wrong diagnosis.

8                   He has gone to a lawyer to represent him in  
9                   bringing suit against the railroad using this as  
10                  merely a opportunity to retire and to sue the  
11                  railroad over a nonexistent injury.

12                  THE COURT: If I might back you up, the  
13                  purpose of putting the medical authorization in  
14                  evidence and having the jury take it to the jury room  
15                  is what?

16                  MR. HAGIE: Is to indicate that Mr. Keeling  
17                  did, in fact, contact a lawyer prior to his  
18                  operation.

19                  THE COURT: I thought that Mr. Keeling did not  
20                  deny that but said he could not remember what it was  
21                  about.

22                  MR. HAGIE: He identified the document but  
23                  said he did not recall obtaining the lawyer.

24                  THE COURT: Are you going to have anything,

1 any other evidence, to go with this authorization?

2 MR. HAGIE: No, Your Honor.

3 THE COURT: How will this document assist the  
4 trier of fact in reaching any decision, this  
5 document?

6 MR. PRITTS: Can we have a second, Your  
7 Honor?

8 THE COURT: Well, apparently, you are taking  
9 it.

10 MR. PRITTS: Well --

11 THE COURT: Yes, sir

12 MR. PRITTS: Thank you.

13 THE COURT: I will ask you a different  
14 subsidiary question.

15 MR. HAGIE: Your Honor, it involves the  
16 veracity of the witness and his ability to recollect  
17 information that he has been testifying to in other  
18 areas of this trial.

19 THE COURT: Is it your -- while you and  
20 Mr. Pritts were talking, I asked you a different  
21 subsidiary question which I ask only -- I ask  
22 lightheartedly, but is it your goal to be sure that,  
23 if the railroad prevails, Mr. Keeling has reversible  
24 error in the Record?

1 MR. HAGIE: That is certainly not my goal,  
2 Your Honor.

3 THE COURT: This would be a strong step onto  
4 that road, in my opinion. I will sustain the  
5 objection to the admission of the document as it  
6 stands. Defendant's Exhibit 1 is tendered and  
7 refused.

8 MR. SCHMIEDER: Your Honor, could I have the  
9 Court instruct the jury that they should ignore any  
10 type of testimony with regard to attorneys and the  
11 like in this particular case? Because I think it's  
12 highly prejudicial.

13 THE COURT: Mr. Keeling has been asked  
14 questions without objection and has answered  
15 questions without objection. The testimony stands.

16 MR. SCHMIEDER: The other question that I --  
17 the other thing is, Your Honor, we had motions in  
18 limine we never argued about the disability  
19 situation. We are getting into issues of disability  
20 here that I think is highly irrelevant and  
21 prejudicial.

22 Now I have to go in and clear up that one  
23 issue of 1989, but now we are going to get into  
24 disability all over the place.

1           THE COURT: I don't know where Mr. Hagie is  
2 going, and I don't know what motions were made and  
3 not set for argument. I know to the extent that I  
4 have been through the motions, but I don't know what  
5 you resolved and what you didn't.

6           If you hear something objectionable, please  
7 object, Mr. Schmieder. The Court is disinclined to  
8 perceive that it ought to admonish the jurors to wipe  
9 out something that wasn't objected to at the time and  
10 that does not to me seem to be anything that would  
11 prejudice the plaintiff's position in the case.

12           Is there anything else anyone wants to take up  
13 while the jurors are in the jury room? Or, I  
14 suppose, question two. Now that the jurors are  
15 having the opportunity for a comfort break, would you  
16 like to take one now?

17           MR. SCHMIEDER: I would, Your Honor.

18           THE COURT: May I ask you what follows  
19 Mr. Keeling?

20           MR. SCHMIEDER: We would have to go into some  
21 depositions which we need your ruling on.

22           MR. PRITTS: We have reached agreement -- in  
23 one of the depositions, I think, there are just -- we  
24 reached agreement on everything but two pages.

1           Another one we have maybe five objections, and we  
2           haven't had a chance to get to the third one yet. We  
3           endeavored to do that as quickly as we could during  
4           the last recess.

5           THE COURT: Let's go out, take a brief break.  
6           As soon as everybody can come back, come back. You  
7           can show me those two since I assume that, after Mr.  
8           Keeling finishes, we are going to have a substantial  
9           amount of time left of the afternoon.

10          MR. SCHMIEDER: Can I talk to Mr. Keeling just  
11          to calm him down a little bit?

12          THE COURT: Mr. Keeling, when you are on the  
13          witness stand, you are not supposed to discuss your  
14          testimony with anybody. It is the job of each lawyer  
15          to ask you questions that may bring out information  
16          that will help the jury.

17          The best thing for a witness, even when he is  
18          the plaintiff, is simply to listen to the question  
19          and answer the question the best he can and then  
20          stop. If Mr. Schmieder thinks there is something  
21          wrong about a question Mr. Hagie asks, he will  
22          object.

23          If you try to figure out the point of the  
24          question or how it is to be used in legal argument,

1           you will drive yourself crazy. You don't need to do  
2           that.

3           THE WITNESS: Okay.

4           THE COURT: You have lawyers to drive you  
5           crazy. The railroad has lawyers to drive it crazy.  
6           You will be a lot happier about this process if, when  
7           you are on the witness stand and when other people  
8           are on the witness stand, you concentrate simply on  
9           the information the questioner wants and what the  
10          witness gives.

11          Do you feel like you need to talk to  
12          Mr. Schmieder before you start back, or do you feel  
13          like your blood pressure has gotten to a point where  
14          you need to take a longer break?

15          THE WITNESS: Just take a few-minute break. I  
16          will be all right.

17          THE COURT: All right. We will take a  
18          few-minute break. If Mr. Keeling needs a little  
19          longer time, we have some information to go over, and  
20          I will ask the bailiff to tell the jurors that it  
21          will be a few more minutes trying to streamline their  
22          day.

23          THE BAILIFF: Yes, sir. Court will be in  
24

1 (A recess was taken.)

2

3 THE COURT: We are again in session. The  
4 parties and counsel are present. May I have the  
5 deposition that Mr. Pritts says there are only two  
6 remaining problems with.

7 MR. PRITTS: I believe Mr. Schmieder has an  
8 extra copy of the deposition. I do not, Your Honor,  
9 but I have a copy of the page and line numbers which  
10 we do not agree upon, and I have marked them.

11 THE COURT: Are there two?

12 MR. PRITTS: Yes, Your Honor. They are marked  
13 in the margin with the circle.

14 THE COURT: Page -- this is the deposition of  
15 Linda A. Thacker, Page 27, Line 14. And is this an  
16 examination being conducted by Mr. Schmieder?

17 MR. PRITTS: By Mr. Cabell, I believe, Your  
18 Honor, who represented T.K. Services.

19 THE COURT: All right. And Ms. Thacker is --  
20 what is her job? President of Quality Services,  
21 Incorporated?

22 MR. PRITTS: Correct, Your Honor.

23 MR. SCHMIEDER: And she is a registered nurse  
24 and I think a certified pulmonologist, I think.



1                   THE COURT: And your objection to that  
2                   question is -- question and answer?

3                   MR. PRITTS: Her answer indicates that she  
4                   doesn't -- she is speculating. She said, You could  
5                   have side effects. I don't know what the side  
6                   effects are or what those could be. I am not sure.

7                   I don't think there is any foundation laid for  
8                   that question and I think she is speculating in the  
9                   answer, so I would have two objections.

10                  THE COURT: The question was: And why would  
11                  you not want to give a pulmonary function test to an  
12                  individual who has a blood pressure greater than  
13                  those parameters? What are the possible  
14                  consequences? A compound question, but no one  
15                  objected to the form of the question.

16                  Well, they are already at high risk in  
17                  general, you know. If you push them or cause them to  
18                  exaggerate, do things like that, they could pass  
19                  out. You could have side effects. What those would  
20                  be, I am not real sure.

21                  So her answer to the two questions posed by  
22                  counsel for a co-defendant is: I wouldn't want to  
23                  give a pulmonary function test to an individual like  
24                  this because they are already at high risk and I am

1 not sure what the consequences will be.

2 It's responsive. The foundation for saying I  
3 don't know what the possible side effects would be  
4 -- doesn't seem to me that she has to lay a  
5 foundation to say I don't know, and she says, I don't  
6 know.

7 MR. PRITTS: Well --

8 THE COURT: Could have side effects. What  
9 those would be, I am not real sure.

10 MR. PRITTS: I think that's speculation, Your  
11 Honor, could have. I think it's beyond -- I think  
12 she is guessing, essentially.

13 THE COURT: I guess you and I read the word  
14 "could" differently. I think it's for the jury, and  
15 I overrule that objection. Page 64, Line --

16 MR. SCHMIEDER: Judge, before you go that far,  
17 I would like to -- on Page 47 we have stricken from  
18 the whole Page 47, but down to Line 20 I think that  
19 from 20 down and all of -- all the way -- I think the  
20 whole Page 47 should be stricken and 48 should be  
21 stricken.

22 THE COURT: Well, this is 79 pages of  
23 testimony which one can predict will take about 79  
24 minutes to read. It's 4:15. Counsel are interested

1 in arguing about more than the two things Mr. Pritts  
2 without contradiction said he wanted to argue about.

3 Let's return to this after we finish with the  
4 testimony. Do you have -- unless you have a way  
5 you think you want to break Ms. Thacker's deposition  
6 testimony.

7 MR. PRITTS: We have struck a lot of her  
8 testimony, Your Honor, but --

9 THE COURT: Okay. Well, Page 64 -- and I will  
10 come back to Mr. Schmieder. How much longer do you  
11 anticipate, approximately?

12 MR. HAGIE: Ten minutes, Your Honor.

13 THE COURT: Assuming we have half an hour  
14 after -- close to half an hour after Mr. Keeling's  
15 testimony.

16 Mr. Schmieder, on Page 64 Line 20 through Page  
17 65 Line 25, I am disposed to sustain the objection  
18 rather than spend a lot of time arguing unless you  
19 think we need to.

20 MR. SCHMIEDER: Well, she is a nurse. She is  
21 the head of this company. She is a pulmonary -- she  
22 is a certified pulmonologist, gives this test. And,  
23 certainly, she can testify as to what she believes  
24 the risks are in this particular case.

1 MR. PRITTS: She hasn't been identified as an  
2 expert in this case, Your Honor. It's clearly  
3 opinion testimony.

4 MR. SCHMIEDER: Well, it's basically a factual  
5 type of opinion testimony.

6 THE COURT: This is opinion. The questions at  
7 the top of Page 65 -- Answer: You didn't ask my  
8 opinion. You asked me known reasons. Question: I  
9 meant to be asking you opinions. Answer: Okay. My  
10 opinion would be.

11 MR. SCHMIEDER: Well, at the time, this was a  
12 defendant in this litigation, Your Honor, and I think  
13 that --

14 THE COURT: If plaintiff is offering  
15 Ms. Thacker as an expert, defendants had a right to  
16 have Ms. Thacker identified as an expert.

17 There is no foundation given, to my  
18 knowledge, for that opinion which contradicts her  
19 earlier statement that she doesn't know. We have  
20 questions asked by three lawyers, some of which make  
21 precious little sense.

22 MR. PRITTS: That's why I ask that we have it  
23 struck down to Page -- Line 17 on Page -- or Line 25,  
24 I believe, Your Honor.

1 THE COURT: Line 17, Mr. Hylla -- do you  
2 pronounce it Hylla or Hylla?

3 MR. SCHMIEDER: Hylla.

4 THE COURT: Mr. Hylla asks: What about a  
5 person with a blood pressure reading of 158/102? Is  
6 that person at risk? Mr. Boelzner asks: For these  
7 other things, or are you asking for PFT? Question by  
8 Mr. Hylla: For the risks you just described. Answer  
9 by the witness: I would say not in my personal  
10 opinion, no.

11 MR. SCHMIEDER: Okay. We will --

12 THE COURT: Now, what in the --

13 MR. SCHMIEDER: -- strike it.

14 THE COURT: Okay. The objection is without  
15 objection sustained. Are we ready for the jury? No.  
16 You want to talk about Page --

17 MR. SCHMIEDER: I think it's Page 47 and 48,  
18 just briefly.

19 THE COURT: Do you want to take out all of 47  
20 and 48?

21 MR. SCHMIEDER: Let me see here.

22 MR. PRITTS: Which line?

23 THE COURT: 47 -- you were down to 47 Line 19.

24 MR. SCHMIEDER: Correct. I want to go the

1 rest of that page, Your Honor, and all of the next  
2 page.

3 THE COURT: Well, these look like legal  
4 conclusions, don't they, Mr. Pritts?

5 MR. PRITTS: Well, I think the question is --  
6 the way she answers it, I think it makes it  
7 significant, and the answer would be okay. She  
8 answers it on the top of Page 48 to say, I don't  
9 think we did anything wrong, and I don't think your  
10 company did anything wrong, either.

11 I am not sure that that is a legal conclusion  
12 but a conclusion based upon her viewpoint, did they  
13 act outside of what is the recognized procedures in  
14 this case.

15 THE COURT: If that question had been asked,  
16 perhaps we would have a different situation. At the  
17 bottom of Line 14 on -- the rest of Page 48 is: Did  
18 you ever have a conversation? Not that I remember.  
19 So that's dead space.

20 It begins on Line 20: Would you agree that  
21 the T.K. Group did nothing that would have been  
22 responsible for Mr. Keeling allegedly injuring  
23 himself in this claim brought against your company  
24 and the T.K. Group? Mr. Hylla objected.

1                   Answer: Yeah. I -- yeah, I agree, but I  
2                   agree Quality Services didn't either. So point  
3                   being? And by Temple Cabell: Well, I want to make  
4                   sure you know that, too. I mean, I am not saying  
5                   Quality Services did anything wrong either, but it  
6                   was the Quality Services technicians that were  
7                   administering the test when Mr. Keeling claims he was  
8                   injured. And what I am trying to understand, first  
9                   off, if I'm in agreement with you that your people  
10                  didn't do anything wrong either. That's for  
11                  Mr. Hylla to establish. But that we had absolutely  
12                  nothing to do with the administration of that test.  
13                  Answer: That's correct.

14                  Now, what does that tell the jury?

15                  MR. PRITTS: I am not sure that it does, Your  
16                  Honor. Now that I have had a chance to look at that  
17                  closer, I am not sure that's going to make a lot of  
18                  difference. I don't have any objection to taking  
19                  that out.

20                  THE COURT: Taking that out. Are we marking  
21                  the transcript that's going to be read so that --

22                  MR. SCHMIEDER: May I have that back, Your  
23                  Honor? I have mine marked here.

24                  THE COURT: Yes, sir.

1 MR. PRITTS: Your Honor, can I address one  
2 thing?

3 THE COURT: Yes, sir.

4 MR. PRITTS: This deposition and many of the  
5 depositions in this case and the video depositions of  
6 witnesses involve questions asked by counsel for  
7 Quality Services or counsel for T.K. Group who are no  
8 longer parties in this case, but the evidence is  
9 important evidence in the case.

10 But I think it could give a misimpression to  
11 the jury if all the defendants' questions are asked  
12 by somebody sitting at counsel table for N&W or -- I  
13 would ask that the jury somehow be instructed that  
14 there may be questions asked by parties that are no  
15 longer parties to this case, counsel for parties, and  
16 that -- just so they understand that.

17 And this deposition was taken by Mr. Cabell  
18 and plaintiff's counsel. Not anyone from N&W was  
19 present at the time, and I would think that we could  
20 have somebody other than Mr. Hagie and I read the  
21 questions that Mr. Cabell had.

22 THE COURT: Leaving aside who reads the  
23 questions, Mr. Schmieder, do you have any objection?

24 MR. SCHMIEDER: Yes, Your Honor. I don't



1 think that the jury should be told there were other  
2 parties in this litigation. This litigation is  
3 getting down to, basically, it's between us and the  
4 railroad.

5 THE COURT: What are you going to do when you  
6 play the videotape and they see Mr. Cabell asking  
7 questions or see Mr. Cabell introduced as counsel for  
8 T.K. Group?

9 MR. PRITTS: It's throughout every deposition,  
10 Your Honor.

11 MR. SCHMIEDER: Only in one deposition, and I  
12 am not going to play that videotape.

13 MR. PRITTS: No, Your Honor. I'm sorry to  
14 interrupt. It's in Doctor May's deposition, which we  
15 plan to show. Mr. Cabell asks questions.

16 It's in the deposition of John Newman, who we  
17 plan to read into evidence. That was taken by  
18 Mr. Cabell. There was cross by me and Mr. Schmieder.  
19 There were three lawyers, at least, sometimes four,  
20 in every one of these depositions.

21 THE COURT: It seems to me appropriate for the  
22 jurors to be told that some of the questions were  
23 asked by lawyers for companies that were involved in  
24 the pulmonary testing but are not involved in this

1           lawsuit, and the jury should not draw any inferences  
2           or conclusions from that. It is simply meant to  
3           explain to them who was asking the questions.

4                   MR. SCHMIEDER: I can live with that, Your  
5           Honor.

6                   THE COURT: Can you live with that,  
7           Mr. Pritts?

8                   MR. PRITTS: Yes, Your Honor.

9                   THE COURT: Now, as far as who reads the  
10          questions, do you have a practical alternative to  
11          someone sitting --

12                   MR. PRITTS: Mr. Harden is here. I don't know  
13          if he has been identified to the jury.

14                   THE COURT: I am not ready to have a claims  
15          representative sit at counsel table and read  
16          questions like a lawyer.

17                   MR. PRITTS: I am not sure we will get to this  
18          today anyway, Your Honor, but we could have someone  
19          here tomorrow to read questions.

20                   THE COURT: Who?

21                   MR. PRITTS: A paralegal.

22                   THE COURT: That's not going to work any  
23          better than a claims representative. Playing the  
24          part of a lawyer in questioning a witness, even a

1 deposition witness, is -- in my view, a lawyer does  
2 it. Paralegals don't question witnesses.

3 I would be glad to tell them that I have asked  
4 you to read that questioning. If you have an idea  
5 between now and tomorrow --

6 MR. PRITTS: We will decide on that and let  
7 you know, Your Honor.

8 THE COURT: For all I know, Mr. Cabell might  
9 be available and willing to have you pay to fly him  
10 in.

11 MR. PRITTS: We will cross that bridge when we  
12 come to it, if that's okay with the Court.

13 THE COURT: We are doing a great job of making  
14 sure we don't get beyond Mr. Keeling today. I asked  
15 the deputy to tell the jurors that we were working on  
16 something that I hoped would streamline their  
17 service. Let's go on with Mr. Keeling and  
18 then see where we are. Who is going to read the  
19 witness?

20 MR. SCHMIEDER: I was under the -- because you  
21 did not prefer a lawyer to be the witness, I probably  
22 would have to get somebody from Lenden's office or --

23 THE COURT: All right. Would you bring the  
24 jury in, and let's -- Mr. Keeling, would you resume

1           your seat on the witness stand.

2

3                   (The jury returned to the courtroom.)

4

5                   THE COURT: Members of the jury, thank you  
6           for your patience. I hope we have streamlined some  
7           of your time that you will spend in the future. We  
8           will now resume the questioning of Mr. Keeling. Mr.  
9           Hagie.

10                   MR. HAGIE: Thank you, Your Honor.

11

12           BY MR. HAGIE:

13                   Q       Mr. Keeling, let's talk a little bit about the  
14           operation that you had down at Bowman Gray. Doctor Kohut  
15           operated on your ear?

16                   A       That's correct.

17                   Q       Was it your understanding that you had more  
18           than one hole in your ear?

19                   A       That's correct.

20                   Q       And as many as nine?

21                   A       That's what they told me.

22                   Q       Now, you continue to have symptoms, you say,  
23           sir?

24                   A       Yes.

1 Q And that's primarily dizziness?

2 A Just when I move too fast. That's all.

3 Q You indicated that Doctor Kohut had put a  
4 ten-pound lifting limit on you, but last time we talked,  
5 Mr. Keeling, you were still a member of a bowling team, were  
6 you not?

7 A I am -- I was, but I wasn't bowling.

8 Q Are you still bowling today?

9 A No.

10 Q Well, did you not testify, sir, that you  
11 missed six weeks of bowling and then you went back to  
12 bowling on a league team?

13 A I went back, but I didn't bowl. I went back  
14 to the team. I was the president of the team. I had to be  
15 there.

16 Q Well, do you remember when we took your  
17 deposition on September 27, 1997, that you testified you  
18 only missed six weeks of bowling and that you were still  
19 bowling?

20 A Yeah, but I didn't bowl every night.

21 Q Not every night?

22 A Huh-uh, not every Thursday.

23 Q You were still bowling?

24 A Yeah, but I didn't bowl every Thursday, no.

1 Q You only missed six weeks, though?

2 A I think it was six weeks. I done forgot.

3 Q And you testified, sir, that, really, there is  
4 nothing you can't do. You just have to do things more  
5 slowly now.

6 A Right.

7 Q Let's talk about wages just a little bit,  
8 Mr. Keeling. You indicated that you were earning about  
9 \$35,000 a year?

10 A I think that's what it was.

11 Q Let me show you a document, sir.

12 A Maybe it was less than that. I don't know.

13 Q Maybe it was. Let's take a look and see if we  
14 can refresh your memory. Let me show you some pay records  
15 from 1993, sir. And if you look down at the bottom of this  
16 column which says gross earnings, sir, there is a number  
17 down there of \$32,468.59. Would that be more in line with  
18 what your gross pay was in 1993?

19 A I guess it would be about right. I don't  
20 remember.

21 Q You what?

22 A I don't remember what I was making.

23 Q Well, you never earned 35,000, did you, sir?

24 A I thought it was that. I don't know.

1 Q Did you ever check your tax returns?

2 A I can.

3 Q Well, I have got them. Would you like to take  
4 a look at them and see if you can find any year when you  
5 earned 35,000?

6 A Well, I thought it was 35.

7 Q Well, in fact, that 32,000, if you go down,  
8 you were -- that's not what you were actually taking home in  
9 your pocket, was it, sir?

10 A No.

11 Q And if you look over in that last column where  
12 it says net pay and you go down, your net pay for that year  
13 was \$19,530; is that correct, sir?

14 A Yes.

15 Q And let me show you -- refresh your memory a  
16 little bit here, sir, in regard to 1994, because you worked  
17 up until August of 19 -- August 16 of 1994, sir?

18 A Huh?

19 Q You worked up until August 16 of 1994?

20 A (Witness nods.)

21 Q And if you look down in the gross earnings  
22 that you had for 1994, you earned \$24,988 that year, did you  
23 not?

24 A That's what it says.

1 Q That's gross wages?

2 A Uh-huh.

3 Q And if you go over under the net wages, that  
4 last column, you earned \$16,500?

5 A Uh-huh.

6 Q And you said, sir, that you were going to work  
7 until retirement. You can actually retire after 30 years of  
8 service with the railroad, can you not?

9 A I guess. I don't know.

10 Q And you had, what, about 26 years of service  
11 with the railroad?

12 A Yes.

13 Q Now, since you have been off work,  
14 Mr. Keeling, you have purchased a house?

15 A That's right.

16 Q You have repainted the bathroom in that house?

17 A Yes.

18 Q Refinished the basement?

19 A (Witness nods.)

20 Q That's work that you did yourself?

21 A With my help, with my brother.

22 Q Took a vacation down at Myrtle Beach?

23 A Yes.

24 Q That was in 1995, I think. You do yard work?



1           A       That's good exercise.

2           Q       And back at least in 1997, you were driving  
3 down to Richmond every other weekend?

4           A       She was driving.

5           Q       You were driving one way and your wife was  
6 driving the other way?

7           A       Yeah.

8           Q       You don't have any restrictions on your  
9 driver's license, do you, sir?

10          A       No.

11          Q       Driving -- your dizziness doesn't bother you  
12 when you drive?

13          A       I can't drive for a long distance.

14          Q       But you don't have any restriction on your  
15 driver's license?

16          A       No.

17          Q       You have never attempted to find any other  
18 work after you quit working for the railroad?

19          A       No.

20          Q       Never applied to work anyplace?

21          A       Nobody wouldn't hire me.

22          Q       You never applied anyplace, did you, sir?

23          A       I went and asked.

24          Q       Where did you go and ask?

1           A       Right here in Roanoke I went to electrical  
2 companies, and they said I was a danger to another man  
3 working.

4           Q       That's if you are climbing something?

5           A       Well, everything electrical is climbing.  
6 That's all I know is electrical.

7           Q       Did you look for any other jobs that you might  
8 be able to do --

9           A       No.

10          Q       -- that did not involve climbing?

11          A       No.

12          Q       Mr. Keeling, you initially filed suit against  
13 the railroad saying that the injuries to your ears have been  
14 caused by excessive noise exposure.

15                 MR. SCHMIEDER: Your Honor, I object to this.  
16 This is not relevant.

17                 THE COURT: Is this cross-examination?

18                 MR. HAGIE: I believe it is, Your Honor. It  
19 deals with his allegations of an injury that he  
20 has.

21                 THE COURT: Rephrase the question and I will  
22 overrule the relevancy objection.

23

24

1 BY MR. HAGIE:

2 Q Mr. Keeling, are you aware that your lawsuit  
3 initially alleged that your ears had been injured by  
4 excessive noise exposure?

5 A No.

6 Q You weren't aware of that, sir?

7 A I don't understand what you are saying.

8 Q Well, your ears have never been injured by  
9 excessive noise exposure, have they, sir?

10 A No.

11 Q You weren't aware that was one of the  
12 allegations that was made against the railroad initially?

13 A No.

14 Q Mr. Keeling, you are a convicted felon, are  
15 you not, sir?

16 A Yeah. Yes, sir.

17 MR. HAGIE: Thank you, sir. I have no further  
18 questions.

19 THE COURT: Redirect examination,  
20 Mr. Schmieder?

21 MR. SCHMIEDER: Yes, Your Honor. I would like  
22 to clarify certain things.

23

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## REDIRECT EXAMINATION

BY MR. SCHMIEDER:

Q Explain to the jury what happened on that issue about the felony, okay?

A Felony was my first wife, we got in a big argument. She smacked my little boy in church. Then we got in a scuffle and I shot her. We went to court. I didn't go to jail, and I went back to work for the railroad.

Q After that, you divorced your wife?

A I got a divorce the same day from the judge when we went to court.

Q And that was because she was abusing your young child, right?

A Yes.

Q That's a long time ago?

A That's more than thirty years ago.

Q Now, with regard to the bowling, you mentioned -- we talked about the bowling and everything else like this. Normally, how many men do you have on your bowling team?

A We have five. It's a four-man team, but one man -- always five in case one of us is sick and we will take over.

1           Q       So the mere fact that you go there on Thursday  
2 night or during the wintertime or something like this  
3 doesn't necessarily mean you are going to bowl?

4           A       That's correct.

5           Q       All right. And when you get back to this --  
6 we have already mentioned your hourly wages you were making  
7 an hour; is that correct?

8           A       Correct.

9           Q       And then you have had pay raises; is that  
10 correct? Hourly pay raises; is that correct?

11                   MR. HAGIE: Objection, Your Honor. I don't  
12 think Mr. Keeling has ever worked after that.

13                   MR. SCHMIEDER: Well, you are talking about  
14 '93. I'm sorry.

15                   THE COURT: It's a factual question to which  
16 Mr. Keeling can respond. Mr. Hagie asked you about  
17 what your pay was on a particular -- at a particular  
18 time. Do you recall that?

19                   THE WITNESS: Yes.

20                   THE COURT: Do you know whether during the  
21 remaining time you worked you got any pay raises?

22                   THE WITNESS: Not that I know.

23                   THE COURT: Go on, Mr. Schmieder.

24

1 BY MR. SCHMIEDER:

2 Q You are a member of a union; is that correct?

3 A That's correct.

4 Q And as such, you have got --

5 MR. HAGIE: Your Honor, if I could just  
6 interrupt for one moment and ask -- I have been very  
7 patient, but I ask Mr. Schmieder not to lead the  
8 witness.

9 THE COURT: Please don't lead, Mr. Schmieder.

10

11 BY MR. SCHMIEDER:

12 Q As a member of a union, are you sent any  
13 information regarding wages and contracts?

14 A I used to.

15 Q And I think you already told us about that.

16 MR. SCHMIEDER: Okay. I have nothing  
17 further.

18 THE COURT: Does that prompt any recross?

19 MR. HAGIE: It does.

20

21 RECROSS-EXAMINATION

22

23 BY MR. HAGIE:

24 Q Mr. Keeling, you are not saying here in court

1 under oath that you did not bowl after your injury, are you,  
2 sir?

3 A I didn't bowl every night. No, I am not  
4 saying that.

5 Q Thank you, sir. But you did bowl?

6 A Right.

7 Q You picked up that 15-pound ball and threw --

8 A Mine was 10 pounds. I can bring it to you and  
9 show it to you.

10 Q You were able to throw that 10-pound ball down  
11 that lane.

12 MR. HAGIE: Thank you, sir.

13 THE COURT: Any further questions for  
14 Mr. Keeling?

15 MR. SCHMIEDER: Nothing, Your Honor.

16 THE COURT: Thank you. Mr. Keeling, you may  
17 step down.

18

19 (Witness excused. )

20

21 THE COURT: Ladies and gentlemen, the lawyers  
22 have told me who the next witness is and  
23 approximately how long the witness's testimony will  
24 take, and it will take us to closer to 5:30.

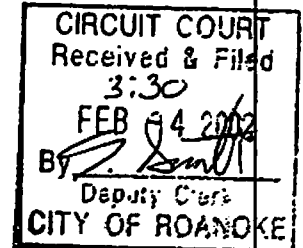
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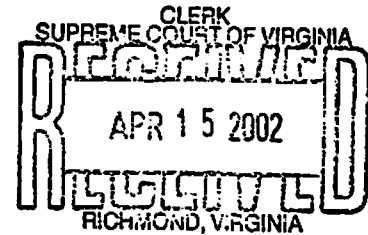


IN THE CIRCUIT COURT FOR THE  
CITY OF ROANOKE

----- :  
RAYMOND P. KEELING, :  
Plaintiff :

-vs- :

NORFOLK AND WESTERN RAILWAY :  
COMPANY, a corporation, :  
Defendant :



Volume II  
November 14, 2001  
9:00 a.m.

HEARD BEFORE:

THE HONORABLE CLIFFORD R. WECKSTEIN

CENTRAL VIRGINIA REPORTERS  
P. O. Box 12628  
Roanoke, Virginia 24027  
(540) 380-5017

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APPEARANCES:

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Counsel on Behalf of Defendant

I N D E X

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
<u>For the Plaintiff:</u>				
K. E. Hippensteel, M.D.	28	81	--	--
Robert I. Kohut, M.D.	97	231	--	--
Linda Thacker (deposition)				





1 say: These are questions asked by the lawyer for  
2 TK Group.

3 MR. HAGIE: Okay. Judge, the next thing  
4 maybe we could -- did you have a question?

5 MR. PRITTS: We have the videotape  
6 deposition of Dr. May. We have maybe five  
7 objections to that. I would prefer that we take  
8 them up as quick as we can so we can get it edited  
9 appropriately. I think we have agreed, there may  
10 be less than five.

11 MR. SCHMIEDER: We are going through this.

12 THE COURT: Let's try --

13 MR. PRITTS: Some of this brings in the  
14 issue of the causation issue, which we contend  
15 that a doctor can't say could have or might have  
16 contributed to this accident. So --

17 THE COURT: Show me where we are. Page?

18 MR. PRITTS: The first thing we need to  
19 discuss, page 22, line 16, the second sentence, I  
20 ask him the question: Does he see anything that  
21 specifically reports in the literature. He said,  
22 "Not specifically." Then he volunteered  
23 additional information, which I think is  
24 nonresponsive. It is --

1                   THE COURT: Mr. Schmieder, can you argue  
2                   that it is not nonresponsive?

3                   MR. SCHMIEDER: Well, the -- I think it's  
4                   relevant. I think, you know, about literature.  
5                   Just the question there is something, is he  
6                   referring to the literature about the fact that  
7                   some of the activities he is looking, literature  
8                   can refer to the pulmonary function test and could  
9                   precipitate a period of --

10                  THE COURT: He answers the question, "Not  
11                  specifically." The rest of that is volunteered,  
12                  nonresponsive, and at least as phrased at this  
13                  point in the deposition nonmaterial. "Some of the  
14                  activities associated with a pulmonary function  
15                  test could conceivably, depending on how it was  
16                  administered, could precipitate a perilymph  
17                  fistula."

18                  We will, the Court will sustain the  
19                  objection to everything on line 16 after "Not  
20                  specifically." And lines 17, 18 and 19, and they  
21                  should be removed from the video that is played to  
22                  the Jury. Next comes?

23                  MR. PRITTS: Page 28, line 17. There is a  
24                  question, "Could hypertension contribute to the

1           development of a perilymph fistula?" Then there  
2           is some objection. He says, "It could contribute  
3           to it."

4           THE COURT: You can take the objections  
5           out, correct?

6           MR. PRITTS: Yes, but I would think that  
7           the question and answer would all come out  
8           because --

9           THE COURT: But I assume that the videotape  
10          has been or will be edited to remove objections.

11          MR. PRITTS: That is my intention, Your  
12          Honor.

13          THE COURT: The question, "Could  
14          hypertension contribute to the development of a  
15          perilymph fistula," the witness after answering at  
16          the top of page 29, "I would say hypertension in  
17          and of itself would not be something that raised  
18          my suspicion in a patient that we had better  
19          control this or you are going to get a perilymph  
20          fistula. I don't think of that as one of the big  
21          risk factors associated with the development of a  
22          perilymph fistula."

23          Mr. Schmieder who asked, "But my question  
24          was, could it contribute to it, that is not cause

1           it, contribute to it." The witness, "It could  
2           contribute to it."

3           Then Mr. Cabell, as Mr. Schmieder noted,  
4           interrupted to ask, "Is it your opinion, Doctor,  
5           within a reasonable degree of medical certainty --"

6           The witness, "When I say 'could,' I am not  
7           quantitating that." Mr. Cabell asked a question,  
8           the witness responded, "I will just say, well, I  
9           can't. I would just say that I don't think that  
10          is a, if you say, would it be more likely than,  
11          you are going to have to make the statement how  
12          you want it and I will say yes or no because I  
13          will just, I will just say it would, but it is not  
14          highly likely. That was what I am trying to say  
15          all along."

16          That testimony does not seem to me,  
17          Mr. Schmieder, to reach the level of probability  
18          required in order for an expert to express a  
19          causation opinion.

20          MR. SCHMIEDER: I disagree. I think under  
21          FELA law, the Sentilles decision, there is no  
22          magic formula.

23          THE COURT: I agree there is no magic  
24          formula either under FELA law or under the Federal

1 rules of evidence or the common law rules of  
2 evidence as they exist in Virginia including as  
3 statutorily codified. But the absence of magic  
4 formula does not mean that a witness's opinion  
5 about causation can be considered by the Jury  
6 until the witness in some fashion indicates that  
7 he believes and "believes" is perhaps not the  
8 right word, that his, in his or her expert opinion  
9 the proposition is more likely than not correct.

10 "Certainty" can be a confusing phrase.  
11 "Probable" perhaps can be a confusing word. But  
12 more likely than not, more probable than not,  
13 takes it from the realm of speculative into the  
14 ambit in which an expert may opine.

15 I am of the opinion that the objection is  
16 well-founded and when plaintiff's counsel embarked  
17 down that path, counsel for Quality, TK Group,  
18 interposed an objection after the first question  
19 that invited questioning to be in different  
20 terms. Possible is not enough. Moving on.

21 MR. PRITTS: So just to get clear, page 28,  
22 line 17 comes out down to page 30, line --

23 THE COURT: Well, your objection started  
24 earlier. I am sorry. Page 28, line 17 down

1 through page 30, line 11.

2 MR. PRITTS: Thank you, Your Honor.

3 MR. HAGIE: Is the top of page 29, we are  
4 starting at, on page 28, taking that out?

5 MR. PRITTS: Yes. The next, Your Honor, is  
6 page 32, line 10.

7 THE COURT: And Mr. Schmieder's objection  
8 to the prior ruling is preserved. Page 32, line  
9 10.

10 MR. SCHMIEDER: I would agree 32, well, I  
11 don't think line 10, but I would say 14. Well, I  
12 will go to 10, I will agree because the question I  
13 think is rephrased so we go over to line 5 to page  
14 33, correct?

15 MR. PRITTS: I think this is the same  
16 issue, Your Honor.

17 THE COURT: Well, Mr. Schmieder has agreed  
18 that page 32, line 10 through page 33, line 5 is  
19 out.

20 MR. PRITTS: Okay.

21 THE COURT: The next one is? The next  
22 objection you have is what?

23 MR. PRITTS: Starting at page 33, line 6 to  
24 the form and lack of foundation to the question,

1           which reads --

2           THE COURT: He has an opinion to a  
3           reasonable degree of medical and otolaryngology  
4           certainty that the pulmonary function test  
5           administered to Raymond Keeling on August 16th,  
6           1994 might or could have caused in whole or in  
7           part a perilymphatic fistula.

8           His opinion is phrased that he is medically  
9           certain that it might be or could have contributed  
10          to it. Might or could is insufficient if that's  
11          all we get from the doctor. I am certain that it  
12          might have been.

13          MR. PRITTS: We would ask that it be taken  
14          out from page 33, line 6 to page 33, line 15.

15          THE COURT: I will sustain that objection,  
16          preserving the plaintiff's objection to that  
17          ruling.

18          MR. PRITTS: One more, Your Honor, I think  
19          that is all. Page 35, line 25, I object to this  
20          question about submitting him to the stress of a  
21          pulmonary function test if their blood pressure  
22          was over 200 over 115, which I think is what the  
23          question meant to be, but it doesn't say that.

24          But it is not, there is no evidence in this



1 case and there can be no evidence in this case  
2 that when he was submitted to the pulmonary  
3 function test that his blood pressure was 200 over  
4 115.

5 THE COURT: Mr. Schmieder?

6 MR. SCHMIEDER: Well, I think he follows up  
7 with his questioning right there, Your Honor. And  
8 that was a protocol that they had set out there.

9 THE COURT: In fact, there is no suggestion  
10 that Mr. Keeling's blood pressure was 200 over 115  
11 when he took pulmonary function test, is there?

12 MR. SCHMIEDER: The experts will say blood  
13 pressure is dynamic. They will say the last test  
14 they had on this gentleman five, ten minutes  
15 before that is 150 over 102. The blood pressure  
16 is dynamic. When you put a person under stress,  
17 you don't know what that blood pressure is going  
18 to be.

19 THE COURT: But you are asking Dr. May to  
20 tell the Jury whether he would give a patient,  
21 subject a patient to the stresses of a pulmonary  
22 function test if his blood pressure was at a  
23 particular level, that level being the top of the  
24 Norfolk and Western protocol; and a level, that

1 level being a level at which under the N & W  
2 protocol he would not have been permitted to be  
3 tested.

4 And there is no suggestion, there is no  
5 testimony that Mr. Keeling was at that level. It  
6 suggests to the Jury, doesn't it, something that  
7 is not in the case?

8 MR. SCHMIEDER: I think a reasonable  
9 inference can be made on that but --

10 THE COURT: But the reasonable inference  
11 that you are going to argue, I guess, is that  
12 Norfolk and Western had no procedure to assure,  
13 given the dynamic nature of blood pressure, that  
14 when they put him through the test he was not over  
15 their limits, but that's not the same thing as  
16 saying Dr. May ought to be asked would he do it  
17 since there is no evidence the railroad would do  
18 that, either, I think.

19 MR. SCHMIEDER: Okay.

20 THE COURT: So we will take that out. And  
21 now we are going to the courtroom because it is  
22 9:30.

23 MR. HAGIE: Could I -- just one thing,  
24 well, Dr. Hippensteel is going to be the first

\* \* \*

\* \* \*

1 MR. SCHMIEDER: I think I would like to  
2 call Dr. Hippensteel to the stand, please.

3  
4 KIRK E. HIPPENSTEEL, M.D.  
5 was called as a witness and after having first been duly  
6 sworn to tell the truth, the whole truth, and nothing but  
7 the truth, was examined and testified as follows:

8  
9 DIRECT EXAMINATION

10  
11 BY MR. SCHMIEDER:

12 Q Would you tell the Court and Jury your  
13 name?

14 A My name is Kirk Edward Hippensteel.

15 Q What is your occupation or profession?

16 A I am a physician.

17 Q And where do you practice your profession,  
18 Doctor?

19 A I am in practice here in Roanoke, Virginia.

20 Q Could you tell the Jury or give the Jury  
21 your educational background, sir?

22 A Yes. I went to medical school in Indiana  
23 where I grew up, Indiana University, and graduated there  
24 in 1971 with a degree of Doctor of Medicine. I did an

Hippensteel - Direct

1       internship in internal medicine in the University  
2       Hospitals in Indianapolis, Indiana University.

3                       Then I went to the Navy as a general  
4       medical officer following my training in internal medicine  
5       in the Navy at the Philadelphia Naval Medical Center. I  
6       completed that training, became board certified in  
7       internal medicine. I then went on to take a fellowship in  
8       pulmonary diseases at the National Naval Medical Center in  
9       Bethesda, Maryland.

10                      . I became board certified after completing  
11       that fellowship of two years in pulmonary diseases and  
12       then stayed another year in the Navy and then moved to  
13       Roanoke where I have been in practice since.

14                      Q       And what states are you licensed to  
15       practice, Doctor?

16                      A       I am licensed to practice in Virginia.

17                      Q       And Doctor, you indicated to us that you,  
18       one of your specialties or one of your boards is internal  
19       medicine; is that correct?

20                      A       That is correct.

21                      Q       Would you explain to the Jury just  
22       basically what, what range or what areas internal medicine  
23       covers on the human being?

24                      A       It is a specialty dealing with the specific

Hippensteel - Direct

1 diseases of different organ systems in adult patients, so  
2 it covers all the organ systems of the body that relate to  
3 patients who are adults that have diseases in that organ  
4 system, that includes the lungs and includes the heart and  
5 includes the brain, musculoskeletal system, intestinal  
6 tract, et cetera. It is a general specialty of the  
7 diseases of adult patients.

8 Q Would a person with that specialty, would  
9 they handle a person who has high blood pressure?

10 A Yes.

11 Q Doctor, you indicated that you have another  
12 specialty and that is pulmon, I think pulmonology; is that  
13 correct?

14 A Yes, that is one. Pulmonary diseases/  
15 pulmonology are the same entity. That is a subspecialty  
16 of internal medicine where I have taken extra training in  
17 the specific area of pulmonary or lung disease as it  
18 relates to internal medicine. I have a certification in  
19 that subspecialty of internal medicine.

20 Q Okay. You mentioned that you were board  
21 certified both in internal medicine and in pulmonology; is  
22 that correct?

23 A Yes.

24 Q Tell the, could you tell the Jury what

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1 board certification means?

2 A It means that the residency or training  
3 director has declared that you have successfully completed  
4 the training that you have set out to complete with your  
5 training program; and that you then get to sit for a  
6 certification examination that amounts to either a one- or  
7 two-day examination over the specialty or subspecialty  
8 that you are being certified in. And you have to pass  
9 that examination as delivered by the American Board of  
10 Internal Medicine to become a certified specialist in that  
11 area.

12 Q And Doctor, is every doctor physician board  
13 certified?

14 A No, they are not.

15 Q And I think you told us about your military  
16 service; is that correct?

17 A Yes.

18 Q How long have you been practicing here in  
19 the Roanoke area, Doctor?

20 A Since 1979.

21 Q On what hospitals are you on the staff of?

22 A I am on the staff of the Carilion Hospital  
23 at Community and Memorial here in Roanoke; and also at  
24 Radford.

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1           Q       Doctor, does the specialty of pulmonology,  
2       does that cover pulmonary function tests?

3           A       Yes.

4           Q       And could you explain to the Jury what a  
5       pulmonary function test and basically, before that --  
6       strike that. Doctor, have you taught any in your  
7       specialities?

8           A       Yes, I am an associate clinical professor  
9       of medicine for the University of Virginia training  
10      program here in Roanoke, which involves itself in training  
11      internal medicine residents and family practice residents  
12      for the practice of those specialities after completing  
13      their training here in Roanoke.

14          Q       Have you published any --

15          A       Yes, I have published some articles when I  
16      was in training of some research that I did at that time.

17          Q       And have you lectured any?

18          A       Yes, I frequently give talks to other  
19      physicians including residents and interns and medical  
20      students in regards to pulmonary diseases and their  
21      referability to patients.

22          Q       Have you worked for the Department of  
23      Labor, Doctor?

24          A       I have done Department of Labor

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1 examinations related to disability evaluations for them as  
2 well as the vocational rehabilitation services of the  
3 State of Virginia related to disability evaluations for  
4 them.

5 MR. SCHMIEDER: Your Honor, at this time we  
6 would like to ask the Court to allow me to examine  
7 Dr. Hippensteel as an expert in the field of  
8 pulmonology.

9 THE COURT: The Court finds that  
10 Dr. Hippensteel is qualified to offer opinion  
11 testimony within that field.

12 MR. HAGIE: Your Honor, may I voir dire  
13 just a few questions on his background?

14 THE COURT: Dr. Hippensteel has  
15 demonstrated that he is qualified to offer opinion  
16 testimony. So you may cross-examine at the  
17 appropriate time.

18

19 BY MR. SCHMIEDER:

20 Q Now, Doctor, in your practice, do you  
21 consult with various individuals or corporations and the  
22 like?

23 A Yes.

24 Q Have you done any work for the railroad?



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1           A       Yes.

2           Q       Specifically the Norfolk Southern Railroad?

3           A       Yes.

4           Q       And what work have you done for them,  
5 Doctor?

6           A       I have done examinations for the Railroad  
7 Retirement Board regarding disabilities for claimants to  
8 that board in reference to their medical problems. I have  
9 also done evaluations of claimants for asbestos claims  
10 referable to work for the railroad. I have testified for  
11 the railroad as well as for claimants who have applied  
12 suits against the railroad for asbestos claims.

13          Q       Okay. Doctor, with regard to a pulmonary  
14 function test, can you tell us, number one, what it is and  
15 how it is given and what information are you seeking?

16          A       Well, specifically the pulmonary function  
17 test that was performed in this case is called a  
18 spirometry. It is one individual test of a composite of  
19 pulmonary function tests that we do in evaluating a  
20 patient's level of function in their lungs. That level is  
21 determined by having them breathe through a machine or  
22 through a device that measures the airflow that they can  
23 generate with their lungs and with the muscles that they  
24 use to promote airflow by having them maximally exhale

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1 with the maximum force that they can generate with the  
2 muscles to blow that airflow out into that machine. We  
3 calculate from that maneuver how fast they can blow air  
4 out and what volume they can blow air out over a period of  
5 time.

6 So we look at specific parameters of that  
7 airflow and the amount of airflow they are able to  
8 generate to determine whether that is in the normal range  
9 or not.

10 Q And Doctor, we discussed blood pressure.  
11 In the medical community, is there, can you explain like  
12 if I give you the term "120 over 80" or something like  
13 that, can you tell us what those various figures mean and  
14 what terminology you use for those figures?

15 A Yes. Blood pressure is a measurement of  
16 pressure in the arterial system of your body that we  
17 usually measure by a cuff; that we look at the pressure  
18 generated through that artery by looking with a blood  
19 pressure cuff, which I am sure most jurors are acquainted  
20 with, having had that done sometime in their life.

21 It is that there is a range of normals  
22 there as well as a range of abnormals. That we have found  
23 through studies over the long term as well as even the  
24 short-term studies that there are specific risks to having

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1       elevated blood pressure.

2                       That that blood pressure increases your  
3 chances of having a stroke, having a heart attack, having  
4 peripheral vascular disease, those kind of things are  
5 increased if your blood pressure is increased. In fact,  
6 there is a figure that you have about a 50-percent  
7 increase in your stroke risk for every five millimeters  
8 above normal your blood pressure is for the long-term.

9                       So the circumstances are that it is a  
10 significant factor in illness in adult patients and that  
11 it is a risk factor for other disease beyond just the  
12 blood pressure itself.

13               Q       What does the medical community consider to  
14 be basically normal or acceptable ranges of blood pressure  
15 without going on medication or anything?

16               A       The circumstances are that 120 over 80 is  
17 flat out normal. It turns out that in studies where they  
18 looked at patients who are actually coming to a doctor's  
19 office and may even have some anxieties related to that,  
20 that pressures at a doctor's office or at a medical  
21 facility that are greater than 140 over 90 have a  
22 significant risk factor of increased disease.

23                       So it isn't about checking pressures when  
24 they are calm or unstressed or have problems, what is

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1     called a white coat syndrome where people get excited and  
2     anxious about being at the doctor's office and getting  
3     checked. It is under that circumstance of coming to that  
4     medical center and getting checked 140 over 90 is a level  
5     of pressure that is considered to be abnormal. If it is  
6     above that it needs to be treated.

7             Q         Doctor, the 140 figure, do we have a term  
8     for that?

9             A         That is called the systolic pressure, it is  
10    the high number on a blood pressure that contains two  
11    numbers. It is the number that is actually generated when  
12    the heart is actually pumping, and so it is the highest  
13    level of pressure in the body during a cycle of the heart  
14    beat.

15                    And then the diastolic pressure is the  
16    lower number. That is the number that is left in the  
17    blood system after the heart completes its pumping and is  
18    resting for the next, between that and the next beat.

19             Q         You said something previously about this  
20    five percent, five points or something like that?

21             A         Yes.

22             Q         Explain that to us in terms of 140 over 90  
23    or 120 over 80.

24             A         So the circumstances are that if you, for

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1 every five millimeters above 140 you go you increase by  
2 one and a half times or 50 percent greater chance of  
3 having a stroke than you would if you had your pressure  
4 under control.

5 Q Doctor, in doing a pulmonary function test,  
6 is there, is there any stress involved in the doing of  
7 that?

8 A Yes. As has been stated in depositions  
9 that I have read in this, and you will probably hear from  
10 other witnesses in this --

11 THE COURT: Dr. Hippensteel, I will ask  
12 you, I will direct the Jury to disregard any  
13 comment by this witness about what any other  
14 witness might say. I ask you to please, sir, to  
15 restrict your testimony to that which you --

16 THE WITNESS: I am sorry. The  
17 circumstances about a pulmonary function test is a  
18 stress. We are instructing the people who perform  
19 the test to coach to give a maximal effort. In  
20 fact, in this case, Mr. Keeling, as he stated, had  
21 an effort that they didn't think was his maximum  
22 on the first time that he performed this test.  
23 They actually had him repeat that test to perform  
24 with more effort.

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1                   In other words, maximally use his muscles,  
2                   maximally give the effort that he could put out to  
3                   make this as rapid of airflow through this machine  
4                   as possible. So it is that, it is a part of the  
5                   technique of this test that we ask the patient who  
6                   is performing this test to give as strong an  
7                   effort to blow as hard as they can blow and for a  
8                   length of time that is lasting well over five  
9                   seconds at the time they are doing it. So it is a  
10                  stress of effort to their maximum potential to do  
11                  that for this case.

12

13       BY MR. SCHMIEDER:

14               Q       Doctor, is there any risk associated with a  
15               both, let's say a person that has high blood pressure and  
16               the doing of a pulmonary function test?

17               A       There is a chance, as I said, because it is  
18               a stressful examination, that there can be aggravations of  
19               that stress played out because of the stress induced and  
20               because of the factors such as very high blood pressures  
21               that could be aggravated further by doing such a test.

22               Q       Now, Doctor, in this case I asked you to  
23               review some records, is that correct, and give me some  
24               opinions; is that correct?

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1           A       That is correct.

2           Q       Could you tell the Jury what records that  
3 you have reviewed in this particular case.

4           A       There was a box full and for that reason I  
5 am referring to a letter that I specifically wrote to you  
6 in regard to this case stating my review of records, which  
7 included statements and deposition testimony of  
8 Mr. Keeling, records and deposition testimony of  
9 Dr. Kohut, deposition testimony of Aaron Davis, Linda  
10 Thacker and Jim Suedmeyer, as well as pulmonary function  
11 test reports from 1994, medical records from Dr. Kurt  
12 Chen, Dr. Gordon Burch, and the emergency room at  
13 Lewis-Gale.

14          Q       Basically would you tell the Jury what your  
15 understanding of the facts of this case are or what the  
16 history of his --

17          A       Yes. It is my, it is my understanding that  
18 Mr. Keeling went to work on the date of August 16th, 1994.  
19 And at that time his supervisor told him that he needed to  
20 go get a screen pulmonary function test. And that he went  
21 to the place where they were giving that test and that  
22 that test involved breathing into this machine as I just  
23 described doing a spirometry.

24                   That before this test was taken he was, had

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1 a blood pressure taken that was declared by the technician  
2 to be too high for him to go forward. And that blood  
3 pressure was not recorded, however. He was told to sit  
4 down for a few minutes and then had another blood pressure  
5 obtained, which was lower at the time it was obtained and  
6 so this spirometry was begun.

7 He was told that the first spirometry did  
8 not produce a maximal effort on his part, and maximal  
9 effort, and therefore what they thought was a valid result  
10 from this test; and so they asked him to do another test,  
11 again, with increased effort.

12 Immediately after this test, he became very  
13 dizzy, had chest pain and was very sweaty, and said that  
14 he was feeling very bad just after that test was  
15 completed. They told him to sit down there for a while.  
16 He later on that morning went to the emergency room at  
17 Lewis-Gale Hospital to be evaluated because of the  
18 symptoms referral to this test.

19 Q Okay.

20 A So that basically is what happened that  
21 day.

22 Q While he was at Lewis-Gale was his blood  
23 pressure being monitored?

24 A Yes.



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1           Q       How would you describe his blood pressure?

2           A       Still elevated, although apparently not as  
3 much as the initial reading at the spirometry testing  
4 site.

5           Q       Doctor, did you --

6                   MR. HAGIE: Objection, Your Honor.

7                   THE COURT: State your objection.

8                   MR. HAGIE: I don't believe Dr. Hippensteel  
9 has a foundation to testify as to what the initial  
10 blood pressure was.

11                  THE COURT: I will sustain the objection  
12 until you lay a foundation for Dr. Hippensteel to  
13 testify about what the initial blood pressure was.

14                  MR. SCHMIEDER: The initial one, but not  
15 the emergency room, but the initial one; is that  
16 correct?

17                  THE COURT: That is what Dr. Hippensteel  
18 just testified about as I understand it. You need  
19 to ask Dr. Hippensteel questions that demonstrate  
20 his knowledge.

21

22 BY MR. SCHMIEDER:

23           Q       Doctor -- let me have this marked as an  
24 exhibit. Doctor, let me hand you what has previously been

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1 marked as Plaintiff's Exhibit Number 1. Are you familiar  
2 with that wording there, Doctor?

3 A Yes.

4 Q And first of all, tell the Jury where that,  
5 where you learned of that wording?

6 A That was in a protocol for the performance  
7 of such testing that the Norfolk and Western Railway had  
8 put out for a procedure to be followed by the testing  
9 people.

10 Q . Could you read that for us, please.

11 A Yes, it is titled a, "Maneuver Protocol."  
12 It states, "Prior to testing, the blood pressure of  
13 employee will be monitored and determined to be within the  
14 acceptable range." And then in parenthesis, Lower than  
15 200 over 115, end of parenthesis. Then says, "If above  
16 this level, testing will not be performed and the  
17 supervisor and medical doctor will be advised."

18 Q Now, Doctor, you indicated to us, I  
19 believe, that you did review the deposition of  
20 Mr. Suedmeyer; is that correct?

21 A Yes.

22 Q You reviewed the depositions of Aaron  
23 Davis?

24 A Yes.

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1 Q And Linda Thacker; is that correct?

2 A Yes.

3 Q In reviewing those depositions, in there  
4 did, was there anything mentioned about a blood pressure  
5 and a level in those depositions?

6 A There was a comment that it was above what  
7 was acceptable under the protocol, and this was thought to  
8 be by them --

9 MR. HAGIE: Objection, Your Honor.

10 THE COURT: State your objection, please.

11 MR. HAGIE: The lack of foundation in  
12 regard to the parameters in the blood pressure  
13 protocol that was being followed by technicians as  
14 opposed to what is in the protocol that was  
15 published by the railroad.

16 THE COURT: Dr. Hippensteel, if I might ask  
17 you, is information of the sort you just referred  
18 to the kind of information that experts in your  
19 field commonly would rely upon in reaching  
20 opinions and conclusions, the testimony of Linda  
21 Thacker and the respiratory technician?

22 THE WITNESS: Yes, it would be a part of  
23 the records that we would review in regards to any  
24 patient or legal situation.

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1 THE COURT: Did those persons in their  
2 testimony, as you understood their testimony,  
3 testify about whether or not Mr. Keeling's blood  
4 pressure was above the level set forth in the  
5 railroad's published protocol?

6 THE WITNESS: They stated it was above the  
7 level of 200 over 110, which they said was an  
8 alerted level that they understood to be at that  
9 time part of the protocol.

10 THE COURT: Is that the sum and substance  
11 of what you know about what his blood pressure was  
12 when it was taken?

13 THE WITNESS: That is.

14 THE COURT: Mr. Hagie, do you have any  
15 objection to --

16 MR. HAGIE: I have an objection to any  
17 inference this man would make as to whether or not  
18 the railroad's protocol was violated, yes, sir.

19 THE COURT: He hasn't testified about the  
20 railroad's protocol. Dr. Hippensteel's testimony  
21 is relying upon information commonly relied upon  
22 by persons who are expert in his field. He has  
23 concluded that the initial blood pressure testing  
24 was greater than 200 over 110; is that correct,

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1           sir?

2                   THE WITNESS: Yes.

3                   MR. HAGIE: From my understanding, Your  
4 Honor, was he testified it was in violation of the  
5 railroad's published protocol.

6                   THE COURT: To which that was where your  
7 objection began. That has now been clarified.  
8 You may continue, Mr. Schmieder.

9

10 BY MR. SCHMIEDER:

11           Q       Okay, Doctor, if I understand it correctly,  
12 if their figures of 210 over 110 was given as a protocol  
13 that they were following; is that correct?

14           A       200 over 110, I think.

15           Q       Right, I am sorry if I said something  
16 different. Okay. And then what was your understanding  
17 when they did the first blood pressure test, how many  
18 blood pressure tests did you determine from looking at the  
19 records they did on Mr. Keeling?

20           A       It appeared that they did two.

21           Q       Based upon the first blood pressure test,  
22 what, if any, conclusions could you reach in that regard  
23 as to where it was?

24           A       The only conclusion since it was not

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1 recorded, which would seem to be a --

2 THE COURT: The only conclusion you could  
3 reach --

4 THE WITNESS: Okay. The only conclusion I  
5 could make that it was something that they decided  
6 not to test him for because it was above what they  
7 thought was appropriate to do and that that  
8 testing therefore was delayed until another blood  
9 pressure was taken.

10

11 BY MR. SCHMIEDER:

12 Q Did, in those depositions did you, were  
13 they asked as to what they thought the protocol was?

14 A Linda Thacker specifically --

15 MR. HAGIE: Objection.

16 THE COURT: Doctor, were they asked?

17 THE WITNESS: Okay. The answer to that is  
18 yes.

19

20 BY MR. SCHMIEDER:

21 Q From your review of the deposition and  
22 everything, what was --

23 THE COURT: I sustain that objection.

24 MR. HAGIE: Thank you, Your Honor.

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1 THE COURT: That is not the subject of  
2 expert testimony. That's --

3 MR. SCHMIEDER: It is foundational.

4 THE COURT: You cannot ask Dr. Hippensteel  
5 to tell the Jury without violating the hearsay  
6 rule what another person believed or opined about  
7 something. You can ask Dr. Hippensteel  
8 appropriate hypothetical questions or proceed as  
9 you deem appropriate.

10

11 BY MR. SCHMIEDER:

12 Q Doctor, I would like you to assume this, I  
13 would like you to assume that in the testimony that will  
14 be coming of Linda Thacker and of Aaron Davis and of --

15 MR. HAGIE: Objection. Mr. Schmieder  
16 cannot give this man testimony and tell him  
17 individual's testimony, what the testimony is. He  
18 can hypothesize and put forth certain facts. He  
19 cannot hypothesize on what witnesses will testify  
20 to.

21 THE COURT: Would you please rephrase the  
22 question or hypothesis to ask the witness to give  
23 an opinion based on hypothetical facts.

24

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1 BY MR. SCHMIEDER:

2 Q Doctor, I want you to assume that there  
3 was, there is, there will be testimony --

4 MR. HAGIE: Objection.

5  
6 BY MR. SCHMIEDER:

7 Q I want you to assume that there was a  
8 maneuver protocol of 200 over 110. And also, too, Doctor,  
9 that one, that there was also a maneuver protocol in  
10 writing from the Norfolk Southern of 200 over 115.

11 When the person to be tested came in on  
12 August 16, 1994, the technician doing his blood pressure  
13 test indicated that it was too high and that they could  
14 not proceed with the pulmonary function test.

15 He was asked then at that particular time  
16 to sit down and rest for approximately ten minutes. And  
17 then his blood pressure was retested and it was at 158  
18 over 102, okay?

19 Doctor, assuming that, all right. Would  
20 you have an opinion to a reasonable degree of medical  
21 certainty as to whether or not, medical and pulmonary  
22 certainty, as to whether or not any pulmonary function  
23 tests that were to be performed when the initial blood  
24 pressure reading was higher than the protocol guidelines



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1 was negligent on the part of the people administering the  
2 test?

3 MR. HAGIE: Objection, Your Honor.

4 Mr. Schmieder has laid out two contradictory facts  
5 in regard to protocol. He is asking this doctor  
6 to give an opinion and we have two different  
7 protocols put in front of the Jury by  
8 Mr. Schmieder's hypothetical facts.

9 THE COURT: And the witness is qualified to  
10 answer the question that assumes those or to say  
11 that he can't.

12 MR. HAGIE: If Mr. Schmieder wants to ask  
13 him two questions using two separate protocols  
14 that is fine; but without the doctor being told  
15 what --

16 THE COURT: Objection overruled.

17 MR. HAGIE: -- was being asked --

18

19 BY MR. SCHMIEDER:

20 Q Did you understand the question, Doctor?

21 A Yes. And I think it can be stated under  
22 either of those blood pressure levels that that was  
23 negligent of them to take forward that test that  
24 particular day.

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1           Q       Okay. And what is the basis of your  
2       opinion, Doctor?

3           A       It is the basis about having general risk  
4       management in doing a screening test that we, as  
5       physicians, involve ourselves regularly in doing  
6       procedures, some of which are called elective and some of  
7       which are called urgent.

8                   We are not here to, I am not here to say  
9       that the circumstances about blood pressure is by a  
10      standard set up nationally required to have a certain  
11      level be, have the blood pressure at the certain level  
12      before a pulmonary function test can be done.

13                  I am here to say that as a general  
14      assessment of risk that the blood pressure was extremely  
15      high and that that made for risks for cardiovascular  
16      complications of putting a person through stress related  
17      to that blood pressure. I think therefore it was  
18      inappropriate for that, those persons to perform such a  
19      test after obtaining a blood pressure that was above  
20      either of those levels.

21           Q       Okay. Doctor --

22                   THE COURT: Excuse me, Doctor. When you  
23      say you think it inappropriate --

24                   THE WITNESS: I can explain that

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1 "inappropriate" by saying I think that is  
2 negligent to do that.

3 MR. HAGIE: Your Honor, objection. That is  
4 a legal conclusion that this doctor is not  
5 qualified to make.

6 THE COURT: Well, the first time the doctor  
7 did an administration and the test --

8 Mr. Schmieder, do you want to ask the question?

9

10 BY MR. SCHMIEDER:

11 Q Okay. Doctor, did the administration of a  
12 pulmonary function test in light of the fact that there  
13 were initial blood pressure readings in excess of the  
14 protocol guidelines, was that a deviation from acceptable  
15 standards of care as referral to the technicians in this  
16 case?

17 A Yes, I think that it was.

18 Q Okay. And again, I thought I asked you,  
19 Doctor, in this particular case, I have heard the term  
20 "elective" and, I don't know what the other term is that  
21 you physicians use.

22 A Urgent or necessary or required. In other  
23 words, electives are things that can be done at that time  
24 or can be done later, while urgent is something that needs

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1 to be done at that time because there is a risk of having  
2 something happen that we are going to find about the  
3 results of that that would be detrimental to the patient  
4 if we waited later to do such a test.

5 Q In the case of Mr. Keeling, was that an  
6 urgent testing or could that be an elective type of  
7 testing?

8 A It was elective. It was a screening test  
9 done for the purposes of just seeing what his pulmonary  
10 function was..

11 Q Then what should the technicians have done  
12 when they saw a blood pressure reading that exceeded the  
13 protocol?

14 A I think that they should have followed the  
15 protocol.

16 Q Which was what?

17 A That the testing would not be performed and  
18 the supervisor and medical director would be advised.

19 Q Do you have an opinion to a reasonable  
20 degree of medical certainty as to whether or not  
21 Mr. Keeling should have been tested on that date of August  
22 16th, 1994 at Shaffer's Crossing by technicians doing  
23 elective testing when they had an initial blood pressure  
24 reading either in excess of 200 over 110 or 200 over 115?

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1           A       I think he should not have been tested.

2           Q       What risk, if any, is there if one tests a  
3 person under these circumstances?

4                   MR. HAGIE: It has been asked and answered,  
5 Your Honor.

6                   THE COURT: Overruled.

7                   THE WITNESS: I think that that risk is  
8 general. It is most specific in the sense that it  
9 is a very significant risk for cardiovascular  
10 complications from extra stress as the blood  
11 pressure goes higher and higher.

12                   As I said, there is a long-term risk, but  
13 we know that in pressures that are greater than  
14 180 over 110, that what we call autoregulation of  
15 the cardiovascular system ceases to be as good as  
16 it would if the pressure is lower than that.

17                   These are circumstances that if we see a  
18 person that has that pressure, has an urgency to  
19 get that pressure under better control, we would  
20 treat that kind of pressure in a specific way on  
21 an urgent basis in seeing that because that kind  
22 of blood pressure can lead to what we call end  
23 organ damage, which means that their organs that  
24 are perfused by that pressure that can be affected

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1           adversely by having the pressure be that high.

2                   And there are levels of pressure that we  
3           say: Here is a reason for you to get your blood  
4           pressure under control. If it's 140 over, 140  
5           over 92, but here is a pressure that is reasonable  
6           for you to get it under immediate control. This  
7           is reasonable for you to do something immediately  
8           to make that pressure better because you can have  
9           a risk of a stroke, a risk of a heart attack, a  
10          risk of some other cardiovascular event.

11                   I would also note in this particular  
12          circumstance it can make it so the regulation of  
13          pressure in the brain is not autoregulated as well  
14          anymore after the blood pressure is over 180 over  
15          110, so I think that that makes it so that a  
16          person who gets a test done when the pressure is  
17          higher than that has extra risks of that test,  
18          especially if it is a stressful test.

19

20       BY MR. SCHMIEDER:

21                   Q        Doctor, what, in your opinion, should the  
22          technicians have done when they got an initial blood  
23          pressure reading in excess of 200 over 110 or in excess of  
24          the maneuver protocol; what should they have done that

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1 day?

2 A I think they should have followed protocol  
3 and informed the supervisor/medical director.

4 Q Should they have tested Mr. Keeling that  
5 day?

6 A No.

7 Q Doctor, is blood pressure constant? I hear  
8 the term "dynamic" or something like that.

9 A It is dynamic, as was shown even in this  
10 case. It came down in a period of several minutes after  
11 sitting there, so that there was a range that it varied.  
12 But one could see just from the, if you will, the stress  
13 of coming into this environment, he had his pressure up  
14 higher and they told him to sit down and rest. That was  
15 at least a part of what I read in the testimony.

16 Q Doctor, if a person has got a blood  
17 pressure reading 158 over 102 and initially had a blood  
18 pressure of 200 over 110 or in excess of that, okay,  
19 Doctor?

20 THE COURT: Mr. Hagie, your objection?

21 MR. HAGIE: Mr. Schmieder is giving the  
22 impression that --

23 THE COURT: Try to make it a recognizable  
24 legal objection. Mr. Schmieder, try not to ask

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1           him bad questions.

2                   MR. HAGIE:  Objection to the foundation of  
3           that question.

4                   THE COURT:  Ask noncompound questions for a  
5           while.

6

7   BY MR. SCHMIEDER:

8           Q       If you have a blood pressure reading of one  
9           thing and then you have another blood pressure reading at  
10          another level, if that person goes up on a pulmonary  
11          function test, what would you as a physician reasonably  
12          expect the blood pressure to be during the pulmonary  
13          function test; would it go up and/or down?

14          A       I would expect it to go up.  I can't  
15          predict how much it would go up.  If a period of a few  
16          minutes after it has been very high one would expect it  
17          would go up to a level it was after waiting the few  
18          minutes.  The risk is there for it being as high or higher  
19          than it was before he sat down to take a rest.  You are  
20          now going to stress him with such a test.

21                   I think that is where the risks lie in  
22          doing it the way that these people did that test in this  
23          particular individual on that date.

24                   THE COURT:  Excuse me, Doctor.  Is that an



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1           opinion you hold to a reasonable degree of medical  
2           probability?

3                   THE WITNESS: Yes, it is.

4

5       BY MR. SCHMIEDER:

6           Q       And Doctor, basically can you just tell us  
7       to a reasonable degree of medical certainty what you felt  
8       were the deviations of acceptable medical care on this  
9       date given to Mr. Keeling?

10                   MR. HAGIE: Been asked and answered, Your  
11       Honor.

12                   THE COURT: I think that is repetitive; I  
13       sustain the objection.

14

15       BY MR. SCHMIEDER:

16           Q       Do you know whether or not the first, did  
17       you answer whether the first blood pressure testing was  
18       recorded?

19           A       It was not recorded.

20           Q       Do you feel that to be a deviation from the  
21       acceptable standard of care?

22           A       I think that if a protocol asked that a  
23       blood pressure be taken, that it has no meaning if the  
24       blood pressure is not recorded after it is taken.

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1 THE COURT: Does that make it a deviation  
2 from acceptable standards of care?

3 THE WITNESS: Yes.

4 THE COURT: To a reasonable degree of  
5 medical probability?

6 THE WITNESS: Yes.

7

8 BY MR. SCHMIEDER:

9 Q Are you familiar with perilymphatic  
10 fistulas?

11 A Yes.

12 Q Can you explain what a perilymphatic  
13 fistula is?

14 A A leakage of fluid from what is called the  
15 perilymph space in the inner ear. And that leakage causes  
16 changes in sensation in the, what we call the vestibular  
17 system, and can affect hearing as well. But it is a part  
18 that makes a person feel dizzy related to a sudden change  
19 in the pressures in that system.

20 Q Well, Doctor, do you have an opinion to a  
21 reasonable degree of medical and pulmonary certainty as to  
22 whether or not the pulmonary function test performed on  
23 Raymond Keeling on August 16, 1994 caused or contributed  
24 in whole or in part to Mr. Keeling developing a

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1 perilymphatic fistula?

2 MR. HAGIE: Objection, Your Honor.

3 THE COURT: And your objection?

4 MR. HAGIE: Lack of foundation, lack of  
5 expertise in this field of perilymphatic fistulas.

6 THE COURT: I sustain the objection pending  
7 laying further foundation.

8

9 BY MR. SCHMIEDER:

10 Q Well, Doctor, in your field of pulmonary,  
11 as a board certified pulmonologist and as a board  
12 certified internist, do you study and are you familiar  
13 with the effects of a pulmonary function test on various  
14 portions of the body?

15 A Yes.

16 Q And specifically, would you be familiar  
17 with the doing of a pulmonary function test as of, say  
18 that would affect either the ear or the head or the face  
19 or anything of that nature?

20 A Yes.

21 Q And you did indicate that you are familiar  
22 with the perilymphatic fistula?

23 A Correct.

24 Q And you are familiar with a pulmonary

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1 function test?

2 A Yes.

3 Q Do you have an opinion to a reasonable  
4 degree --

5 THE COURT: Ladies and gentlemen of the  
6 Jury, I will ask you to go with the sheriff to the  
7 jury room and we can discuss the objections out of  
8 the presence of the Jury.

9

10 . (The Jury leaves the Courtroom.)

11

12 THE COURT: If counsel could hear what  
13 Juror Hampton said, she said, "It's the good  
14 part." All right. The jurors are no longer  
15 present. Mr. Hagie, you rose to object.

16 MR. PRITTS: If I might interrupt just a  
17 second, Mr. Keeling needs to go to the rest room.

18 THE COURT: Yes, Mr. Keeling may go to the  
19 rest room. Mr. Keeling doesn't want to hear this  
20 legal argument. Does Mr. Keeling want us to  
21 wait?

22 MR. PRITTS: No, sir.

23 THE COURT: Mr. Hagie?

24 MR. HAGIE: Doctor or Judge, as much

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1           respect as I have for Dr. Hippensteel and his  
2           qualifications, Dr. Hippensteel is not an expert  
3           on perilymphatic fistulas. He has indeed never  
4           diagnosed a perilymphatic fistula, he has never  
5           treated one, he has never seen a perilymphatic  
6           fistula in conjunction with a pulmonary function  
7           test.

8                     I would submit that Dr. Hippensteel is  
9           unqualified to render an opinion as to causations  
10          of perilymphatic fistulas. He has admitted in his  
11          deposition that that is, lies within the field of  
12          otolaryngology. I would certainly or respectfully  
13          say to Dr. Hippensteel's qualification that this  
14          is one area he is not qualified to render opinion  
15          testimony on.

16                    THE COURT: Mr. Schmieder got as far as  
17          asking Dr. Hippensteel twice if he has an  
18          opinion. Do you, sir?

19                    THE WITNESS: Yes.

20                    THE COURT: Is that an opinion that persons  
21          in your fields of practice would render  
22          customarily?

23                    THE WITNESS: It is, I would say no, but  
24          qualify what I would say by that. The

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1           circumstances as I, Mr. Hagie said, are not that  
2           we see perilymphatic fistulas occur in our regular  
3           use of pulmonary function tests. It is not  
4           reported in the literature as a complication of  
5           it.

6                     It is, though, that there are mechanisms  
7           and again, part of what we do as specialists is  
8           from the mechanisms that we know are operating in  
9           any particular circumstance, from the knowledge of  
10          those mechanisms which I am aware of and am an  
11          expert in, can make inferences related to the  
12          possibilities of something like this happening  
13          referable to that knowledge. So that would be the  
14          basis on which I could make a comment. And it is  
15          on that basis --

16                    THE COURT: When you go through and I am  
17          shortcutting the questions that the lawyers might  
18          ask you, when you go through drawing those  
19          inferences and get to the end, you said you could  
20          make the comment on the possibilities. Could you  
21          as a board certified pulmonologist, is that the  
22          right terminology?

23                    THE WITNESS: Yes.

24                    THE COURT: State to a reasonable degree of

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1           medical probability whether the pulmonary function  
2           test caused or contributed in any way or part to  
3           causing the fistula?

4                   THE WITNESS: What I would say, if I can  
5           just say exactly to you what I could comment  
6           about. I can say that the autoregulation of his  
7           blood pressure and therefore of the cerebral  
8           spinal fluid acutely was changed. And that that  
9           acute change makes for increased risks for peri-  
10          lymphatic fistulas in my knowledge of that.

11                   That it also is associated with increased  
12          pressures in the middle ear, which is something  
13          that is also an extra risk as in sneezing, as in  
14          other things that do increase such pressures.  
15          Those are known risk factors for perilymph  
16          fistulas as that the circumstances of this  
17          particular incident made those factors present.

18                   And therefore by inference, even though as  
19          I said, no report has ever been made of perilymph  
20          fistulas developing, it doesn't mean it has never  
21          happened, it has not been reported in the  
22          literature as happening. But in that  
23          circumstance, I could infer that it contributed to  
24          the chances for perilymph fistula development with

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1 a reasonable degree of medical certainty.

2 THE COURT: Mr. Hagie, out of the Jury's  
3 presence, would you like to, as you said, voir  
4 dire or would you like to examine Dr. Hippensteel  
5 to ask the foundation?

6 MR. HAGIE: I would, Your Honor, I would  
7 like to point out that he just admitted that he  
8 could infer the possibility of something. I would  
9 submit that that certainly does not rise to the  
10 level an expert needs to be testifying.

11 THE COURT: I know diagnosticians infer  
12 everything. Is that a fair statement, Doctor?

13 THE WITNESS: Well, I have seen a statement  
14 that when it comes down to even discussions of the  
15 science and art of medicine, that there are  
16 figures put out as low as 20 percent that we  
17 actually know by factual data and the rest is from  
18 inference.

19 THE COURT: Mr. Hagie, if you will.

20

21 VOIR DIRE EXAMINATION

22

23 BY MR. HAGIE:

24 Q Doctor, in terms of your inference, I think



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1       you said it could have contributed to?

2               A       That, that the circumstances were there  
3       that are known to be risk factors for perilymph fistulas  
4       developing by the circumstances in this case.

5               Q       What is the normal pressure in an  
6       individual of the cerebral spinal fluid?

7               A       It is normally about 15 sonometers of  
8       water.

9               Q       What is the relationship of that pressure  
10      to blood pressure?

11              A       It is the circumstances about when there is  
12      an edema related to any autoregulation defects that that  
13      affects what that pressure -- in other words, it would  
14      elevate that pressure.

15              Q       When there is edema, if an individual has a  
16      blood pressure 120 over 80, you are going to say he has  
17      what, cerebral spinal fluid pressure of about 10 or 15?

18              A       Yes.

19              Q       If he has a blood pressure 140 over 100,  
20      then that cerebral --

21              A       Shouldn't make any difference.

22              Q       So there is no connection between the  
23      cerebral spinal fluid and the blood pressure, initial  
24      blood pressure reading whether it is down here or up here?

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1           A       There is no difference during, in a period  
2 of adequate autoregulation of the blood pressure. I think  
3 Dr. Lambert specifically addressed that in his comments  
4 referral to this case, that there should be equilibration  
5 over time, and that that is expected. But when you are  
6 above the autoregulatory level of blood pressure, that  
7 that equilibration doesn't occur.

8           Q       That autoregulatory level is above 158 over  
9 102?

10          A       Well, it is above 180 over 110 is what is  
11 considered.

12          Q       If an individual has a blood pressure of  
13 158 over 102, which is the only blood pressure we have  
14 recorded in the case?

15          A       Yes.

16          Q       That is below that auto, so the cerebral  
17 spinal fluid is going to be, you would assume at that  
18 normal level?

19          A       At that, at the time that it is at that  
20 level that would not be expected to alter that.

21          Q       So when you go under stress, that stress is  
22 not going to raise that cerebral spinal fluid any more at  
23 158 over 102 than it would at 120 over 180?

24          A       Right, in those ranges, that's correct; the

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1 blood pressure would not be a factor.

2 THE COURT: It seems me a whole lot more  
3 like cross-examination, Mr. Hagie, than  
4 foundation.

5  
6 BY MR. HAGIE:

7 Q You have never seen, have you ever seen a  
8 pulmonary or perilymphatic fistula develop from the  
9 pulmonary function test?

10 A No, I have not.

11 Q Have you ever heard of it outside of this  
12 allegation we have here; have you ever heard of a  
13 perilymph fistula ever developing during a pulmonary  
14 function test, before or afterwards?

15 A No, I have not.

16 Q The only relationship, then, that you are  
17 basing your testimony today on that it could have is  
18 really a temporal relationship?

19 A There is that, and also the factors related  
20 to the stress of pulmonary function testing as versus what  
21 Dr. Lambert said does raise pressures in the inner ear or  
22 in the middle ear. And that that circumstance makes for  
23 some of the same risk factors that are known to create  
24 perilymphatic fistulas.

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1           Q       That in the case 158 over 102 would be  
2       separate from any relationship to the blood pressure?

3           A       Right, that is a separate risk.

4           Q       Okay. And that is a risk that, that is the  
5       same risk that any one of us would have today if we were  
6       to cough or do a Valsalva movement?

7           A       That is correct; and perilymph fistulas are  
8       known to occur when you cough or sneeze. So that  
9       circumstance is a known association of people who  
10      developed such fistulas, they do do that, and that that  
11      circumstance is a similar circumstance to this and getting  
12      a maximum effort blowing in a pulmonary function test.

13          Q       Did you review the pulmonary function test  
14      reports, Doctor, in this case?

15          A       Yes.

16          Q       And did you see where Mr. Keeling actually  
17      had a coughing fit?

18          A       Yes.

19          Q       Now, can you distinguish between the risk  
20      of increasing or having a perilymphatic fistula in  
21      performing a pulmonary function test as opposed to  
22      coughing?

23          A       That those would have some similar  
24      effects. You are doing the similar thing to inner or

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1 middle ear pressure when you are doing either.

2 Q So you don't, you can't say which one is  
3 more likely than not to cause the perilymphatic fistula?

4 A Since they both occurred in the  
5 circumstance, the timing wise of this occurred during the  
6 time he was getting the test done. I think the timing of  
7 that related to the test, the test was producing the  
8 coughing, too; they are tied together there.

9 Q You have, you have nothing other than the  
10 temporal relationship, then, to tie these to, that  
11 perilymphatic fistula?

12 A Yes, and the circumstances would make for  
13 increased risk of perilymphatic fistulas related to this  
14 test.

15 Q Doctor, do you have any reason to believe  
16 that at the time Mr. Keeling was administered the test  
17 that his blood pressure was over 158 over 102?

18 A I would have reason to believe that it did  
19 go up again with the stress of that test during the test.

20 Q During the test, but not at the time the  
21 test was administered to him?

22 A Yes, during the test I would expect that  
23 his blood pressure would go higher than it was before the  
24 test.

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1           Q       As it would with anyone's?

2           A       As it would with anyone. The stress of  
3 that test would make your blood pressure go up.

4           Q       There would certainly be nothing wrong in  
5 administering a pulmonary function test if somebody walked  
6 in and sat down and was measured at 158 over 102, there  
7 would be nothing wrong under the protocol that these  
8 individuals were operating under, whichever one you take,  
9 for them to administer that test to him?

10          A       . If that was the only test that would  
11 certainly meet the criteria of the protocol and would be  
12 acceptable.

13          Q       With regard to the protocol, you have  
14 never, you are not an expert on protocols, are you?

15          A       No.

16          Q       You have never dealt with corporations'  
17 protocols in regard to pulmonary function tests?

18          A       Not, well, I have dealt with protocols  
19 about pulmonary function tests in regards to my  
20 involvement in doing pulmonary function tests at various  
21 institutions that I practiced. I have also been involved  
22 in making guidelines for other things than that, so I have  
23 had some acquaintance.

24                   I even have guidelines in regards to my own

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1 treatment of the patients in the hospital that, so there  
2 is some acquaintance with this. It is not that I don't  
3 have any acquaintance. I have not developed corporate  
4 protocols in regard to that.

5 Q You are not really an expert on corporate  
6 protocol in order to say whether or not this protocol was  
7 violated, are you, sir? You are relying on one word --

8 MR. SCHMIEDER: Your Honor, I object here.

9 THE COURT: Mr. Hagie, it seems to me that  
10 you are conducting a deposition of Dr. Hippensteel  
11 for the purpose of preparing cross-examination and  
12 not going to laying the foundation. Correct my  
13 misapprehension if I have one.

14 MR. HAGIE: The foundation, Your Honor, is  
15 first of all, Dr. Hippensteel has no foundation to  
16 say that the autoimmune system in this instance  
17 was such that it would have contributed or caused  
18 a perilymphatic fistula. Secondly, he has no  
19 foundation to have testified about the violation  
20 of a protocol.

21 THE COURT: He has testified -- do you have  
22 any more knowledge about protocols of the railroad  
23 than what you've testified to already, sir?

24 THE WITNESS: No.

1           THE COURT: Do you have any other  
2           questions, Mr. Hagie?

3           MR. HAGIE: No, Your Honor.

4           THE COURT: Mr. Schmieder, do you want to  
5           ask Dr. Hippensteel any questions?

6           MR. SCHMIEDER: No, sir, Your Honor. I  
7           want to ask him a question in front of the Jury.

8           THE COURT: Would you like to argue  
9           further, Mr. Hagie?

10          MR. HAGIE: Your Honor, I don't believe  
11          that Dr. Hippensteel has ever testified that to a  
12          reasonable degree of medical certainty this caused  
13          or contributed. He has inferred that it could  
14          have contributed to, he has inferred that there  
15          are activities at the same time that could have  
16          contributed to.

17          But I do not believe that Dr. Hippensteel's  
18          expertise in this area covers or allows him to  
19          testify or that he has testified to a reasonable  
20          degree of medical certainty that this did cause or  
21          contribute to a perilymphatic fistula. I would  
22          move to preclude him from testifying further on  
23          this issue of causation.

24          THE COURT: Would you like to respond?



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1 MR. SCHMIEDER: I would, Your Honor, on  
2 page 77 of the Doctor's deposition.

3 THE COURT: The doctor's deposition is not  
4 before the Court now.

5 MR. SCHMIEDER: The point I thought Mr., I  
6 thought Les was making the point, Judge, that he  
7 never said this before and therefore it's, this  
8 comes as a complete surprise. That is what I  
9 thought. If that is not the issue, then, I  
10 respond that the Doctor --

11 THE COURT: That is not the issue.

12 MR. HAGIE: That is not the issue, Your  
13 Honor. I can address that because it also goes to  
14 I think the foundation that Dr. Hippensteel was  
15 relying upon a statement by Dr. Kohut which we  
16 think is also an issue at the trial as to whether  
17 Dr. Lambert had the proper foundation.

18 MR. SCHMIEDER: I think the evidence is  
19 such Dr. Hippensteel is board certified in  
20 internal medicine and pulmonology. Those fields  
21 cover the area of which his testimony is going to  
22 be.

23 It seems that his testimony in this  
24 particular case goes to its weight, not its

1           admissibility. I think he is qualified. I think  
2           he has the foundation. He has explained that this  
3           is based upon a reasonable degree of medical  
4           certainty. This is an area that he as an  
5           internist and pulmonologist has studied and has  
6           worked with and is familiar with.

7           THE COURT: Thank you. Anything else,  
8           Mr. Hagie?

9           MR. HAGIE: Judge, he has not worked with  
10          perilymphatic fistulas, he has never diagnosed  
11          one, he has never treated one. He is not  
12          qualified to testify as to causation of  
13          perilymphatic fistulas.

14          THE COURT: The Court is of the opinion  
15          first that opinion testimony on these facts is  
16          appropriately placed before the Jury under  
17          Virginia Code Section 8.01-401.3. The witness has  
18          demonstrated that he has knowledge, skill,  
19          experience, training and education that permit him  
20          to express opinions within the fields of  
21          pulmonology and internal medicine.

22          It is my belief in Virginia the rule of  
23          Daubert v. Merrell-Dow Pharmaceuticals was adopted  
24          long before the 1993 Daubert case in Spencer v.

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1           Commonwealth, one of the several appeals involving  
2           Mr. Timothy Spencer, an opinion by Judge Roscoe B.  
3           Stephenson, Jr. The Court as gatekeeper is  
4           satisfied that testimony along the lines I am  
5           about to outline properly is placed before the  
6           trier of fact.

7                       I hold that it is appropriate for  
8           Mr. Schmieder to ask Dr. Hippensteel if he has an  
9           opinion to a reasonable degree of medical  
10          probability about the relationship between the  
11          pulmonary function test administered to  
12          Mr. Keeling and the perilymph fistula. And when  
13          Dr. Keeling says, "Yes," I am of the opinion that  
14          it is appropriate for Mr. Schmieder to ask  
15          Dr. Keeling upon what do you base that opinion and  
16          for Dr. Keeling to proceed to answer. And at that  
17          point for Mr. Schmieder, again, I suppose, to ask  
18          if that opinion is held to a reasonable degree of  
19          medical probability or to go wherever you need to  
20          go to set the opinion forth. And either  
21          plaintiff's counsel or defendant's counsel can  
22          elicit from Dr. Hippensteel the qualifications  
23          that Dr. Hippensteel has put onto his opinion.

24                     Dr. Hippensteel said in answer to the

1           initial question that it's never been seen, it has  
2           never been diagnosed, it is not in the literature  
3           and so on. That, in this Judge's view, agreeing  
4           with Mr. Schmieder, goes to the weight of the  
5           evidence for the Jury's consideration, but I  
6           cannot hold that Dr. Hippensteel's considered  
7           professional judgment held to a reasonable degree  
8           of medical probability about a subject that  
9           requires specialized knowledge can be kept from  
10          the Jury.

11                 Defendant's objection to that ruling is  
12           noted; and would you bring the Jury in, please,  
13           Sheriff.

14                 THE WITNESS: Your Honor, is it possible  
15           for me to ask how much longer this is expected to  
16           take for me to be here? I was told that I would  
17           be out by 11:00. It certainly doesn't look like  
18           that is the case.

19                 THE COURT: I would say out by 11:15.  
20           Wouldn't you say that is right?

21                 MR. HAGIE: It probably won't take much  
22           longer than that, Your Honor.

23                 THE COURT: It shouldn't take that long.

24                 MR. HAGIE: Unfortunately, I am not sitting

Hippensteel - Voir Dire

1           there and you are not sitting here.

2           THE COURT: Having heard, do you need to  
3           make a phone call?

4           THE WITNESS: Yes, in relation to that it  
5           would be useful if I could do that. Maybe this  
6           would be a good time.

7           THE COURT: We will take a brief recess.

8

9           (A Recess was taken. Following the Recess,  
10          the Parties returned to the courtroom and the  
11          Trial continued.)

12

13          THE COURT: We are again in session; the  
14          parties and counsel are present. 11:15 is less  
15          likely, but we are ready for the Jury.

16

17          (The Jury returned to the courtroom.)

18

19          THE BAILIFF: Jury are present and seated,  
20          Your Honor.

21          THE COURT: Thank you. Mr. Schmieder --  
22          thank you, ladies and gentlemen of the Jury --  
23          would you resume your examination.

24

Hippensteel - Direct

1 BY MR. SCHMIEDER:

2 Q Doctor, do you have an opinion to a  
3 reasonable degree of medical probability about the  
4 relationship between a pulmonary function test  
5 administered to Mr. Keeling on August 16th, 1994 and the  
6 development of a perilymphatic fistula?

7 A Yes.

8 Q And what is your opinion?

9 A It is my opinion that the circumstances  
10 were there to make for an increased risk of perilymph  
11 fistula on that test. And that as stated earlier in my  
12 testimony, that those factors included the stress of  
13 blowing into a machine as hard as he could blow and the  
14 stress of having an elevated blood pressure that at least  
15 was, even though not in the record, the circumstances that  
16 it was before he did this test at a level above the  
17 protocol levels.

18 Q That is to a reasonable degree of medical  
19 certainty, Doctor?

20 A Yes.

21 THE COURT: Mr. Hagie?

22 MR. HAGIE: Your Honor, I would just object  
23 that that does not meet the requirements of an  
24 expert opinion to say the circumstances are there

Hippensteel - Direct

1           for an increased risk.

2           THE COURT: I overrule your objection.

3           MR. SCHMIEDER: I have nothing further,  
4           Your Honor.

5           THE COURT: Well, Doctor, would you  
6           please --

7           MR. SCHMIEDER: I am sorry, Your Honor?

8           THE COURT: I think part of you asking what  
9           the opinion is is you stated part of this.  
10          Doctor, upon what do you base the opinion?

11          THE WITNESS: On the basis that the factors  
12          in this case showed that he had proximate symptoms  
13          to the pulmonary function test in developing this  
14          dizziness that was later diagnosed as perilymph  
15          fistula; and that circumstances to make for an  
16          increased risk of that were there for this test at  
17          the time it was done.

18          THE COURT: Mr. Hagie, your objections are  
19          fully preserved without needing to restate them.  
20          Is this an opinion you hold to a reasonable degree  
21          of medical probability as a pulmonologist and  
22          internist?

23          THE WITNESS: Yes.

24          THE COURT: Thank you.

Hippensteel - Direct

1 BY MR. SCHMIEDER:

2 Q Just to clarify one thing, it is your  
3 opinion to a reasonable degree of medical certainty that  
4 there was a, that the development of a pulmonary, of the  
5 perilymphatic fistula was contributed to by the pulmonary  
6 function test to a reasonable degree of medical certainty?

7 A Yes, through those mechanisms.

8 THE COURT: Mr. Hagie, you may cross-  
9 examine.

10

11 CROSS EXAMINATION

12

13 BY MR. HAGIE:

14 Q You are not a specialist on fistulas, are  
15 you?

16 A No, I am not.

17 Q And you never diagnosed one?

18 A No.

19 Q Never treated one?

20 A No.

21 Q As a pulmonologist, how many individuals  
22 have you even given pulmonary function tests to or  
23 referred for pulmonary function tests?

24 A No specific figure but thousands.



Hippensteel - Cross

1 Q Maybe even hundreds of thousands?

2 A That would seem to be excessive but --

3 Q Thousands. And you have never seen a  
4 pulmonary or perilymphatic fistula develop from a  
5 pulmonary function test either before or after  
6 Mr. Keeling's test, have you?

7 A No, I have not.

8 Q You talked about spirometry; that is  
9 blowing through the tube?

10 A . Yes.

11 Q The risks of that are very low, are they  
12 not?

13 A What?

14 Q Risks associated with the spirometry  
15 itself?

16 A Yes, in the usual circumstance we have no  
17 problems with that.

18 Q You don't even have to get informed consent  
19 to do a pulmonary function?

20 A That's correct.

21 Q And Doctor, you talk about some of the  
22 risks associated with high blood pressure. But certainly  
23 you would agree that fistula is not a recognized or  
24 contemplated risk of a pulmonary function test, is it,

Hippensteel - Cross

1 sir?

2 A No, it is not.

3 Q It is not unusual for people to get dizzy  
4 from pulmonary function tests?

5 A They can do that, yes.

6 Q Sometimes they get sweaty?

7 A Yes.

8 Q You have even known people to get chest  
9 pains perhaps?

10 A Yes.

11 Q None of those are symptoms of a  
12 perilymphatic fistula, are they?

13 A Yes, getting dizzy is.

14 Q Dizziness, but certainly not the chest  
15 pains and sweatiness is not related to perilymphatic  
16 fistula?

17 A Sweating can occur as a secondary factor of  
18 dizziness. Chest pain would not be expected.

19 Q You indicated when you were talking about  
20 high blood pressure there was a screening mechanism for  
21 people at risk for stroke from high blood pressure?

22 A State the question again, please.

23 Q I probably said that very poorly. Let me  
24 try it again. You talked about the blood pressure,

Hippensteel - Cross

1 monitoring or taking someone's blood pressure. Is there a  
2 screening process to identify people who are at risk of  
3 stroke or cardiovascular problems because of high blood  
4 pressure?

5 A Yes.

6 Q I think high blood pressure has been  
7 referred to as a silent killer or something within our  
8 society?

9 A Yes.

10 Q And certainly from your reading of the  
11 documents you reviewed, Mr. Keeling did not suffer from  
12 anything related to stroke or cardiovascular problems or  
13 heart attack, did he?

14 A No, he did not.

15 Q Now, the last blood pressure that  
16 Mr. Keeling had before taking the test was 158 over 102;  
17 is that correct?

18 A It was what was documented in the record.

19 Q You don't know what the first blood  
20 pressure reading was?

21 A No.

22 Q You have reviewed some of the medical  
23 records, though, you said --

24 A Yes.

Hippensteel - Cross

1           Q       -- haven't you? Let me show you -- first  
2 of all, I refer you to the medical record of Dr. Burch  
3 from August 23, 1994. I ask you if you have reviewed that  
4 medical record.

5           A       Yes.

6           Q       On August 23, 1994 if you just take a look  
7 down, I put a red check so you don't have to read the  
8 whole thing, what was Mr. Keeling blood pressure?

9           A       160 over 110.

10          Q       . If that blood pressure had been the  
11 original blood pressure of Mr. Keeling on August 16, 1994,  
12 would that blood pressure have violated the railroad's  
13 protocol?

14          A       No, it would not.

15          Q       Would it have violated the standards or the  
16 parameters that the technicians were using?

17          A       Not as I understand it from their  
18 testimony.

19          Q       What was your understanding of their  
20 testimony?

21          A       That it was 200 over 110.

22          Q       If a man has a blood pressure of 160 over  
23 110, would that not require them to sit the man down and  
24 rest it?

Hippensteel - Cross

1           A       That the --

2           Q       The diastolic is 110 and the technicians  
3       are using a protocol of 200 over 110, and a man has a  
4       blood pressure of 110 as a diastolic. They are going to  
5       sit him down and rest him, aren't they?

6           A       Again, I didn't see anything about sitting  
7       him down to rest him as a part of the protocol.

8           Q       We will talk about that later. But let's  
9       say if the technicians were using a protocol of 200 over  
10      110?

11          A       Yes.

12          Q       And the man had a reading of 160 over 110,  
13      is it your understanding that they would not have given  
14      the test to that man that day?

15          A       May I said that? Again, this is by their  
16      protocol. And again, the testimony about how it was  
17      changed I didn't see any written document of how it was  
18      changed about that. This said lower than 200 over 115;  
19      whether that said lower than or not above that, those  
20      things would make it referral to whether that would be a  
21      technical violation of that protocol or not.

22          Q       Maybe I'm, maybe we are miscommunicating  
23      here, Doctor, and maybe there is another area we have to  
24      go in and talk about. If the protocol that the

Hippensteel - Cross

1 technicians are following is 200 over 110, a man comes in  
2 with a systolic of 160 and diastolic of 110, can the  
3 technicians go ahead and give that man a pulmonary  
4 function test?

5 A As I said, it depends on whether it said  
6 not above that he would not be given or whether it has to  
7 be below that.

8 Q Let's say it falls within the guidelines of  
9 lower than 200 over 110.

10 A . Right. I discussed this in my deposition,  
11 but the circumstances are that the protocol was, as at  
12 least I understand that, was that if either number above  
13 that or either number exceeded that, it was not to be  
14 done.

15 Q So my question to you is if it was 160 over  
16 110, your reading of the protocol is they should not have  
17 given that test?

18 A That would be, if it read as this one read  
19 it would be that case.

20 Q Now, before I go back and get on another  
21 thing, let me go ahead and ask you to take a look at the  
22 medical records there. I will show you the emergency  
23 room, too. Take a look at the other check marks on there,  
24 Doctor.

Hippensteel - Cross

1                   Can you tell me based upon those medical  
2 records whether or not Mr. Keeling had been on any type of  
3 medication prior to taking his pulmonary function test?

4                   MR. SCHMIEDER: I am going to object to  
5 this. This is beyond my direct.

6                   THE COURT: Overruled.

7                   THE WITNESS: It said that he had not been  
8 taking the Vasotec for several weeks, which was a  
9 blood pressure medicine.  
10

11 BY MR. HAGIE:

12                  Q           What about the emergency room report, sir?

13                  A           They said he is not taking any medications  
14 of any type.

15                  Q           Thank you, sir. Now, let's talk about the  
16 protocol, Doctor, because the protocol that you have by  
17 the railroad that I have taken away from you, that is the  
18 only copy of the protocol that you have seen written by  
19 the railroad which says it has got to be lower than either  
20 200 or the diastolic of 115.

21                  A           I had a specific document that was, that is  
22 versus just on a sheet like this, it was a page 3 of a  
23 protocol that said this exact thing.

24                  Q           Correct. It is your understanding that if

Hippensteel - Cross

1 he exceeded either 200 systolic or 115 diastolic, there  
2 was something to be done at that point?

3 A Yes.

4 Q But you understand that the technicians  
5 were using something different than that?

6 A Yes.

7 Q You have never seen anything in writing to  
8 justify why they were doing that?

9 A No.

10 Q Now, Doctor, I think you have testified  
11 that the technicians if, first of all, those blood  
12 pressures are kind of at a very liberal end of the scale,  
13 are they not?

14 A Yes, they are.

15 Q But you are not prepared to say that the  
16 railroad was wrong to use that standard, are you, sir?

17 A No, I am not prepared to say that the  
18 standard itself was more than liberal. It was a liberal  
19 standard because there isn't any specific standard for  
20 blood pressure measurements before pulmonary function  
21 tests.

22 Q In fact, pulmonary function tests are  
23 really the American Thoracic Society and the American  
24 Association of Respiratory Care are the ones who put out



Hippensteel - Cross

1 the guidelines for pulmonary function tests, aren't they?

2 A That's correct.

3 Q There is nothing in there about requiring  
4 someone to take blood pressure before you administer a  
5 pulmonary function test?

6 A No, there is not.

7 Q Now, going back to the protocol of the  
8 railroad, Doctor, there is a word in there that says, "The  
9 blood pressure will be monitored." What is your  
10 understanding of what the word "monitor" means?

11 A Well, that it is checked specifically. I  
12 mean, it means that it will be evaluated and checked as a  
13 part of this procedure.

14 Q When people come into your office, Doctor,  
15 for examinations and I think you already testified today  
16 about that, that there is such a thing as a white coat  
17 syndrome?

18 A Yes.

19 Q Their blood pressure can be elevated, the  
20 first blood pressure when they come in?

21 A Yes.

22 Q You generally take a second blood pressure  
23 when an individual comes in to see you?

24 A Right, but I write down the first one as

Hippensteel - Cross

1 well as the second.

2 Q But there is nothing that says the blood  
3 pressure has to be written down in the protocol?

4 A If it is to be monitored it seems to me  
5 that is a requirement of the protocol. The only way to  
6 know if it is monitored is to have a document of  
7 monitoring.

8 Q We know 158 over 102 was written down.

9 A Yes.

10 Q You testified that you think the  
11 technicians violated this protocol?

12 A Yes.

13 Q You are not, though, Doctor, you are not  
14 involved with any occupational testing by corporations,  
15 are you, sir?

16 A That is correct.

17 Q You have never been involved in, with  
18 setting up the procedures that corporations use to conduct  
19 protocols or to set out protocols for pulmonary function  
20 tests?

21 A No, I would say I do read pulmonary  
22 function tests that are done from an occupational  
23 screening basis, so I interpret tests, but I am not  
24 involved in the company screening programs.

Hippensteel - Cross

1           Q       You have done some work for the railroad  
2 before, Doctor?

3           A       Yes.

4           Q       You have talked with Dr. Prible, the  
5 medical director down there?

6           A       Right.

7           Q       You don't know him personally?

8           A       Right.

9           Q       Do you know if he is in this room, sir?

10          A       No.

11          Q       Let me introduce Dr. Ray Prible.

12          A       Okay.

13          Q       You have talked with him on the phone  
14 before?

15          A       Yes.

16          Q       You never picked up the phone and called  
17 him to ask him about the protocol, sir?

18          A       No.

19          Q       You never asked him about what the word  
20 "monitor" means?

21          A       No.

22          Q       I am not a doctor, but I went to a  
23 dictionary. What I find in here on the definition of  
24 "monitor" --

## Hippensteel - Cross

1 THE COURT: Would you work on being a  
2 cross-examiner?

3 MR. HAGIE: I will try to be a cross-  
4 examiner, too.

5

6 BY MR. HAGIE:

7 Q The dictionary gives a definition of  
8 monitor, "To track or check systematically or keep watch  
9 over." Would you disagree with any of those meanings for  
10 the word "monitor"?

11 A Well, I won't disagree with the dictionary.

12 Q That would insinuate that you watch the  
13 blood pressure over a time continuum, does it not? If you  
14 monitor something, if you check it, if you track it  
15 systematically?

16 A It means that is a possible way to do that,  
17 yes.

18 Q Doctor, if Mr. Keeling had walked in to  
19 take a pulmonary function test with the railroad as part  
20 of its respiratory protection program, and they sat him  
21 down and administered a pulmonary function test to him,  
22 there wouldn't have been anything wrong with that  
23 procedure, would there, without taking a blood pressure?

24 A No, that would be an acceptable procedure.

Hippensteel - Cross

1           Q       So the fact that the railroad decided to go  
2 out and to use this opportunity to screen its people for  
3 the risk of stroke is what is now what you think they did  
4 wrong in regard to going ahead with the pulmonary function  
5 test?

6           A       Well, it is that they did find information  
7 that then they had a protocol to deal with that, then it  
8 wasn't dealt with in the way the protocol said it should  
9 be.

10          Q       . You don't know that that blood pressure  
11 ever reached 200 or 115, do you?

12          A       I don't know the specifics of that blood  
13 pressure other than the statement that it was too high.

14          Q       Now, when you take blood pressure, Doctor,  
15 your concern in measuring that blood pressure is not  
16 before a pulmonary function test, and you said you had  
17 some standard that you use?

18          A       Right, just some general guidelines. Not  
19 that these are national standards or that it turns out,  
20 though, that most pulmonary function labs were set up  
21 originally to be in medical care situations, so there were  
22 other evaluations taking place at the time the pulmonary  
23 functions were done. So that there was less, I mean,  
24 those people were, they are being monitored in other ways

Hippensteel - Cross

1 before they would get pulmonary function tests.

2 In the setting of how pulmonary function  
3 tests were set up, even ATS used guidelines for quality  
4 control of those tests, not about risk factors when --

5 Q ATS, American Thoracic Society?

6 A Yes.

7 Q They no longer have blood pressure in  
8 regard to their performance of pulmonary function tests?

9 A I don't know that they ever did. They  
10 never addressed themselves to that issue.

11 Q Certainly when you monitor somebody's blood  
12 pressure, you are not doing that out of concern for a  
13 possible inner ear damage when they are taking a pulmonary  
14 function test?

15 A No, I am not.

16 MR. HAGIE: I have no further questions,  
17 Doctor.

18 THE COURT: Mr. Schmieder, any redirect-  
19 examination?

20 MR. SCHMIEDER: I don't, Your Honor. I  
21 would like to offer into evidence Plaintiff's  
22 Exhibit Number 1.

23 THE COURT: That was read to the Jury.  
24 There is no objection?

1 MR. HAGIE: I have no objection.

2 THE COURT: Exhibit 1 is admitted.

3

4 (The above-mentioned document was marked as  
5 Plaintiff's Exhibit Number 1 and entered into the  
6 Trial.)

7

8 THE COURT: Dr. Hippensteel, you are  
9 excused. Thank you for being here.

10

11 (The witness was excused.)

12

13 THE COURT: Jury, are you ready to start  
14 another witness? Call your next witness.

15 MR. SCHMIEDER: At this time I would like  
16 to call Dr. Kohut to the stand.

17 THE COURT: Dr. Kohut, if you would come  
18 forward the court reporter will swear you in at  
19 the witness stand.

20

21 ROBERT I. KOHUT, M.D.

22 was called as a witness and after having first been duly  
23 sworn to tell the truth, the whole truth, and nothing but  
24 the truth, was examined and testified as follows:

Kohut - Direct

DIRECT EXAMINATION

BY MR. SCHMIEDER:

Q Would you tell the Court and Jury your name, sir?

A Robert I. Kohut.

Q And what is your occupation or profession?

A I'm a retired professor of otolaryngology.

Q And where did you practice your profession?

A Most recently in North Carolina.

Q Can you tell the Jury your educational background?

A Okay. I went to Whittenberg College and then went to the University of Chicago School of Medicine. I served an internship there and then took four years of residency in otolaryngology there and then a year NIH special fellowship which involved both clinical and research activities.

Q Let me just stop you. What is the NIH?

A National Institute of Health.

Q Doctor, do you have any, did you do any fellowships or anything like that during your residency or after that?

A Well, the fellowship, NIH special



Kohut - Direct

1 fellowship was just that, doing research, and it involved  
2 the vestibular system, the balance mechanism of the ear  
3 and brain. And then during my residency I had a special  
4 three-month tutorial with Professor Santiago  
5 Riesco-McClure, he was from the Neurotology Institute in  
6 Chile, and was brought up to the University of Chicago to  
7 join Dr. Vincey, my professor. And give special  
8 tutorials, wrong word, allowed for a block of time for  
9 certain residents in training. During that block of time  
10 you would just see patients that have problems with  
11 dizziness.

12 Dr. Riesco was one of the most prominent  
13 neuro-otologists. Neuro-otology is the study of dizziness  
14 and special hearing problems in the world, so I had that  
15 special experience.

16 Q Doctor, once you graduated and did complete  
17 your residency at the University of Chicago, can you bring  
18 us to date as to your education and what you did?

19 A I had the fellowship there. Then I was an  
20 instructor. That is the lowest rank on the faculty at the  
21 University of Chicago. Then I accepted a position at the  
22 University of Florida on the faculty as an associate,  
23 assistant professor. That is the next step up from  
24 instructor. And I was there for seven years during which

Kohut - Direct

1 I had grants, research grants awarded by the National  
2 Institute of Health. And then I went to the University of  
3 California at Irvine where I accepted the chairmanship.

4 By that time I had been raised in rank to  
5 associate professor and was acting chairman of  
6 otolaryngology. During that period of time, I feel  
7 embarrassed to tell you, but the, not out of shame but it  
8 sounds like I am patting myself on the back, I won for  
9 this research that I did there. I won a Foller award for  
10 my thesis. A thesis is a special paper that you write to  
11 qualify for a significant society. The Foller Award is  
12 one of two awards that are given. They are really the  
13 highest ones we have in the, both of equal rank.

14 Then I went to the University of California  
15 at Irvine and I accepted the chairmanship there. I  
16 continued with my research and it was at that point that  
17 for interest that I saw the first patient, sort of an  
18 interesting story, the first patient with a perilymphatic  
19 fistula that I recognized as, in retrospect as such.

20 I stayed there for seven years and I wanted  
21 an administrative change. The chancellor asked why I was  
22 leaving. And he said, "Yes, the greatest rank in the world.  
23 You don't even have to come to work and we pay you."

24 MR. PRITTS: Your Honor, I am sorry to

Kohut - Direct

1 interrupt. I don't mind hearing the  
2 qualifications. To the extent he brings in  
3 hearsay what other people told, I think it goes --

4 THE COURT: Dr. Kohut, I am going to ask  
5 Mr. Schmieder to ask you another question to move  
6 us forward in the facts of this case.

7

8 BY MR. SCHMIEDER:

9 Q Then so, Doctor, that put you at what year  
10 in your career?

11 A At Irvine, I was there from 1972 to 1979.

12 Q And then what did you do then next, Doctor?

13 A Then I accepted the chairmanship at Wake  
14 Forest University School of Medicine.

15 Q Okay. Where is that located at?

16 A Winston-Salem, North Carolina.

17 Q Is that also, is that Bowman Gray, too?

18 A Yes, the name has been changed from Bowman  
19 Gray to Wake Forest University School of Medicine is the  
20 Bowman Gray campus.

21 Q How long were you at Bowman Gary or Wake  
22 Forest, Doctor?

23 A From 1979 until current. I am a professor  
24 emeritus, having retired about two years ago.

Kohut - Direct

1           Q       Doctor, are you licensed to practice your  
2 profession?

3           A       Yes.

4           Q       Let me ask what states you are licensed  
5 in.

6           A       North Carolina, Illinois, California; I  
7 think the one in Illinois has been put on inactive status.

8           Q       And Doctor, do you belong to any  
9 professional societies?

10          A       . Oh, yes, a host of them.

11          Q       Can you briefly tell me how many and --

12          A       American Otological Society, the  
13 Neurotological Society, the one for the thesis, the  
14 Otorhinolaryngology Society, the International Federal for  
15 Otolaryngological Societies, the Neurotology Society, and  
16 then, of course, my local societies.

17          Q       And what hospitals do you practice at,  
18 Doctor?

19          A       Well, I no longer have an active practice.  
20 That is I don't regularly see patients, but Baptist  
21 Hospital and at the medical center.

22          Q       Okay. That is Wake Forest Medical?

23          A       Yes.

24          Q       And Doctor, what position did you hold

Kohut - Direct

1       there at Wake Forest or Bowman Gray?

2               A       I was James A. Harrill Professor; that was  
3       an endowed chair, and chairman.

4               Q       Can you explain to the Jury what the  
5       practice of your specialty, that is otorhinolaryngology?

6               A       Otorhinolaryngology, "oto" means ear,  
7       "rhino" means nose and "laryngo" means larynx, neck or  
8       throat.

9               Q       What does that specialty consist of?

10              A       Disorders of the head and neck.

11              Q       All right. And Doctor, are you board  
12       certified?

13              A       Yes.

14              Q       And what are you board certified in,  
15       Doctor?

16              A       Otolaryngology.

17              Q       And how long have you been board certified,  
18       Doctor?

19              A       Since 1966, I think. Yes, I think that was  
20       the year of certification.

21              Q       Doctor, do you hold any certain positions  
22       with the American Board of Otorhinolaryngology?

23              A       Yes, I am a senior counselor now. I was a  
24       doctor for 18 years.

Kohut - Direct

1           Q       Did you ever conduct any examinations for a  
2 given, for boards for other people that were sitting to  
3 take them?

4           A       Yes, yes. The directors give the  
5 examinations and there are two components, one is written  
6 and the other is an oral examination.

7           Q       Doctor, I assume you taught; is that  
8 correct?

9           A       Yes.

10          Q       How long have you taught?

11          A       Oh, I started teaching when I was a  
12 resident.

13          Q       Do you, when was the last time you have  
14 taught any residents or doctors?

15          A       Oh, within the last year or two.

16          Q       There is mention of Dr. May in this case.  
17 Was he one of your students?

18          A       Yes, he, Dr. John May took his residency in  
19 our residency program at Wake Forest University School of  
20 Medicine. And he was in my department and he was  
21 particularly good.

22          Q       Doctor, have you ever published any  
23 articles in your specialty?

24          A       Oh, yes, hundreds.

Kohut - Direct

1           Q       And Doctor, concerning, let's say, have you  
2 published any articles specifically about perilymphatic  
3 fistulas?

4           A       Oh, yes, several; not two or three but four  
5 or five or something.

6           Q       And what books have those been published  
7 in, Doctor?

8           A       Those are papers. I also have chapters in  
9 books regarding perilymphatic fistulas. The chapters, I  
10 think that is what you want, in textbooks were in Cummings  
11 & Frederickson and then in Bailey's Textbook on Head and  
12 Neck Surgery. Otolaryngology, I was the otology editor  
13 for that book.

14          Q       And Doctor, have you lectured in your  
15 profession?

16          A       Oh, yes.

17               MR. SCHMIEDER: Your Honor, at this time I  
18 would ask for the Court to recognize the Doctor's  
19 experience in the field of otolaryngology.

20               THE COURT: The Court finds that Dr. Kohut  
21 is qualified to offer opinion testimony in the  
22 field.

23

24

Kohut - Direct

1 BY MR. SCHMIEDER:

2 Q What is a perilymphatic fistula?

3 A A perilymphatic fistula exists when there  
4 is an opening between the inner ear and the middle ear.  
5 There has to be -- and the inner ear is encased in bone.  
6 You can't see it during life. And the microscopic opening  
7 will occur in some people that have a little pathway  
8 through the bone.

9 Now, that pathway is very small. At its  
10 largest dimension it would be 51 thousandths of a  
11 millimeter. And that is enough. And if that passage is  
12 there and if it will allow the permeation, if the  
13 passageway is there, it allows the permeation of fluid  
14 from the inner ear. A particular type, one of two types  
15 of fluid, which the perilymph, "peri" meaning around and  
16 "lymph" meaning fluid of a specific type, if it allows  
17 that passage, then the, the equivalent, it appears to be  
18 the equivalent of a biochemical or bioelectrical  
19 phenomenon occurs that sets the inner ear, which is sort  
20 of like a fancy battery, it allows it or causes it to do  
21 things that it shouldn't do. Function in a way,  
22 malfunction, I think that is the best term.

23 So it is a little opening, perilymphatic  
24 fistula is a little opening from the inner ear to the



Kohut - Direct

1 middle ear. And that, when that fluid is there, it can  
2 cause, so to speak, a short, just like an -- even though  
3 tiny, when you have a multi-stranded electric wire, all  
4 you have to do is short a little part of that and the  
5 light doesn't work right anymore. That is as good an  
6 analogy as I can give you.

7 Q Doctor, with regard to the ear itself, can  
8 you tell us basically how do you break down the ear, you  
9 as a doctor or as a physician?

10 A Well, there is the external ear, okay, the  
11 pinna in the ear canal. And then at the bottom of the ear  
12 canal there is an eardrum, okay, the bottom or inner  
13 surface. There is an eardrum. That is where the outer  
14 ear external canal ends.

15 The eardrum has attached to it one bone,  
16 and there are three bones in the middle ear. You may have  
17 heard of the hammer, the anvil and the stirrup. And when  
18 the eardrum moves it pushes on these bones. And they sort  
19 of magnify the movement of the eardrum. Then the stirrup  
20 is hooked up with the inner ear, okay, sort of like a  
21 sealed piston so to speak.

22 It is sealed so that there is a ring around  
23 it, an E ring, we call it a ligament. And that when it  
24 pushes in, there is a -- it moves the fluid in the inner

Kohut - Direct

1 ear. In the inner ear there are tiny little cells. There  
2 are balance cells and there are hearing cells, the  
3 vestibular and Cupula. And when that fluid moves, it  
4 moves those tiny little cells that have hairs on the top,  
5 microscopic little hairs, so the hairs, the cells which  
6 are attached send a signal by way of a nerve to the  
7 brain. And that's in the inner ear.

8 Now, the inner ear is both the balance and  
9 the hearing portion. It is smaller than a dime, okay?  
10 And it is contained in the temporal bone which is about  
11 the size of a walnut. And you can't look at it during  
12 life. It is only because it is encased in this solid  
13 piece of bone, so to speak, which has intricate, little  
14 pathways inside.

15 It is a, so only people who have bequeathed  
16 their temporal bones or they became available so they can  
17 be studied after death. The way you study them is under a  
18 microscope.

19 Q Doctor, did you have an occasion to see  
20 Raymond Keeling?

21 A Yes.

22 Q And do you recall when it was that you  
23 first saw Mr. Keeling?

24 A Not exactly. It was 1994, 1995.

Kohut - Direct

1 Q Do you have your notes with you, Doctor?

2 A Yes, I have some in my briefcase right back  
3 there.

4 Q If it would help you, Doctor --

5 THE COURT: The sheriff will get your  
6 briefcase for you, Doctor.

7 THE WITNESS: November 21, 1995.

8

9 BY MR. SCHMIEDER:

10 Q At that time did you obtain a history from  
11 Mr. Keeling?

12 A Yes, his chief complaint was dizziness and  
13 balance problems. And in September of 1994, a year and a  
14 half, year and a quarter ago, he had a pulmonary function  
15 test and at the time of that test had vertigo. He had a  
16 positive fistula test in the left ear only and had  
17 postural vertigo, that means dizziness when you turn over  
18 in bed very often, only related to one side.

19 He had a Tulleo phenomenon by history and  
20 that is a phenomenon where a loud sound will cause a  
21 person to become dizzy. He had constant disequilibrium.  
22 He had surgery in his left ear in August of 1994, and he  
23 got better. But there was still a little light  
24 unsteadiness or dizziness, but he got better after his

Kohut - Direct

1 surgery. He then was sent to rehab. Now, vestibular  
2 rehabilitation is usually a series of exercises and so on.

3 MR. PRITTS: I am not sure this is within  
4 the terms of the question about the history he  
5 gave.

6 THE COURT: I am not sure it is, either.  
7 Doctor, I would also ask you to spell the  
8 condition Tulleo.

9 THE WITNESS: T-U-L-L-E-O.

10 THE COURT: Thank you.

11 THE WITNESS: But that is the history that  
12 he gave me.

13 THE COURT: Mr. Schmieder, would you focus  
14 the examination, please.

15

16 BY MR. SCHMIEDER:

17 Q Doctor, insofar as can you relate to us  
18 what you felt -- first of all, how did he come to see you?

19 A He was referred by Dr. Chen.

20 Q And is Dr. Chen an otolaryngologist?

21 A Yes.

22 Q And as part of this history that you took,  
23 could you tell the Jury what you felt was basically  
24 significant?

Kohut - Direct

1           A       Well, I thought it was very significant  
2       that he had Tulleo phenomenon and he gave constant vertigo  
3       and constant dizziness, and that also with rehabilitation  
4       exercises he had a recurrence of his symptoms.

5           Q       What is Tulleo phenomenon?

6           A       It is a condition wherein a patient will  
7       become dizzy if they are presented with a loud sound. You  
8       become dizzy because of noise. It is also, "always" or  
9       "never" I don't use, it is related to an opening in the  
10      bony labyrinth capsule, that bone that leads, that holds  
11      the inner ear.

12          Q       Okay. What else was significant as far as  
13      you were concerned about Mr. Keeling?

14          A       Well, I thought that the rather abrupt  
15      onset with the pulmonary function test and the positive  
16      fistula test that had previously been found.

17          Q       Would you explain what the fistula test is,  
18      what it shows?

19          A       Yes. What you do when you perform a  
20      fistula test is put a special type of scope and seal off  
21      the ear canal. And to that scope is attached a bulb. So  
22      with that you can raise and lower the pressure in the  
23      external ear canal.

24                   When you do that, that pushes on the middle

Kohut - Direct

1 ear, on the eardrum. And alternate, raises and lowers the  
2 pressure in the middle ear. What you look for as a  
3 response or lack of is either an eye movement response  
4 with a specific type of eye movement or more sensitive is  
5 the vestibular spinal, that is vestibulocochlear, the eye  
6 movement, standing with the feet together and eyes closed.  
7 The vestibular spinal and do a fistula test and they, when  
8 it is positive, they lose their balance. When it is  
9 negative they stand like a rock.

10 Q . Okay. What else did you observe about  
11 Mr. Keeling?

12 A This was all history so far.

13 THE COURT: Significant history. Was there  
14 any other significant history, Doctor?

15 THE WITNESS: He had MS and blind right eye  
16 and six years later paralysis of his legs. And he  
17 had been treated with steroids and his vision  
18 returned two months after its onset, blindness  
19 onset.

20

21 BY MR. SCHMIEDER:

22 Q Now, on this day, Doctor, that you saw him,  
23 did you conduct an examination of Raymond Keeling?

24 A Yes.

Kohut - Direct

1           Q       What did that examination, maybe you could  
2       give us what the examination consisted of and give us what  
3       the significant parts of that examination were.

4           A       He had a positive fistula test that was  
5       extremely positive on the left ear. He almost fell. I  
6       had him standing with his feet together. Right ear just a  
7       little bit of sway. When I had him look to the right his  
8       eyes moved in a specific way. His gait was unsteady.

9                   On balance test he had a decreased response  
10      when we stimulated the right ear, of the right ear. And  
11      when we tested his balance he was fine if he was on a  
12      solid platform. But if, when he swayed, as we all sway a  
13      little bit, the floor swayed with him and this apparatus  
14      will not, he would lose his balance if his eyes were  
15      closed. And if he or if the wall swayed with him. And  
16      this apparatus allows for that.

17                   And he had a nystagmus, specific type of  
18      eye movement when he was placed in given positions, not in  
19      all positions but given positions.

20           Q       Doctor, what conclusions did you reach from  
21      your testing and your examination of him?

22           A       I said it was probably recurrent  
23      perilymphatic fistula, but I had to rule other things out.

24           Q       Did you proceed to rule out other things?

Kohut - Direct

1           A       Yes.

2           Q       Tell us what you ruled out in this case.

3           A       Well --

4           Q       And how you did it.

5           A       Inflammation, a sed rate is usually a good  
6 measure of the presence of inflammation. A granuloma, we  
7 wanted to make sure there was no syphilis, because  
8 syphilis is a great imitator. He had a blood test for  
9 that. We wanted to make sure he didn't have any  
10 autoimmune disorder going which might play a role and had  
11 an ANA for that.

12                       We wanted to make sure there were no  
13 lesions anatomically related to, of his brain, not related  
14 to this dizziness, okay, anatomically-related neurologic  
15 events.

16           Q       Did you do an MRI of the brain?

17           A       Yes.

18           Q       What, if anything, did that MRI of the  
19 brain tell you?

20           A       Okay. Now, we didn't do it at our  
21 institution. It was done here in Roanoke, I think for  
22 insurance purposes or for some specific purpose. And the  
23 previous MRI had shown a lesion in the cerebellum and  
24 medulla; cerebellum and lower medulla are parts of the



Kohut - Direct

1 brain. The cerebellum particularly has to do with  
2 balance. It is the back part of the brain. Those were  
3 not present on this newer MRI; the old lesions weren't  
4 there. They had healed up. He just had lesions on the  
5 front part of the brain, the cerebral part.

6 Q What conclusions were you able to reach  
7 from that MRI alone?

8 A There were no anatomically-related  
9 neurologic lesions --

10 Q And --

11 A -- at that time.

12 Q Is that what you are trying to refer to  
13 with the MS; is that what you are trying to look at?

14 A The old multiple sclerosis lesions that  
15 could have been interpreted, even though they are very  
16 tiny that had been seen before would have related to,  
17 anatomically to a balance disorder. But at this time  
18 those lesions, previous lesions, were not present, okay?  
19 They healed.

20 Q Okay.

21 A They myelinated.

22 Q Did you do any other testing at that time?

23 A Yes, the vestibular tests that I had told  
24 you.

Kohut - Direct

1           Q       Well, Doctor, what conclusions were you  
2       able to reach based upon your tests and based upon the MRI  
3       insofar as the symptoms that Mr. Keeling was experiencing?

4           A       Well --

5                   MR. PRITTS: Your Honor, I would object to  
6       the form of the question. I don't think he has  
7       laid a foundation as to the requisite degree of  
8       certainty.

9                   THE COURT: Would you rephrase the  
10      question.

11

12      BY MR. SCHMIEDER:

13           Q       Doctor, did you reach any conclusions to a  
14      reasonable degree of medical certainty or probability  
15      insofar as whether the symptoms that Mr. Keeling was  
16      experiencing were related to the multiple sclerosis or  
17      were they related to the peripheral ear or were they  
18      related to both as far as you are concerned?

19           A       Well, I knew that at least one component  
20      had --

21                   THE COURT: Were you able to reach any  
22      conclusions?

23                   THE WITNESS: Yes, sir.

24                   THE COURT: To a degree of probability?

Kohut - Direct

1 THE WITNESS: Yes, Your Honor.

2

3 BY MR. SCHMIEDER:

4 Q What was your opinion or conclusion,  
5 Doctor?

6 A That he had probable perilymphatic fistula.

7 Q Now, in this history that you obtained from  
8 him, did he give you any complaint about dizziness or the  
9 like?

10 A That was his chief complaint.

11 Q Doctor, were you able to reach an opinion  
12 based on that examination and based on the testing that  
13 you do as to whether or not the dizziness that he was  
14 experiencing had any relationship to the multiple  
15 sclerosis or if it had any relationship or only to the  
16 perilymphatic fistula?

17 A I knew that there was a, he could have a  
18 concomitant situation from the MS. But I knew as part of  
19 medical certainty goes, that the most significant  
20 component was his perilymphatic fistulas. I could not  
21 exclude a concomitant element of MS.

22 Q All right. Even though the MRI was  
23 improving?

24 A Yes, I mean, funny things happen.

Kohut - Direct

1           Q       All right, Doctor, so then basically how  
2 does the, how does the perilymph affect your dizziness or  
3 how does the fistula cause dizziness?

4           A       Well, trying to put it in a nutshell, we  
5 have been working on this for, as I explained it to the  
6 Jury, there are sort of three types of changes that come  
7 up. One is biomechanical, you change the shape of  
8 something in the knee or anything else and it doesn't work  
9 quite right.

10                   . The other is biochemical and the chemicals  
11 that are needed just aren't working right. Or the third  
12 would be a bioelectric. And a perilymphatic fistula it  
13 appears causes either a biochemical or bioelectric or both  
14 bioelectric through a biochemical change, sort of that  
15 short that I mentioned to you a moment ago.

16           Q       All right. Now, Doctor, based upon your  
17 experience and to a reasonable degree of medical  
18 certainty, what, in your opinion, has been the cause of  
19 the development of perilymphatic fistulas?

20                   MR. PRITTS: Your Honor, is he asking in a  
21 general sense? I am not sure that is relevant to  
22 the question here.

23                   THE COURT: Doctor, did you understand the  
24 question to apply to Mr. Keeling?

Kohut - Direct

1 THE WITNESS: I can, Your Honor.

2 THE COURT: Is that what you are asking?

3 THE WITNESS: I didn't understand if it was  
4 in general or --

5

6 BY MR. SCHMIEDER:

7 Q I want it in general and then to  
8 Mr. Keeling.

9 THE COURT: Well, then, would you ask the  
10 question again to make it clear?

11

12 BY MR. SCHMIEDER:

13 Q In general, what are the causes of  
14 perilymphatic fistulas?

15 A It appears that they are due to an increase  
16 in the pressure of this special fluid perilymph, the part  
17 of the inner ear. And that can be increased through an  
18 increase in spinal fluid pressure. Then there is a whole  
19 cascade of things that can increase spinal fluid  
20 pressure. For instance, a sneeze, a blow, heavy lifting,  
21 Valsalva.

22 Q What is Valsalva, Doctor?

23 A A Valsalva is where you strain and, a  
24 Valsalva would be where you strain lifting something

Kohut - Direct

1 heavy, you know, you lock your chest in order to lift this  
2 heavy sack of cement or whatever, or blow exceedingly hard  
3 to a point of more and more and more. Pressure change,  
4 barometric pressure change, severe. Sometimes in an  
5 airplane, that kind of barometric pressure change. That is  
6 generally what it was.

7 Q Doctor, do you have an opinion to a  
8 reasonable degree of medical certainty or probability as  
9 to the cause of Mr. Keeling's perilymphatic fistula?

10 A Yes.

11 Q What is that opinion?

12 A I think that the, when you, it was the  
13 forced, forcing of his air out. Now, what you do --

14 Q In the pulmonary function test?

15 A Yes, this one component of the pulmonary  
16 function test.

17 Q Okay. Can you give us basically the  
18 mechanism of how that occurs, Doctor?

19 A Yes. When you do one of these forced  
20 things, and try it in your privacy, if you wish, you take  
21 a breath and you breathe out as fast as and as completely  
22 as you can. You get to the end of this expiratory phase  
23 of breathing, and you are really straining.

24 I have done this to myself, not to myself,

Kohut - Direct

1 I have done this myself, and really straining. You are  
2 encouraged to get that last little bit out. Well, do it  
3 and you will find that you'll be straining and it  
4 increases your venous pressure. And that, in turn, is --  
5 it is also an element of diastolic pressure, blood  
6 pressure. That, in turn, is transferred to this spinal  
7 fluid.

8 MR. PRITTS: Your Honor --

9 THE COURT: Doctor, when you hear one of  
10 the lawyers object --

11 MR. PRITTS: I hesitate to do this but  
12 there is something that we have to take up outside  
13 the presence of the Jury based on what has been  
14 disclosed to us that he is going to say in this  
15 case.

16 THE COURT: Let me ask the jurors a  
17 question at this point. How close are we to when  
18 you need to eat?

19 A JUROR: About a half an hour.

20 THE COURT: Is this a convenient place to  
21 break Dr. Kohut's testimony? We have one diabetic  
22 juror.

23 THE WITNESS: Oh, yes.

24 THE COURT: Do you want to?

Kohut - Direct

1 MR. PRITTS: Certainly.

2 MR. SCHMIEDER: This is convenient, Your  
3 Honor.

4 THE COURT: Ladies and gentlemen of the  
5 Jury, I will say real quickly, don't talk about  
6 the case among yourselves or with anybody else.  
7 Don't listen to anybody talk about the case or  
8 remain within hearing distance of anyone talking  
9 about the case.

10 . Don't have any contact with any party,  
11 witness, attorney or spectator or have any other  
12 investigation or inquiry or reading or study. We  
13 will start back at 1:15. If you will go with the  
14 Sheriff, please.

15  
16 (The Jury left the courtroom.)

17  
18 THE COURT: Before we get into the  
19 objection, I will ask the court reporter to, if  
20 there are words she wants to ask Dr. Kohut.

21 THE COURT REPORTER: Santiago Riesco.

22 THE WITNESS: R-I-E-S-C-O - M-C-C-L-U-R-E.  
23 And Dr. Lindy was the head of the department.

24 THE COURT: Something in the ear that -- I



Kohut

1           can't remember. We may have gotten it. Moving on  
2           with Mr. Pritts's objection.

3                   MR. PRITTS: Your Honor, I think it is  
4           important at that point that you have in front of  
5           you the expert witness's report produced by  
6           opposing counsel on Thursday of last week, four or  
7           five days prior to the commencement of this  
8           trial. It was attached as an exhibit to our trial  
9           memorandum.

10                   THE COURT: I have it in front of me.

11                   MR. PRITTS: On page 4 of, page 3 of that  
12           report, and the reason I objected to this at this  
13           time, because I think we start going into blood  
14           pressure and any of the issues with blood  
15           pressure, I don't think that they have made a  
16           fundamental and threshold showing of the  
17           reliability of his testimony.

18                   And more importantly, this witness and  
19           first of all, I want to repeat our objection as to  
20           the tardiness of the disclosure of this  
21           information. As we set forth in our Motion to  
22           Strike that was filed before the November 1  
23           hearing, how they had identified Kohut as a  
24           witness and said he would testify according to his

Kohut

1 testimony in deposition according to his medical  
2 records.

3 There is nothing in his deposition or  
4 medical records that considers the issues that he  
5 is going to try to testify to according to this  
6 report.

7 THE COURT: Mr. Pritts, after Dr. Kohut's  
8 testimony has concluded, I will give you the  
9 opportunity to discuss with Mr. Hagie and  
10 Dr. Prible whether you want to renew that and move  
11 for mistrial. You can do it in the real world  
12 context then knowing what the Jury has heard.

13 MR. PRITTS: I appreciate that, Your  
14 Honor. I want to point out that is my first  
15 fundamental objection. The second one is  
16 consistent with your ruling in this case on the  
17 depositions we dealt with Dr. May this morning, if  
18 Dr. Kohut testifies without trying to materially  
19 vary from his report, which isn't allowed, he is  
20 going to testify that the blood pressure on the  
21 day to a reasonable degree of medical certainty  
22 might or could have contributed to the development  
23 of a fistula.

24 "Might" or "could have" contributed is

Kohut

1 not, does not meet the evidentiary standard as you  
2 have ruled in this Court. Any discussion of the  
3 blood pressure from this witness if he can't link  
4 it up, I don't know -- it might or could have  
5 contributed is irrelevant. It has come in through  
6 Dr. Hippensteel.

7 To have this witness talk about blood  
8 pressure -- he talks about material variance in  
9 blood pressure, I could go on and do voir dire now  
10 on the assumption that I think that is based on.  
11 I think anything about blood pressure is going to  
12 be irrelevant if that is what he testifies to.  
13 That is what he has got to be bound to testify  
14 about based on their expert witness disclosure.

15 THE COURT: It is reasonably obvious that  
16 Dr. Kohut in his phraseology responded to the  
17 inquiry propounded by Mr. Schmieder, I agree that  
18 Dr. Kohut will be held to a higher standard if his  
19 opinion is to be admissible before the Jury. I  
20 disagree that if he says that is so that it is at  
21 material variance from the report. But let's  
22 see.

23 Dr. Kohut, do you have an opinion to a  
24 reasonable degree of medical probability about

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1           whether it is more likely than not that the  
2           administration of the pulmonary function test to  
3           Raymond Keeling on this day in 1994 with his blood  
4           pressure readings being what you understood them  
5           to be, do you have an opinion that it is more  
6           likely than not that the administration of that  
7           test caused or contributed to causing a  
8           perilymphatic fistula?

9           THE WITNESS: Yes, Your Honor.

10          THE COURT: Mr. Pritts, what is your  
11          objection to my question?

12          MR. PRITTS: That is not what he said here,  
13          Your Honor. What he says is, you've asked him did  
14          the pulmonary function test in his mind cause the  
15          blood pressure, cause the perilymph fistula.

16          THE COURT: No, I didn't ask him that. I  
17          asked him, I think I rephrased the second full  
18          paragraph on page 3 of his report.

19          MR. PRITTS: Well, I think --

20          THE COURT: Why don't you ask the question  
21          that you think should be asked.  
22  
23  
24

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VOIR DIRE EXAMINATION

BY MR. PRITTS:

Q I am Matt Pritts and I represent the railroad. We have never been introduced. Doctor, in your opinion, in your expert witness report which we got last week, you talk about the blood pressure Mr. Keeling had that day.

A Yes.

Q Now, it's not your opinion, is it, in your report, didn't you, and this is signed by you, was this report prepared by you or by Mr. Schmieder?

A That was prepared by me. Mr. Schmieder had sent me something that sort of summarized what he had discussed and asked me to edit it and then add what I thought would be pertinent. And so I did. And then sent it back to him and there was, we discussed it, and there was one word that he suggested be changed and it was a "that" be changed to a "this." Okay? It was a grammatical point, trivial. So I prepared that.

Q So the first draft of this was drafted by Mr. Schmieder who sent it to you?

A No, the first draft, the suggestions were drafted by Mr. Schmieder. He sent to it me and said, "Is

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1       this what you told me? If it is, is this a proper  
2       statement, make any corrections you want and any additions  
3       that you want."

4               Q       Did you work from that draft?

5               A       Then I worked from that draft that was in  
6       essence a summary of what we discussed.

7               Q       Do you have your report in front of you?

8               A       I don't think so.

9               Q       Let me direct your attention to this  
10      paragraph on page 3.

11              A       Okay.

12              Q       Did you not say --

13              A       I have 5.

14              Q       Page 3, bottom right-hand, the paragraph  
15      that begins, "Diastolic pressure can affect the mean  
16      venous pressure."

17              A       Yes.

18              Q       Did you not report there that the blood  
19      pressure in excess of some numbers, and at later pressure  
20      of 158 over 102 at rest with the addition of pulmonary  
21      function test in your opinion to a reasonable degree of  
22      medical certainty might or could have contributed to the  
23      development of Mr. Keeling's perilymph fistula?

24              A       Yes.

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1           Q       Is that going to be your testimony, it  
2 might or could have contributed?

3           A       The diastolic pressure?

4           Q       Listen to my question. But all of these  
5 things might or could have contributed in your mind?

6           A       Now, if you are asking if I can say  
7 absolutely, on an absolute point of reference, it has to  
8 be might or could have. If you are asking --

9           Q       Well, that is what I am asking.

10          A       In an absolute, so I have divine insight?

11               THE COURT: If you can't say it absolutely,  
12 to what degree of certainty beyond might or could  
13 can you say it?

14               THE WITNESS: Yes, it was quite likely, I  
15 mean, yes, it did cause it with medical certainty,  
16 of the degree of medical certainty that we humans  
17 have.

18               MR. PRITTS: Your Honor, what he said  
19 here --

20               THE COURT: Okay. We can argue that  
21 without Dr. Kohut being present.

22               THE WITNESS: That was on a point of,  
23 absolute point of reference. You know, not a  
24 medical certainty point of reference.

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1 BY MR. PRITTS:

2 Q Well, you are saying it is possible that  
3 this contributed, the pulmonary function test, the blood  
4 pressure in conjunction with the pulmonary function test,  
5 it is possible that that contributed to the development --

6 A Using an absolute, you know, point of  
7 reference. If you want to medical certainty, which is  
8 never absolute, then it did with medical certainty. With  
9 an absolute point of reference, it might have.

10 Q . Might have?

11 A That is an absolute. That would be  
12 somebody had the absolute answer, and we never have that  
13 clinically, the absolute answer.

14 Q What I am asking you is, you didn't state  
15 here in this report to an absolute degree of absolute  
16 reference. You said, did you not, that the blood pressure  
17 at the level shown in this paragraph, at rest with the  
18 addition of the pulmonary function might or could have  
19 contributed to the development of the fistula?

20 MR. SCHMIEDER: I would like to just  
21 object. He has expressed his opinion. Maybe poor  
22 phrasing.

23 THE COURT: We are out of the Jury's  
24 presence and I will give Mr. Pritts appropriate



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1 latitude.

2 THE WITNESS: I think I did. If that is  
3 what you are saying that is what I tried to  
4 express.

5

6 BY MR. PRITTS:

7 Q And you stand by what you wrote in your  
8 report there?

9 A Yes, unless it contradicts -- whatever. I  
10 am not a legal person. I am a doctor. I believe that --

11 Q Doctor, do you stand by your report?

12 THE COURT: Mr. Pritts, one voice at a  
13 time. And Doctor, if you will try to watch the  
14 lawyer for signals that he is trying to break in.  
15 Thank you.

16

17 BY MR. PRITTS:

18 Q My question was do you stand by what you  
19 wrote in your report?

20 A Yes.

21 MR. PRITTS: Your Honor.

22 THE COURT: All right. Are you finished  
23 with any questions you want to ask the Doctor?

24 MR. PRITTS: That is what I was going to

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1 ask you. I think that right there is something  
2 that in my opinion that is enough that the whole  
3 blood pressure issue, strikes that.

4 But if the Court is disinclined to rule  
5 that way, I think I need to, this may be a good  
6 time to go into the foundation for some of his  
7 other opinions.

8 THE COURT: I think you should go into the  
9 foundation for some of his other opinions and make  
10 whatever record we are going to make.

11

12 BY MR. PRITTS:

13 Q Doctor, let me ask you a question: In your  
14 report, you say there was a likelihood of very, and how do  
15 you pronounce this, "labile" blood pressure?

16 A Yes.

17 Q Is that how to pronounce "labile"?

18 A Yes, it will be up and down. That was sort  
19 of demonstrated.

20 Q Labile pressure means unstable?

21 A Right.

22 Q How much does a blood pressure, in your  
23 medical training, were you taught a blood pressure has to  
24 fluctuate to be called labile?

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1           A       There is not an absolute value, but a  
2       significant amount, 50 degrees, 50 millimeters of mercury  
3       is certainly significant.

4           Q       Fifty, you would say 50 millimeters would  
5       be significant?

6           A       Maybe, you know, 50 millimeters as was  
7       here, was demonstrated a labile hypertension, systolic.

8           Q       Let me make sure I understand this. It is  
9       your opinion and you are basing your opinion that he had,  
10      it is your opinion that he had very labile blood pressures  
11      on the day in question?

12          A       Yes, sir.

13          Q       And you are basing that on the assumption  
14      that there was a 50 point increase or decrease?

15          A       A little bit less than 50, 40 millimeters  
16      of mercury systolic.

17          Q       Okay. So what were you assuming his  
18      systolic pressure was the first time his blood pressure  
19      was tested?

20          A       I am assuming it was 200 or over as was  
21      reported, whose name escapes me now, the deposition of the  
22      technician, I think that is where I read it, that his,  
23      though he didn't write it down, it was a recollection that  
24      it was someplace over 200 and something over 115.

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1           Q       And it's important to your opinion that  
2       that assumption that the blood pressure was 200, systolic  
3       blood pressure was 200 and dropped to 158?

4           A       That is important in terms of my statement  
5       regarding it being labile. Important to venous pressure  
6       more than diastolic.

7           Q       That is a different question. Well, what  
8       are you assuming the diastolic pressure was in the first  
9       reading; you are assuming the systolic was 200 or over?

10          A       . I think it was reported by one of the  
11       techs, it was 115 or something.

12          Q       So it is your assumption that the systolic,  
13       the systolic was 200 and diastolic was 115 on the first  
14       blood pressure reading?

15          A       I think it was a little over 200.

16          Q       How much does the change in the diastolic  
17       pressure have to be from one measurement or another to be  
18       considered labile in your medical training?

19          A       His, in general?

20          Q       Yes.

21                 THE COURT: In absolute terms, if there are  
22       any.

23                 THE WITNESS: In absolute terms, Your  
24       Honor, I would think something like 20, 30

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1 millimeters of mercury. Some people get a  
2 significance there if his diastolic pressure did  
3 not decrease very much.

4  
5 BY MR. PRITTS:

6 Q But let me ask you this: So just to make  
7 sure I have that right, you think 50 millimeters, 50 point  
8 drop on the systolic has to be that much before you  
9 consider that a significant increase or decrease in the  
10 blood pressure?

11 A Yes. Please don't misunderstand me. I am  
12 not trying to debate the question. It would depend on the  
13 situation. Significant in who? Significant in an  
14 otherwise healthy person, significant in a person that has  
15 fragile vascular, significant in a person with a mitral  
16 valve insufficiency, significant in a person with  
17 hemorrhage going on?

18 Q In this person, Mr. Keeling didn't have any  
19 of those conditions, did he?

20 A No, I don't think so. I think 50 would be  
21 significant in Mr. Keeling at that time.

22 Q Well, if you -- okay. So you don't know  
23 what the initial blood pressure reading of Mr. Keeling  
24 was, do you?

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1           A       As I understand, it was not recorded but it  
2 was reported.

3           Q       What is your assumption that this first  
4 reading was?

5           A       Well, the assumption I am going on is what  
6 was reported.

7           Q       Okay.

8           A       Not recorded. And the, it was something  
9 200, 200 and something, and it was a diastolic of 115,  
10 that is what I recall.

11                   THE COURT: Do you know where that was  
12 reported?

13                   THE WITNESS: It wasn't recorded in the --

14                   THE COURT: I understand.

15                   THE WITNESS: At the time of the pulmonary  
16 function test. If I recall correctly, it was  
17 reported in some document by one of the  
18 technicians doing the test, that did the test.  
19 There were two technicians there involved with  
20 doing the testing.

21

22 BY MR. PRITTS:

23           Q       Now, based upon that assumption that it  
24 was, his blood pressure initially was 200 over 115,

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1       that's, that assumption is upon which you base your  
2       opinion as expressed in your report that he had a blood  
3       pressure that was fluctuating?

4               A       Labile.

5               Q       Too much that day?

6               A       Yes. Yes, I saw that. That is a  
7       significant drop.

8               Q       Okay. Now, what if the blood pressure  
9       reading, initial blood pressure reading was 158 over 110  
10      and it dropped from, to 158 over 102, would that be a  
11      significant, that wouldn't be a significant drop?

12              A       Yes -- no. A significant drop or  
13      significant blood pressure?

14              Q       A significant drop, would it?

15              A       From 158 to 152?

16              Q       158 over 110 to 158 over 102; that would  
17      not be a significant drop, would it?

18              A       The significance would be that the  
19      diastolic pressure didn't drop much, so that would, the  
20      significance would be the inverse. If you are talking  
21      about -- no, that would not be a significant drop in terms  
22      of pressure readings.

23              Q       Fair enough.

24              A       But it might be significant medically.

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1           Q       In your report you identified the materials  
2       that you reviewed in this case, the deposition of  
3       Dr. Hippensteel, Dr. May, Linda Thacker, Aaron Davis, Jim  
4       Suedmeyer and the Norfolk Southern Maneuver Protocol?

5           A       Not the written copy of Dr. May. I just  
6       asked, I only had an opportunity to ask for a report.  
7       I've not seen the written copy of Dr. May.

8           Q       So you have not reviewed a copy of Dr. May;  
9       you had someone explain to you what Dr. May said?

10          A       Yes.

11          Q       That was Mr. Schmieder?

12          A       Yes, because I called him for that.

13          Q       Let me ask you, you haven't read  
14       Mr. Keeling's deposition in this case?

15          A       No.

16          Q       And you haven't looked at the Lewis-Gale  
17       emergency room medical records, have you?

18          A       I don't recall having seen the medical  
19       records, but I specifically, but I do recall seeing that  
20       his blood pressure, there were three blood pressures taken  
21       at the emergency room.

22          Q       Where did you get this information?

23          A       I think it was in one of the depositions.

24          Q       Okay. Whose deposition was that, do you



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1 recall?

2 A I can't recall, I am sorry. But there were  
3 three blood pressures taken.

4 Q It is on the first page of your report if  
5 you want to look at that. There are actually five on  
6 there, are there not?

7 A Yes, I recall three but there were five.

8 Q The last four blood pressures were taken  
9 over a 28-minute period, were they not?

10 A . It looks like.

11 Q And diastolic blood pressure there?

12 A 104, 107.

13 Q 109, 105, 104, 107 and 104, correct?

14 A Yes, sir.

15 Q Would you agree that that is not an  
16 unstable diastolic number?

17 A No. It is high.

18 Q Unstable. I am talking about not whether,  
19 in your opinion it is high or not, is that an unstable  
20 number fluctuating widely?

21 A No, it is not fluctuating widely.

22 Q Did your opinion that you are going to, are  
23 you basing your opinion on an assumption as to what  
24 Mr. Keeling's blood pressure was at the time he started to

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1 take the pulmonary function test?

2 A Something raised his venous pressure. And  
3 the diastolic pressure can be a great contributor to the  
4 mean venous pressure. And if you add to a mean venous  
5 pressure, and I am trying to answer your question, I am  
6 trying to be very specific, if you add a Valsalva or  
7 Valsalva-like maneuver, which is necessary in a forced  
8 vital capacity, component of the pulmonary function test,  
9 if you add that, the venous pressure is going to go up.

10 Q My question was do you have an opinion as  
11 to what, and you are basing your opinion on some  
12 assumption as to what his blood pressure was at the time  
13 he started to take that test, this is after he was  
14 measured 158 over 102 and then began to take the test.

15 Are you basing your opinion, and it looks  
16 like you are in your report, upon what that blood pressure  
17 was at that time?

18 A Yes.

19 Q What was it?

20 A What was it at that time that he took the  
21 test?

22 Q Yes.

23 A The blood pressure was something 158 or  
24 something, retake 158 over 102.

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1           Q       That is your assumption what the blood  
2       pressure was when he started to take the test?

3           A       When he took the testing, right, when he  
4       started to take the test, right.

5           Q       Now, you are not an expert on pulmonary  
6       function tests, are you?

7           A       No, not an expert, but I know the essential  
8       components of it.

9           Q       Would you agree that the body has a  
10      mechanism, an internal mechanism where the spinal fluid  
11      pressure is autoregulated and that a hypertension,  
12      long-term hypertension is going to be autoregulated by  
13      the --

14          A       Of, the spinal fluid pressure?

15          Q       Yes, sir.

16          A       Spinal fluid pressure is going to be not  
17      necessarily raised unless there is an absorption of, to  
18      any dangerous point. It will be raised a bit. That is  
19      why we have the range. The mean spinal fluid pressure  
20      will be affected by the blood pressure and counter-  
21      affected by the absorptive mechanism. If they are in  
22      balance, it is going to work out so that nature is  
23      protecting the individual.

24          Q       There is no evidence that Mr. Keeling had

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1       some absorption problem in his central or that mechanism  
2       that you know of?

3               A       Not that I know of.

4               Q       Well, I guess my point is that your blood  
5       pressure could be 120 over 80 and cerebral spinal fluid is  
6       going to be around 10, isn't it?

7               A       As I recall, yes.

8               Q       Do you have any reason to disagree with  
9       that?

10              A       . No.

11              Q       But your blood pressure could be 150 over  
12       110 and your cerebral spinal fluid is going to be around  
13       10?

14              A       Maybe. I don't know what the range is for,  
15       but I know the mean venous pressure. The spinal fluid and  
16       perilymphatic pressure will vary, be raised. If there is  
17       a mean diastolic pressure, it will be raised. Now, does  
18       it raise it to the point of being dangerous?

19              Q       You don't know that?

20              A       That I don't know. But I would think not.  
21       Because otherwise, people with high blood pressure will be  
22       walking around with brain compression type of symptoms.

23              Q       They are not, are they?

24              A       No, they are not.

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1           Q       And would you agree that you don't know  
2       that if the administration of a pulmonary function test is  
3       done properly that that can cause an individual to  
4       experience the symptoms of a fistula?

5           A       What I do know is that it will raise the  
6       venous pressure very significantly. If the person is in  
7       that group that is at risk for developing a fistula, it  
8       would do it.

9           Q       Well-- do you remember having your  
10       deposition taken in this case?

11          A       Yes, vaguely.

12                 THE COURT: Are we still going to the  
13       admissibility of the evidence, Mr. Pritts?

14                 MR. PRITTS: I think that his, if the  
15       question is is this reliable testimony, has this  
16       threshold been shown in the assumption that we've  
17       already covered -- but this is another thing if he  
18       is changing his opinion and he said he didn't know  
19       back then and he does, it goes to the  
20       reliability.

21                 THE COURT: Let me see if I can. When  
22       scientific evidence is altered, the Court must  
23       make a threshold finding of fact with respect to  
24       reliability of the scientific method offered,

1           unless it is of a kind so familiar and accepted as  
2           to require no foundation to establish the  
3           fundamental reliability of the system, such as  
4           fingerprint analysis, or unless it is so  
5           unreliable that the considerations requiring its  
6           exclusion have ripened into rules of law such as  
7           lie detector tests or unless its admission is  
8           regulated by statute such as blood alcohol test  
9           results, Spencer v. Commonwealth 240 Va. 78 at 97,  
10          339 S.E. 2nd 609, cert. denied, 498 U.S. 908, 112  
11          Lawyers Edition 2nd 235, 111 S.Ct. 281, 1990,  
12          citations omitted.

13                 That is, as I said, in my view three years  
14          before Daubert. The expression of the Daubert  
15          standard of reliability of the scientific method  
16          employed by the doctor is not, I think, at issue.  
17          The reliability of the information opinion which  
18          he relied may be. But I am not sure where you are  
19          going with the next series of questions, but it  
20          seemed to me that you were engaging in cross-  
21          examination.

22                 MR. PRITTS: The reason is because in his  
23          deposition he said he did not know that the  
24          administration of a pulmonary function test done

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1 properly can cause an individual to experience the  
2 symptoms of fistula. Now he says it does.

3 I think that this is the scientific method,  
4 and given the circumstances of this case,  
5 certainly a pulmonary function test causing a  
6 fistula is not something that is accepted like a  
7 lie detector test or fingerprint analysis or  
8 something.

9 THE COURT: Doctor, given what you've just  
10 heard, have you changed your opinion?

11 THE WITNESS: You mean do I think that the  
12 component of perilymphatic test, that is pulmonary  
13 function test can contribute and cause this?

14 THE COURT: It is asserted that you  
15 testified previously that you did not know that  
16 the administration of a pulmonary function test  
17 could cause a perilymphatic fistula. Is that an  
18 accurate statement of your previous testimony, not  
19 the report that Mr. Pritts will show you.

20

21 BY MR. PRITTS:

22 Q Page 65 line 2. Were you not asked this  
23 question, "So assuming that a test is administered  
24 properly, that, in itself, could cause an individual to

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1 experience the symptoms of a fistula?"

2                   Wasn't your answer, "I don't know, I don't  
3 know. But if an examination is proper -- well, I can't  
4 tell you about that. I know with the pulmonary function  
5 test, you're supposed to get all of that air out that you  
6 can so that they can measure the capacities of the lung.  
7 It can be pretty strenuous." That was your answer, wasn't  
8 it?

9                   A       Yes, I don't think that that is a change in  
10 my opinion. I think it is a change in analysis as I  
11 thought of this. This can be pretty strenuous. That was,  
12 those were the key words that I said. That in my opinion,  
13 looking back, do I know it can be pretty strenuous?

14                   Q       Are you agreeing with me nobody has ever  
15 looked at this issue to determine whether hypertensives  
16 are more prone to get a perilymphatic fistula?

17                   A       Hypertensives, no, no one has looked to see  
18 if that, by chart review, it would be very complex and I  
19 think only, it would be very complex; but it does mean  
20 that the venous, mean venous pressure was up.

21                   Q       There is no study that says that  
22 hypertensive people doing things, certain things, are more  
23 likely to get a fistula. No study that says that. Do you  
24 agree with that?



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1           A       No, there is no, the causes of  
2           perilymphatic fistula remain anecdotal.

3                   THE COURT: Are there any studies that  
4           relate perilymphatic fistulas and blood pressure  
5           in any way?

6                   THE WITNESS: No, sir. Perilymphatic  
7           pressure, though --

8                   THE COURT: Are there studies that relate  
9           perilymphatic pressure and perilymphatic  
10          fistulas?

11                   THE WITNESS: Yes.

12                   THE COURT: Do those studies tell you  
13          anything about the relationship between  
14          hypertension and perilymphatic fistulas?

15                   THE WITNESS: Only looking at a series of  
16          studies where one affects the other element, Your  
17          Honor, and that element affects perilymphatic  
18          pressure. Only through the cascade of information  
19          from a series of studies would allow one to come  
20          to that. That would be the only data you would  
21          have to come to a conclusion. There was none  
22          answering that specific hypothesis, Your Honor.

23                   THE COURT: Have you relied upon studies  
24          that you can identify to extract data to use in

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1 reaching any conclusion you have reached in this  
2 case?

3 THE WITNESS: Yes. Do you want me to  
4 mention?

5 THE COURT: Have you previously discussed  
6 these or revealed these?

7 THE WITNESS: No, no, I just know of them.  
8 And I used these in my intellectual process. Not  
9 discussed them regarding this specific case that I  
10 can recall, anyway.

11

12 BY MR. PRITTS:

13 Q You've never before heard of a patient  
14 getting fistula from a pulmonary function test?

15 A No, sir.

16 Q Even though thousands of them are done  
17 every day?

18 A Um-um.

19 Q And --

20 A I can qualify that answer in that, in that  
21 others say they haven't seen it. Did they have people  
22 that are focused on pulmonary function test? I qualify  
23 that by saying there are no longitudinal follow-up. It  
24 may be there. There is a 40-percent chance of spontaneous

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1 healing. You have a 40-percent chance of, if one develops  
2 a perilymphatic fistula, I find that 40 percent of them  
3 self heal.

4 Q So they can come from a cough or sneeze,  
5 perilymph fistulas?

6 A Yes.

7 Q And they can self heal?

8 A Yes.

9 Q Nobody has ever done any longitudinal  
10 studies to say that perilymphatic fistulas have anything  
11 to do with hypertension?

12 A No. As I have explained to you, there are  
13 so many anecdotal causes, apparent causes, but the  
14 fundamental change that each of those anecdotal causes, in  
15 each of these anecdotal causes is a rise in venous  
16 pressure, okay?

17 Q And perilymph fistula can occur  
18 spontaneously, can't it?

19 A Nothing occurs spontaneously, not even  
20 spontaneous combustion. By spontaneous, if you use  
21 idiopathically with no identified specific cause, then you  
22 would say -- you use the term "idiopathic" here, not  
23 spontaneous.

24 MR. PRITTS: Fair enough.

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1 THE COURT: The answer is yes if you use  
2 the term "idiopathic," correct, sir?

3 THE WITNESS: Yes. Yes, sir.

4 THE COURT: Dr. Kohut, if you assume that  
5 hypothetically a person with Raymond Keeling's  
6 history had a blood pressure test, and that that  
7 blood pressure test resulted in a reading of  
8 either greater than 200 over 115 or greater than  
9 200 over 110, and if you assume that he had a  
10 later pressure of 158 over 102, I will ask counsel  
11 if that is the number I should be using.

12 MR. PRITTS: That is the number in the  
13 report, Your Honor.

14 THE COURT: All right. And if you assume  
15 simply that he had a later pressure that was not  
16 greater than 200 over 110, but you do not know  
17 what that later pressure was, are you able to  
18 reach a conclusion that it is more probable than  
19 not that administration of a pulmonary function  
20 test contributed to causing a perilymphatic  
21 fistula?

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: And your answer is that it is  
24 more probable than not?

1 THE WITNESS: Yes, sir.

2 THE COURT: So is it in any way essential  
3 to your opinion to actually know what the second  
4 blood pressure reading was or what the first blood  
5 pressure reading was beyond the fact that it was  
6 more than 200 over 110?

7 THE WITNESS: No, I don't need the exact  
8 figure, because that was an alarming figure for  
9 many reasons, not only perilymphatic fistula.

10 THE COURT: And the basis for your opinion  
11 that administration of a pulmonary function test  
12 probably contributed to causing perilymphatic  
13 fistula is in a nutshell?

14 THE WITNESS: The forced expiratory  
15 component where the person is straining to get out  
16 that last little bit of air and that causes the  
17 equivalent or causes a Valsalva-like response of  
18 the body.

19 THE COURT: Within your background,  
20 training and experience, are you aware of what the  
21 standard of care in 1994 in the Commonwealth of  
22 Virginia was for administration of pulmonary  
23 function tests?

24 THE WITNESS: In the Commonwealth in

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1           general, no, sir.

2           THE COURT: Are you aware of whether there  
3           was a generally-accepted national standard?

4           THE WITNESS: I am not aware.

5           THE COURT: Can you testify within your  
6           background, knowledge and experience whether in  
7           your opinion to a reasonable degree of medical  
8           probability testing blood pressure at all was a  
9           prerequisite to administration of a pulmonary  
10          function test?

11          THE WITNESS: Oh, yes. Knowing the  
12          straining that one has as a component of pulmonary  
13          function evaluation, I would think this would be a  
14          necessary additional measure.

15          THE COURT: Within your -- now, you were  
16          actively on the teaching faculty in 1994 and  
17          practicing regularly?

18          THE WITNESS: Oh, yes.

19          THE COURT: Within your experience in the  
20          scope of your practice and your knowledge of the  
21          literature at that time, rather than saying you  
22          would think it is, do you know whether, in fact,  
23          prudent medical practice for the administration of  
24          a pulmonary function test by a technician mandated

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1           taking blood pressure, measuring blood pressure  
2           before the test was given?

3           THE WITNESS: Did I know in 1994 whether or  
4           not --

5           THE COURT: Whether or not the standard of  
6           care for administration --

7           THE WITNESS: Was taking blood pressure,  
8           no, I did not know, but I would hope so, Your  
9           Honor.

10          THE COURT: So it is your, but it is your  
11          opinion that whether or not that was prudent  
12          practice if, tell me, I don't mean to put words in  
13          your mouth. I believe I understand that it is  
14          your opinion that once a blood pressure reading of  
15          200 over 115 was obtained, then the pulmonary  
16          function test should not have been administered?

17          THE WITNESS: Yes, sir. That's exactly  
18          right. I would hope that for me or anybody else  
19          that that prudence would be exercised.

20          THE WITNESS: And the answer is the same if  
21          it is 220 over 110?

22          THE WITNESS: Yes, sir.

23          THE COURT: And is it your opinion to a  
24          reasonable degree of medical probability that

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1 administering a pulmonary function test after  
2 having obtained a blood pressure reading of 200  
3 over 110 or greater, without regard to resting  
4 periods, without regard to what later measurement  
5 might be obtained, deviated from the standard of  
6 care for the administration of a pulmonary  
7 function test to an individual?

8 THE WITNESS: Yes, sir. I think that that  
9 is a heralding blood pressure, it is alerting. I  
10 think once you have that, you know it can be that,  
11 and you know it has the possibility of being  
12 more. That would be alarming and should be  
13 referred to a physician for care without delay.

14 THE COURT: Did you ever teach respiratory  
15 therapists about administration of PFT's?

16 THE WITNESS: No.

17 THE COURT: Did you teach physicians about  
18 the administration of PFT's?

19 THE WITNESS: Did I teach, no, sir. I  
20 didn't have that as a component of my curriculum  
21 that I taught.

22 THE COURT: Did you order PFT's in the  
23 course of your clinical practice?

24 THE WITNESS: Yes, sir.



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1                   THE COURT: Did you have any involvement in  
2                   what protocols were followed by or what  
3                   instructions were given to the persons who  
4                   administered those tests?

5                   THE WITNESS: No, I trusted the protocol of  
6                   the pulmonologist.

7                   THE COURT: Do you have any knowledge of  
8                   whether those protocols addressed blood pressure?

9                   THE WITNESS: No, sir.

10                  THE COURT: Thank you, Doctor.

11                  THE WITNESS: I would hope so.

12                  THE COURT: I understand that. Are there  
13                  any other questions to ask Dr. Kohut out of the  
14                  Jury's presence?

15                  MR. SCHMIEDER: I have one.

16                  THE COURT: There may be argument to be  
17                  made, but is there anything to ask Dr. Kohut?

18

19                               VOIR DIRE EXAMINATION

20

21                  BY MR. SCHMIEDER:

22                   Q           The only question that I would ask  
23                  Dr. Kohut, if you refer to your report here, Doctor?

24                   A           This one?

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1           Q       And Doctor, I guess the question is if you  
2 look at that paragraph and if I approach the witness, if  
3 you would --

4           A       At which page?

5           Q       Bottom of page 3, okay. If you struck out  
6 the words "might have," "could," can that question still  
7 be answered, and I think you have; is that correct?

8           A       Yes.

9           THE COURT: Yes, he has.

10          MR. SCHMIEDER: That is all I have.

11          THE COURT: It is now a quarter to 1. The  
12 Jury is supposed to come back at 1:15. I am going  
13 to say the same thing I said yesterday. The court  
14 reporter ought to have time to eat lunch and so  
15 should the witness. Whatever time we have, we  
16 will now recess planning to start back at 1:30.  
17 And I would like to see counsel in chambers for  
18 just a brief minute or two after any personal  
19 comfort stops necessary. Sheriff, stand in  
20 recess.

21

22                   (The Noon Recess was taken. Following the  
23 Recess, the Parties returned to the room and the  
24 Trial continued.)

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1 THE COURT: We are again in session,  
2 parties and counsel are present. The witness is  
3 on the witness stand. Before the jurors return to  
4 the courtroom, do you have an objection to make or  
5 motion to make based upon the assertion that there  
6 is a variance between the expert report and the  
7 testimony Dr. Kohut has indicated it will be,  
8 reserving your right to make your motions later?

9 MR. PRITTS: Between the variance, Your  
10 Honor, first of all, before -- I do want to make  
11 an argument and I would ask that the witness be  
12 excluded from the argument.

13  
14 (Dr. Kohut left the courtroom.)

15  
16 THE COURT: I had a particular question.

17 MR. PRITTS: I am sorry, would you repeat  
18 your question?

19 THE COURT: Are you ready to say at this  
20 point based on what Dr. Kohut has said, all right,  
21 that without regard to anything else of perceived  
22 variance between what he said on page 3 and what  
23 he will testify, is enough that you want to have a  
24 mistrial and come back more and better prepared?

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1 MR. PRITTS: Well, Your Honor, I think we  
2 are a little hamstrung at this point because I  
3 don't know what else he is going to say and I  
4 don't know what your ruling is going to be. I  
5 agree, I don't think I have had adequate  
6 opportunity to do discovery.

7 THE COURT: I will reserve your right to  
8 make that motion after he says it if he does.  
9 What else do you want to say now?

10 MR. PRITTS: Well, briefly, Your Honor, I  
11 would like to say, one basis. I think to have him  
12 vary from what he said on page 3 where this blood  
13 pressure and pulmonary function test might or  
14 could have contributed to the development of  
15 fistula --

16 THE COURT: Moving on beyond that one.

17 MR. PRITTS: The other thing, based on the  
18 Virginia case law about opinion testimony based on  
19 facts not in the record and assumptions not in the  
20 record and based on they have a threshold duty --  
21 I don't have the duty to disprove the reliability  
22 of the witness. They haven't put forth evidence  
23 to prove the reliability of the witness.

24 The doctor clearly said, there is no doubt,

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1           he interprets the facts in this case that there  
2           was a significant increase and rise and lowering  
3           of blood pressures and the blood pressures were  
4           unstable. Given that fact, that the pulmonary  
5           function test shouldn't have been given.

6                     He has admitted that his assumption was  
7           that the initial blood pressure was 200 over 110  
8           or 115, both of those numbers being that high; and  
9           that a significant lowering would have to be on  
10          the systolic number, I think he said about 50  
11          points, and on the diastolic 20 to 30 points.

12                    There is no basis in the record, and that  
13          is not a fact in the record, and it is an  
14          assumption. It is an inference based on an  
15          inference, which I think is in violation of  
16          Stover.

17                    The evidence in the case can't be anything  
18          other than it is possible that that first blood  
19          pressure reading was 158 over 110, which given all  
20          the other evidence in the record, would have made  
21          it a situation where they wanted to sit the  
22          patient down and retake his blood pressure.

23                    For him to say he is basing his opinion on  
24          it is 200 and over 115, and there is a significant

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1 drop and a significant lowering, it is clear in  
2 his report, Your Honor -- do you have a copy of  
3 his report?

4 THE COURT: Yes, sir.

5 MR. PRITTS: He talks about the bottom of  
6 page 2, the doing of the pulmonary function test  
7 will add the effect of the stress to the resting  
8 blood pressure. The mere fact that the blood  
9 pressure test was recorded at 158 over 102 at rest  
10 one would expect the blood pressure to increase  
11 during stress, which would have included the doing  
12 of PFT, the initial, over the limit. He assumes  
13 both are over, with significant lowering at rest.

14 There is no evidence in this case there was  
15 significant lowering, by his definition of  
16 significant lowering, should have been alerting to  
17 the likelihood of very labile blood pressures.

18 That is an assumption that is based on  
19 facts not in evidence. That is what he is basing  
20 his opinion on. He goes on, it says, "It was ill-  
21 advised to give the pulmonary function test given  
22 those facts." So I just think, Your Honor, that  
23 the, that he has based his opinion on assumptions  
24 and facts not in the record.

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1                   He certainly, he has gone off and attempted  
2                   to bolster their case. They have got him into  
3                   something which is beyond his review of the  
4                   records, beyond his expertise. The questions that  
5                   you elicited from him, you know, he said he is  
6                   not, he is not aware of the standard of care in  
7                   Virginia in 1994 or generally-accepted national  
8                   standard. He doesn't teach this. He can't say  
9                   that there is any evidence in the literature about  
10                  a relationship between hypertension and the  
11                  development of the perilymph fistulas.

12                  I mean, the assumptions in the record  
13                  aren't there. The reliability showing under Kuhmo  
14                  Tire and Daubert and the Virginia test under  
15                  Spencer v. Commonwealth is not there. I don't see  
16                  that reliability shown. I don't think he can come  
17                  in and testify as to the cause of this fistula and  
18                  certainly cannot testify as to the blood pressure  
19                  in any way because it is based on speculation.

20                  He also testified that the causes of  
21                  perilymphatic fistula remain anecdotal.

22                  THE COURT: What is the factual basis upon  
23                  which Dr. Kohut's opinion testimony would be  
24                  based?

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1 MR. SCHMIEDER: Well, it would be on the  
2 factual testimony of the evidence that will be  
3 presented through Linda Thacker, Jim Suedmeyer and  
4 Aaron Davis insofar as establishing the various  
5 blood pressures that were recorded or not recorded  
6 on that date and what they have testified or will  
7 testify to in their deposition.

8 THE COURT: Has any of those persons at any  
9 time testified that Mr. Keeling's initial blood  
10 pressure reading was greater than 200 over 110,  
11 both the diastolic and systolic?

12 MR. SCHMIEDER: They have testified that  
13 Mr. Keeling's blood pressure had to be greater  
14 than 200 over 110 because they sat him down to  
15 rest.

16 THE COURT: Did they testify about whether  
17 a blood pressure reading in excess of either  
18 diastolic or the systolic would be enough to sit  
19 him down to rest?

20 MR. SCHMIEDER: That is correct, Your  
21 Honor.

22 THE COURT: They said --

23 MR. SCHMIEDER: Yes.

24 THE COURT: Is there any testimony or other



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1 evidence that allows as a bedrock assumption for  
2 Dr. Kohut's opinion the conclusion that both,  
3 diastolic and systolic, were as Dr. Kohut  
4 indicates, over 200 over 110?

5 MR. SCHMIEDER: There is none that I know,  
6 but I don't think his testimony is limited to that  
7 extent.

8 THE COURT: Is there any evidence at all  
9 about what the reading on the second blood  
10 pressure test was other than testimony that it  
11 must have been within the threshold established by  
12 the railroad?

13 MR. SCHMIEDER: There is, yes. There is  
14 testimony that the second blood pressure reading,  
15 which was the one that they recorded, was 158 over  
16 102.

17 THE COURT: Did Dr. Kohut have that  
18 information?

19 MR. SCHMIEDER: Yes, he did, Your Honor.

20 THE COURT: Whose testimony is that?

21 MR. SCHMIEDER: That is, I think both Aaron  
22 Davis and I think it is Jim Suedmeyer. It is also  
23 written on a document, too, Your Honor.

24 THE COURT: You agree that that is the

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1 evidence, Mr. Hagie?

2 MR. HAGIE: Yes, Your Honor.

3 THE COURT: Is the trier of fact, well, let  
4 me phrase that differently. When Dr. Kohut says  
5 the conclusions he draws are based upon many, many  
6 studies, the cross-examiner is entitled to know  
7 what those studies are and what particular  
8 supporting basis there is for those studies, is he  
9 not?

10 MR. SCHMIEDER: Well, I think he is  
11 entitled to know, and we did provide the studies.

12 MR. PRITTS: They didn't.

13 MR. SCHMIEDER: The publications, I gave  
14 you the list of the publications.

15 MR. PRITTS: That is not what, there was  
16 never any provision of the studies to us as  
17 required under rules of court as required under  
18 the discovery, which we gave. They gave us a list  
19 of 73 articles seven days before trial, some of  
20 which are written in German and, Your Honor --

21 THE COURT: Any problem with that as what,  
22 you can get somebody to translate it from German  
23 to Russian and Mr. Hagie can read it.

24 MR. PRITTS: If it was in Russian it would

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1 be a different story. But we never got to the  
2 articles. And this is in conjunction with his  
3 testimony in the deposition, no one ever studied  
4 this before. And then they gave us a list of 73  
5 articles which they say show a relationship  
6 between hypertension and perilymphatic fistulas,  
7 blood pressure and perilymphatic fistulas. On the  
8 stand Dr. Kohut said there aren't any articles. I  
9 think he is talking about articles that talk about  
10 cranial pressures.

11 I don't think there is any showing in any  
12 of the articles that state what they allegedly  
13 stand for, Your Honor.

14 MR. SCHMIEDER: I was not going into  
15 articles. I was going to, not trying to bootstrap  
16 Dr. Kohut on those articles. I think that was  
17 something that was just asked of the doctor and he  
18 said outside the presence of the Jury.

19 THE COURT: The second paragraph of  
20 Virginia Code Section 8.01-401.1, of course,  
21 says, "The expert may testify in terms of opinion  
22 or inference and give his reasons therefore  
23 without prior disclosure of the underlying facts  
24 or data, unless the Court requires otherwise. The

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1 expert may in any event be required to disclose  
2 the underlying facts or data on  
3 cross-examination."

4 Is it correct that the pretrial order  
5 required disclosure in advance?

6 MR. PRITTS: It required disclosure, a  
7 standard expert witness disclosure language. I  
8 don't know if I have the pretrial order. I can  
9 pull it out, Your Honor. There was expert witness  
10 disclosure that was required many months ago and  
11 they identified Dr. Kohut and they said he is  
12 going to testify according to his medical records  
13 and his deposition.

14 This is, you could read his deposition  
15 backwards, forwards and upside down; that is the  
16 type of information that they are trying to get in  
17 here has not been disclosed. The articles were  
18 never disclosed to us.

19 MR. HAGIE: That was the purpose of the  
20 hearing we had also, not just the pretrial order,  
21 Your Honor.

22 THE COURT: Dr. Kohut -- Mr. Schmieder?

23 MR. SCHMIEDER: Yes, Your Honor.

24 THE COURT: Do you seek from Dr. Kohut

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1 testimony concerning negligence?

2 MR. SCHMIEDER: No.

3 THE COURT: You seek from Dr. Kohut only  
4 testimony concerning the proposition that there  
5 could be a causal link between administration of,  
6 between hypertension and pulmonary function test?

7 MR. SCHMIEDER: Causing perilymphatic  
8 fistula.

9 THE COURT: Causing perilymphatic fistula.

10 MR. SCHMIEDER: That is it, Your Honor.

11 MR. HAGIE: Judge, if I may, there was the,  
12 this Court's order that was entered on November  
13 1st, nunc pro tunc as of October 9th stated  
14 plaintiff's responses must be signed under oath  
15 and his response must identify and include any  
16 documentation that supports his contention the  
17 plaintiff's blood pressure has some relevance to  
18 the allegation that the administration of a  
19 pulmonary function test caused plaintiff to suffer  
20 a perilymphatic fistula.

21 Furthermore, unless my notes are wrong,  
22 what Dr. Kohut testified today was that no one has  
23 looked to see if hypertension, people with  
24 hypertension are more prone to perilymphatic

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1           fistulas, and he knows of no studies that relate  
2           perilymphatic fistulas and blood pressure.

3           THE COURT: Mr. Schmieder?

4           MR. SCHMIEDER: Two things. First of all,  
5           in that order I was asked to produce a report from  
6           Dr. Kohut by last Friday, which was done. Second  
7           of all, which is the report here. Second of all,  
8           this report tracks what was, what was basically  
9           spelled out what was in his deposition with regard  
10          to the hypertension and the causal connection in  
11          this matter.

12          Third thing is, Your Honor, a physician can  
13          come into Court, and he gathers the various data  
14          and information that he does, and then he tries to  
15          reach a reasonable conclusion based upon a medical  
16          certainty. And the mere fact that there is  
17          nothing out there reported doesn't mean that this  
18          cannot be to a medical certainty. That goes to  
19          its, as I see it, as to weight as opposed to  
20          admissibility.

21          The point I am trying to make, Judge, I can  
22          remember they used to give thalidomide to pregnant  
23          women. So if you look at this, the mere fact that  
24          the first woman that gives birth to a defective

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1 child, a doctor can't opine an opinion because  
2 there is nothing out there in the literature? I  
3 don't believe that is the law, Your Honor.

4 I think in this particular case he is  
5 saying based upon his medical training, based upon  
6 his knowledge of the venous pressure, based upon  
7 Valsalva, based upon all of this, what it takes to  
8 cause a perilymphatic fistula, that he has made a  
9 conclusion to a reasonable degree of medical  
10 certainty that it was related to both hypertension  
11 and to the pulmonary function tests.

12 THE COURT: Mr. Pritts?

13 MR. PRITTS: Your Honor, I take direct  
14 issue with the fact that the fact that there  
15 hasn't been something that studied this before the  
16 contention that only goes to the weight of the  
17 evidence. I mean, that's one of the standards  
18 under Kuhmo and Daubert, especially when dealing  
19 with scientific evidence like this. It is the  
20 telling factor right there.

21 And Your Honor, no one has read Mr.,  
22 Dr. Kohut's deposition more than I have, Your  
23 Honor. This stuff is not in the deposition, Your  
24 Honor. It is not in there where he talked about

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1           extremely fluctuating blood pressures. It is not  
2           there.

3                       When you ask him about the pulmonary  
4           function test, that is the quote I read, "The  
5           pulmonary function test, could that have, do you  
6           know whether or not that could have caused this,"  
7           he said, "I don't know. I don't know. There is  
8           straining but I don't know." And Your Honor, it  
9           is just, I know this is a treating physician, but  
10          when you go out and you start taking him off into  
11          areas much beyond what he treated this patient for  
12          and start treating him as a different witness and  
13          as a hired expert witness, you have got to  
14          disclose the information according to the orders  
15          and according to the discovery orders.

16                      THE COURT: As far as the "I don't know"  
17          answer, Dr. Kohut answered presumably as he will  
18          in the presence of the Jury, after those questions  
19          were asked, I thought about it. And I thought to  
20          myself, and he explained that. And if that were  
21          the only question, that would be for the Jury.

22                      Can Dr., has Dr. Kohut established that he  
23          has sufficient training, background and the  
24          experience to testify about the known and



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1                   suspected causes of perilymph fistulas?

2                   MR. PRITTS: I am not sure where he hasn't  
3                   already done that.

4                   THE COURT: I think he has.

5                   MR. PRITTS: Prior to the point where we  
6                   had to get into the area of objections.

7                   THE COURT: He has demonstrated that he has  
8                   sufficient background, experience, knowledge and  
9                   ability to relate blood pressure to perilymphatic  
10                  fistula.

11                  MR. PRITTS: No, I don't think so, Your  
12                  Honor. You are talking about arterial blood  
13                  pressure, it is a different thing than venous  
14                  pressure and the pressures he is talking about. I  
15                  haven't seen where he has laid that foundation at  
16                  all.

17                  THE COURT: Do you think he can?

18                  MR. PRITTS: I don't, I don't think so.

19                  THE COURT: Has he demonstrated that he has  
20                  the background, experience and training, et  
21                  cetera, to testify to how the mechanism involved  
22                  in a PFT, pulmonary function test, could implicate  
23                  the same reactions that might cause a fistula with  
24                  a sneeze or a cough?

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1                   MR. PRITTS: I don't think so, Your Honor,  
2                   I really don't. I think that there is a severe  
3                   gap into any of his knowledge of these pulmonary  
4                   function tests and the experience. I think it is  
5                   speculation. I think it's part of the speculation  
6                   as pointed out by the fact that he made so many  
7                   assumptions about the blood pressure of  
8                   Mr. Keeling.

9                   THE COURT: Mr. Schmieder?

10                  MR. SCHMIEDER: I must disagree, Your  
11                  Honor, because he has indicated here that a --

12                  THE COURT: May I ask the deputy to tell  
13                  the jurors that if they want to take a walk and  
14                  come back at a quarter to three?

15                  MR. PRITTS: What time?

16                  THE COURT: Quarter to three. Do you want  
17                  to make it later than that?

18                  MR. PRITTS: I don't know how much longer  
19                  we are going to argue this, but it is up to you,  
20                  Your Honor.

21                  THE COURT: Any objection, Mr. Schmieder?

22                  MR. SCHMIEDER: No, Your Honor.

23                  THE COURT: Please tell the jurors if they  
24                  want to stay that is fine. If they want to take a

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1 walk, be back at a quarter to 3. That is fine.  
2 Deputy Howell, would you ask Dr. Kohut to come  
3 back in, please.

4

5 (Dr. Kohut returns to the Courtroom.)

6

7 THE COURT: Before the afternoon is over, I  
8 am going to call you Mr. Schmieder. Doctor, will  
9 you please have a seat again on the witness  
10 stand. Mr. Schmieder, do you want to ask  
11 questions along the lines I have been discussing  
12 with counsel or would you like me to?

13 MR. SCHMIEDER: I would like you to, Your  
14 Honor, because I --

15 THE COURT: Does that suit, Mr. Pritts?

16 MR. PRITTS: Well, I think that --

17 THE COURT: The burden is on the plaintiff.

18 MR. PRITTS: The burden is on the  
19 plaintiff.

20

21 VOIR DIRE EXAMINATION

22

23 BY MR. SCHMIEDER:

24 Q Doctor, can I lay a foundation? Doctor, an

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1 issue has come up here about your knowledge with regard to  
2 blood pressure and hypertension and their affect on a  
3 perilymphatic fistula, whether it can cause a  
4 perilymphatic fistula.

5 A Yes, a cascade.

6 Q What do you mean? Well, first of all, do  
7 you have an opinion, is it to a reasonable degree of  
8 medical certainty or probability?

9 THE COURT: Before we get to the opinion,  
10 lay the foundation.

11

12 BY MR. SCHMIEDER:

13 Q Tell me, what is your background with  
14 regard to blood pressure hypertension as a medical doctor  
15 and as a professor; can you tell us what your knowledge  
16 consists of?

17 A As a physician first, one has to have  
18 general knowledge of all of the parameters of medical  
19 science. And when, and regarding hypertension, when  
20 something is at either extreme, very high or very low,  
21 every physician should be able to recognize this.

22 As far as treating it, that takes an  
23 expertise. You don't just give a hypertensive medicine,  
24 for instance. As far as looking to the etiology of a

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1 given hypertensive case, well, I could get that ball  
2 rolling in the right direction and then turn it over to a  
3 cardiovascular person or a nephrologist.

4 I would look to see -- so in terms of  
5 general parameters, now, in terms of hypertension, that's  
6 a general physician. Hypertension as it relates to the  
7 ear is, as far as we know, only related to the pressures  
8 of the perilymphatic system through the cerebral spinal  
9 fluid. And although there are alleged and often diagnosed  
10 so-called vascular accidents of the ear, there have only  
11 been two that have been documented as a cause.

12 One was "Basilar Artery Thrombosis"  
13 published by Harold Suneck and "AICA Thrombosis," which is  
14 an acronym of anterior inferior cerebral artery by Raul  
15 Hinojosa and myself.

16 THE COURT: Could you spell that?

17 THE WITNESS: H-I-N-O-J-O-S-A, R-A-U-L.

18 And so although there are allegations or even  
19 diagnoses that are made alleging a vascular  
20 accident of the ear because this person is  
21 hypertensive, none are documented except those two  
22 incidents. Then they take in other things.

23 So then there is, we've started in our lab,  
24 if I digress too much please correct me, all the

1 studies of the vascular of the inner ear when you  
2 look into them have been done using a contrast  
3 injection method. There have been no studies, so  
4 they say the big ones are arterials and little  
5 ones capillaries.

6 There have been no studies looking for the  
7 vascular, the changes in the muscular vasculature  
8 relative to hypertension in the inner ear. We  
9 have just embarked on that, my laboratory has.

10 THE COURT: Now, Doctor, right now --

11 THE WITNESS: Yes, sir.

12 THE COURT: In this case, we have no  
13 measurements of pressure in the inner ear,  
14 correct, sir, we have no measurements before  
15 this?

16 THE WITNESS: Not arterial end, only  
17 through the spinal fluid; and would there be an  
18 increase in perilymphatic pressures, yes, sir.

19 THE COURT: You are asked to give an  
20 opinion in the presence of the Jury about the  
21 probable causal relationship on hypertension,  
22 pulmonary function tests and fistula, correct?

23 THE WITNESS: Yes, sir.

24 THE COURT: What is there in your

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1 particular background and experience that we can  
2 point to, extract from the transcript, and say  
3 Dr. Kohut has the expertise, the background and  
4 experience to give an enlightened medical opinion  
5 about the probability that perilymphatic fistula  
6 is caused by a pulmonary function test when  
7 administered to someone with primary  
8 hypertension?

9 THE WITNESS: Okay. You want me to give  
10 that reasoning right now?

11 THE COURT: What I want you to give me is  
12 what is in your background.

13 THE WITNESS: Yes.

14 THE COURT: If these lawyers are in front  
15 of the Supreme Court of Virginia arguing Dr. Kohut  
16 doesn't have the expertise to give this opinion,  
17 what are they going to point to in the  
18 transcript?

19 THE WITNESS: So you want to know where  
20 that comes from. There are two associates, one at  
21 the laboratory at the University of Chicago,  
22 George Allen, and Cesar Fernandez, my mentor's  
23 laboratory, did a study relative to the increase  
24 or decrease of labyrinthine function relative to

1           perilymphatic pressure by way of raising the  
2           cerebral spinal fluid pressure.

3                   My laboratory director, that sounds  
4           progressive, my associate, who directs our  
5           laboratory in otolaryngology at the university,  
6           did a study in Iowa, where they raised, said, How  
7           much does it take to raise the spinal fluid  
8           pressure to cause even a, to cause, in fact, a  
9           rupture of the membrane. The knowledge base that  
10          rises in venous pressure affects the spinal fluid  
11          pressure -- remember, we have, the spinal fluid  
12          can affect the perilymphatic pressure. That  
13          venous pressure rise can affect the spinal fluid  
14          pressure rise is almost common knowledge in terms  
15          of the dynamics of the perilymphatic pressure.

16                   And that the diastolic pressure, sort of  
17          the back pressure, if you will, arterial pressure,  
18          causes a rise in the venous pressure is almost  
19          common knowledge.

20                   You know, it now -- have I done any  
21          experiments to show that a rise in diastolic  
22          pressure causes a rise in venous pressure, but no,  
23          but there are many, many studies out there through,  
24          and to just double check my conclusions based on



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1           what I thought was a cascade of knowledge of facts  
2           I called and asked Dr. Rudy Thalmann, who is sort  
3           of a super expert at fluid dynamics in the ear,  
4           and asked Dr. Thalmann, T-H-A-L-M-A-N-N, if he had  
5           any challenging words to my line of thinking. And  
6           he said no.

7                     He said, in fact, he had many -- so I  
8           wanted to challenge my own line of thinking. He  
9           had a series of experiments, that the data from  
10          each when collated or put together, allows only  
11          for the same conclusion. Has anybody shown that  
12          the rise, that these series of rises, this cascade  
13          of events, rise in venous pressure, rise in,  
14          relate to diastolic pressure, rise in cerebral  
15          spinal fluid pressure, the rise in perilymphatic  
16          pressure, has anybody found anything to challenge  
17          those conclusions that have come about  
18          experimentally or observationally. Not that I  
19          know of whatsoever. It all follows.

20                    And so through the literature, through  
21          association with friends, I don't think there is  
22          one person who has done the single experiment that  
23          could answer your question, Your Honor, directly.  
24          But it is the results of a series of experiments

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1           and publications and common knowledge that allows  
2           for this conclusion.

3           THE COURT: I apologize for asking, I  
4           didn't write it down the first time. Your fields  
5           of board certification are?

6           THE WITNESS: Otolaryngology and neck  
7           surgery, right.

8           THE COURT: I recall your demonstration.  
9           If we assume, I want you to assume that you know  
10          that either the diastolic reading was over 200 or  
11          the systolic reading was over 110, assuming I got  
12          them in the right position.

13          THE WITNESS: I got you.

14          THE COURT: But you don't know that both  
15          were. What impact would that have on your ability  
16          to express an opinion about the probability that  
17          the pulmonary function test contributed to causing  
18          or caused the perilymph fistula?

19          MR. PRITTS: Can I, with all due respect, I  
20          am not sure that is the question.

21          THE COURT: It is the question I am  
22          asking.

23          MR. PRITTS: It is the question he has  
24          already answered I am afraid, Your Honor.

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1 THE COURT: Thank you, Mr. Pritts. I am  
2 going to ask the question anyway because I didn't  
3 think I had heard an answer.

4 THE WITNESS: If there is an elevated  
5 pressure, blood pressure, the critical --

6 THE COURT: Either --

7 THE WITNESS: Either systolic or diastolic,  
8 it will have an effect on the venous pressure.  
9 However, the diastolic pressure will be the more  
10 critical of the two for the absolute value of the  
11 venous pressure. Because that's the standing,  
12 that is as low as the blood pressure gets in the  
13 blood vessels.

14 Now, on top of that would be the systolic  
15 pressure which could cause somewhat of a pulsation  
16 in the venous pressure, a rise and lowering, but  
17 not lower than that allowed by the systolic  
18 pressure.

19 THE COURT: If you know, if all you know is  
20 that there was a recorded blood pressure reading  
21 of 158 over 102, and that sometime before that,  
22 within the same session, there was a blood  
23 pressure reading in which either the systolic was  
24 over 200 or the systolic was over -- the other way

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1           around.

2           THE WITNESS: Go ahead.

3           THE COURT: Over 110, can you say based on  
4           your background and training and experience and  
5           knowledge that you know which was or to what  
6           degree?

7           THE WITNESS: Which one was more  
8           important?

9           THE COURT: Which one was elevated. You  
10          just testified to which one was more important.

11          THE WITNESS: Um-um. Which one was  
12          elevated. Well, even at the resting pressure, the  
13          resting blood pressures, systolic, if I recall  
14          correctly, was 158 over 102, the 102 is elevated.  
15          Did I answer your question, Your Honor?

16          THE COURT: So the 102 in your opinion is  
17          sufficiently elevated that you can say to a  
18          reasonable degree of probability that there is a  
19          causal relationship between then having a PFT,  
20          then giving a PFT, and then having a perilymphatic  
21          fistula?

22          THE WITNESS: With the additional variable,  
23          Your Honor, of the Valsalva, of the forced  
24          expiratory pressure.

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1 THE COURT: Of doing what you have to do to  
2 take the pulmonary function test, correct?

3 THE WITNESS: Yes, sir.

4 THE COURT: If there was no hypertension,  
5 the Valsalva, I believe you testified, could cause  
6 a fistula; is that correct?

7 THE WITNESS: Yes, and there have been  
8 patients with fistulas from all reasonable  
9 conclusions. Straining in a patient who has no  
10 hypertension, okay? Do fistulas occur in patients  
11 who do not have arterial hypertension but do have  
12 an identifiable cause or related cause, be it  
13 sneeze or blow or something like that, Your Honor,  
14 it does occur in nonhypertensive, yes.

15 THE COURT: When, at what point? I realize  
16 I am asking questions that --

17 THE WITNESS: No, they are right on the  
18 money.

19 THE COURT: The primary, if in order to  
20 perform the pulmonary function test there has to  
21 be a Valsalva and if a Valsalva is a likely cause  
22 of the fistula --

23 THE WITNESS: In the addressed person?

24 THE COURT: In the addressed person, then

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1 is the presence or absence of hypertension a  
2 relevant factor?

3 THE WITNESS: Only that it would increase  
4 the effect of the Valsalva in the diastolically  
5 hypertensive person.

6 THE COURT: And you cannot say the amount  
7 to which it would increase, the amount by which it  
8 would increase the risk?

9 THE WITNESS: No, no, I don't know of that  
10 experiment or observation. I haven't done it, no,  
11 sir.

12 THE COURT: So you tell me if I am  
13 rephrasing incorrectly, taking a pulmonary  
14 function test directly causes risk of a fistula,  
15 correct?

16 THE WITNESS: In the addressed person, yes,  
17 sir.

18 THE COURT: Well, in any patient.

19 THE WITNESS: Yes, because we don't know  
20 who is at risk, yes, sir.

21 THE COURT: Is it your view that the risk,  
22 is it your view that the risk of a fistula is or a  
23 perilymphatic fistula is in some unquantified  
24 amount increased by administration of a pulmonary

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1 function test to a person who has hypertension?

2 THE WITNESS: Yes, diastolic hypertension  
3 particularly.

4 THE COURT: Diastolic hypertension. Is  
5 there anything in any of the studies that you've  
6 relied upon that would enable you to distinguish  
7 between the risks inherent in every pulmonary  
8 function test, the risk of perilymphatic fistula  
9 and the risks inherent in pulmonary function tests  
10 on persons with known diastolic hypertension?

11 THE WITNESS: Is there any study, may I  
12 make sure I understand the question? Is there any  
13 study that tells me who is at risk for, because of  
14 a pulmonary function test, for developing a  
15 perilymphatic fistula?

16 And separating two groups, one group are  
17 those with diastolic hypertension and the other  
18 group are those that are normal hypertensive?

19 THE COURT: The other group is the rest of  
20 the population, including everybody whose risk  
21 factors we don't know.

22 THE WITNESS: I don't think that there is,  
23 and when I say, "I don't think," that doesn't mean  
24 that I am insecure about my answer. Those are

1           just my thoughts, I don't think that we have a way  
2           of saying who is at risk. We just know that, so  
3           far we know that 25 percent of the population has  
4           these little pathways, but 25 percent of the  
5           population is not at risk. They don't have the  
6           symptoms. They are in that little pathway, that  
7           little tubular pathway.

8                     Some have a different composition of the  
9           fibrous core of this little tube. And that  
10          composition doesn't have to do with the cells  
11          themselves. It has to do with this jelly, this  
12          ground substance that holds the cells sort of  
13          together, doesn't let them just float around like  
14          marbles.

15                    What we have found so far is that the  
16          ground substance, which is made of proteoglycans,  
17          has a deficiency when in those little channels  
18          into two substances. These substances are keratan  
19          sulfate and chondroitin 6 sulfate. Those two  
20          substances tend to be hydrophilic, they tend to  
21          hold water. I may be getting too far afield for  
22          the question.

23                    Twenty-five percent of the population looks  
24          like it would be at risk for further study. We



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1 know that is illogical. We don't know yet how  
2 many in a crosscut of society, we have no way of  
3 looking at it, have the deficiency of at least  
4 these two proteoglycans.

5 And so to answer your question, no, we  
6 don't know which ones are at risk, we don't know  
7 yet. We are working toward that. Then if we can  
8 find some DNA marker for the proteoglycans, and so  
9 on, by then we could grab to it. But I think we  
10 are a long way away from that, sir.

11 THE COURT: Tell me if I am now saying  
12 something, paraphrasing you too simpl-mindedly.  
13 Since we know that the forced expiration of breath  
14 necessary for every pulmonary function test  
15 carries with it some risk of perilymphatic  
16 fistula, and since we know all the risks of  
17 diastolic hypertension, common sense tells us that  
18 diastolic hypertension coupled with forced  
19 exhalation of breath is going to increase the risk  
20 of perilymphatic fistula.

21 THE WITNESS: Diastolic, yes, sir, yes,  
22 sir. It would increase the risk.

23 THE COURT: When you tell Mr. Schmieder  
24 that your opinion is the administration of the

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1           pulmonary function test with what you know about  
2           the blood pressure probably contributed to causing  
3           the perilymphatic fistula, you cannot distinguish  
4           between or discriminate between the likelihood  
5           that the pulmonary function test alone would have  
6           had a causal relationship and the likelihood that  
7           the pulmonary function test with someone who is --

8           THE WITNESS: Hypertensive.

9           THE COURT: Hypertensive, would have a  
10          causal relationship with the --

11          THE WITNESS: The hypertension would  
12          enhance the likelihood of cause, the risk, enhance  
13          the risk, increase the risk, sir, and in  
14          Mr. Keeling or the general population.

15          THE COURT: But you cannot say the amount  
16          by which the risk would be enhanced?

17          THE WITNESS: The amount, no, whether it is  
18          one percent, ten percent or something, no, sir, I  
19          cannot.

20          THE COURT: Have I prompted questions for  
21          Dr. Kohut before we discuss the legal implications  
22          of what he said?

23          MR. HAGIE: This isn't my fight but can I  
24          enter it, Judge?

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1 THE COURT: Yes, sir.

2

3

VOIR DIRE EXAMINATION

4

5 BY MR. HAGIE:

6 Q Dr. Kohut, you've talked about the pressure  
7 of the cerebral spinal fluid?

8 A Yes.

9 Q That could be impacted by venous pressure?

10 A Yes.

11 Q If you are in a straining motion and you  
12 increase your blood pressure and you increase your venous  
13 pressure, that can affect cerebral spinal fluid pressure?

14 A Yes.

15 Q Is it not true, sir, that the cerebral  
16 spinal fluid pressure at rest is independent of the blood  
17 pressure, the arterial blood pressure?

18 A As I mentioned before, there is pressure  
19 input and there is pressure release, okay, a system that  
20 generally we have that in all of our biologic systems in  
21 our body. And if the relief valve is very adequate, using  
22 that analogy, then the pressure, the arterial pressure  
23 which can affect the venous pressure would have little  
24 effect.

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1           Q       You have no indication that that relief  
2 valve was not operating properly with Mr. Keeling?

3           A       That is right. But why we do a spinal tap,  
4 I think this answers your question, when we do a spinal  
5 tap, during, we see what the opening pressure is. And  
6 then we have the patient bear down, which is the  
7 equivalent of a Valsalva.

8                   Now, they don't push as hard as you do at  
9 the end of forced total volume, but you will see the  
10 spinal fluid, you have the manometer, you will see that  
11 pressure change dramatically, in fact, you look for that,  
12 that is good.

13           Q       But the point I am making is if your relief  
14 valve is working properly and you have a blood pressure  
15 over 120 over 80?

16           A       It will adapt to it.

17           Q       You have your cerebral spinal fluid here,  
18 if you have high blood pressure of 158 over 102, that  
19 cerebral spinal fluid pressure, starting, is going to  
20 adapt to that because of that relief mechanism?

21           A       That is right, but the venous pressure will  
22 be higher.

23           Q       What is the relationship between the  
24 arterial pressure and the venous pressure?

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1           A       The arterial pressure, particularly the  
2       diastolic, okay, if the pressure going out and it's a  
3       loop, okay, I have pressure coming back and it wants, and  
4       the diastolic causes essentially a back pressure on the  
5       venous pressure, because that pressure in the arterial is  
6       going to raise the venous pressure, it has, things have --

7           Q       Is that common sense basically?

8           A       Well, and it also has been proven a zillion  
9       ways but the -- and so if you start with a higher venous  
10      pressure, then the additional force, straining, would the  
11      additional force would have an implication regarding, for  
12      lack of a better word, tensile strength, plugging  
13      strength, whatever you want.

14                    So it would, tensile strength or plugging  
15      strength is a, has a limit. It takes so much to poke a  
16      hole in this piece of paper, okay? If I have a pencil on  
17      it that weighs five pounds, it is going to take six pounds  
18      to push it through. I don't mean to give you a false  
19      analogy and oversimplification. It is going to take six  
20      pounds to push through. I only have to push one more  
21      pound. If I have a two-ounce pencil and it takes six  
22      pounds to push it through, I have to add a lot.

23           Q       But my question goes to you don't, you  
24      don't have a correlation that says if a blood pressure is

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1       120 over 80 your venous pressure is such and such?

2               A       I don't have that exact correlation, but I  
3 know that a raised diastolic pressure will cause an  
4 increased venous pressure.

5               Q       Pick a number, let's say 120 over 80 gives  
6 you venous --

7               A       120 over 80.

8               Q       -- of 50 something?

9               A       Okay.

10              Q       . If you have a blood pressure of 150 over  
11 102 and your venous pressure is instead of being 50, it is  
12 75, just hypothetical number. Your cerebral spinal fluid  
13 pressure is the same if your relief valve is there and  
14 operating properly?

15              A       I would think so at rest, yes.

16              Q       When you strain down and you increase that  
17 venous pressure by 10 points, when you do a Valsalva  
18 movement?

19              A       Ten to 15.

20              Q       Or 75 to 85, it is that 10-point increase  
21 or 15-point increase to whatever it is that is then going  
22 to affect the starting point of cerebral spinal fluid?

23              A       What is the starting point of?

24              Q       I think you said around 10.

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1           A       It is going to affect, go through it  
2 again. I don't mean to --

3           Q       I am struggling here with concepts I really  
4 don't understand.

5           A       If you have a venous pressure that is  
6 elevated and now the Valsalva maneuver is going to  
7 increase that, the question is is it an arithmetic  
8 increase or geometric increase. I am not begging your  
9 question. I am not trying to muddy the waters. I don't  
10 know that function. The, if it is an arithmetic increase,  
11 it just adds 10. That will have an effect, but what if it  
12 adds 10 percent, it may be greater than 10.

13          Q       I understand that, Doctor. There is  
14 nothing that has been done, studies yet to correlate that  
15 increase with the increase in the cerebral spinal --

16          A       I am not aware of it. That doesn't mean  
17 there is not. A cerebral spinal fluid expert would, I  
18 don't doubt, would be able to find out.

19               THE COURT: Mr. Schmieder, do you want to  
20 ask Dr. Kohut any questions?

21               MR. SCHMIEDER: No, Your Honor, I do not.  
22 Because I think he is --

23               THE COURT: Would you please step outside  
24 again. I suppose I ought to ask, did you drive

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1           here or --

2                   THE WITNESS: Yes.

3                   THE COURT: You don't have a flight to  
4           catch?

5                   THE WITNESS: No, sir, I don't have a  
6           flight to catch. I just find they are making  
7           light a little dimmer at nighttime.

8                   THE COURT: I have noticed that.

9                   THE WITNESS: It is amazing.

10

11                   (Dr. Kohut leaves the courtroom.)

12

13                   THE COURT: If I may, I will tell you what  
14           I think and then you can both tell me I am wrong.  
15           I think that it is likely that Dr. Kohut has  
16           admissible testimony on causation questions which  
17           is to say testimony that would assist the trier of  
18           fact to understand the evidence or determine a  
19           fact in issue in an area in which scientific,  
20           technical and other specialized knowledge will do  
21           so. And that he is qualified as an expert by his  
22           knowledge, skill, experience, training and  
23           education.

24                   I also think that a lot of what Dr. Kohut



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1           would opine is inadmissible. But I also think  
2           that in order for meaningful cross-examination of  
3           Dr. Kohut, counsel for the defense should have had  
4           the opportunity to have the information revealed  
5           by Dr. Kohut in his testimony out of the presence  
6           of the Jury.

7                     Now, I like Dr. Kohut a great deal and I  
8           think he is deserving of great respect. I think  
9           like many true scientists he is a moving target  
10          because he constantly wants to find out what else  
11          is out there and talk to people and test his  
12          hypothesis.

13                    While that is a wonderful thing for a  
14          scientist, it is a difficult thing for a witness.  
15          Meaningful cross-examination of Dr. Kohut requires  
16          or I shouldn't say that, meaningful cross-  
17          examination of Dr. Kohut might, depending on the  
18          cross-examiner's view, require the cross- examiner  
19          to ask Dr. Kohut the basis for some of his opinions.

20                    And if Dr. Kohut testified, as he did  
21          today, about the various studies, then a cross-  
22          examiner who knew what was coming might have  
23          inquired into those studies and might have taken a  
24          look at what else was out there.

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1                   And the basis upon which Dr. Kohut relies,  
2                   as he testified to today, for a number of  
3                   statements he made, which go well beyond the two  
4                   studies he cited, I don't know where they come  
5                   from but I am not a physician or a scientist.

6                   I am of the view that if the defense wants  
7                   a mistrial to come back and prepare with Dr. Kohut  
8                   that motion would be well taken. I will consider  
9                   without articulating my thoughts on any of them  
10                  any other alternatives you might have or would be  
11                  pleased to have you point out any errors in my  
12                  thinking. Mr. Schmieder.

13                  MR. SCHMIEDER: Your Honor, with all due  
14                  respect to the Court, okay, the statutes in FELA  
15                  are different than the standards under Virginia  
16                  law, and that in this particular case and in his  
17                  deposition he has indicated that, in the  
18                  deposition he stated that, "In my opinion that  
19                  high blood pressure certainly was a cause or  
20                  contributed," he said it was, that it was, it  
21                  could cause or contribute or you would not wish to  
22                  do a test in this regard. That is on page 21.

23                  Then on page 12 in his deposition also he  
24                  says that he says in answer to, Was it your

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1 opinion that the pulmonary function tests that  
2 Mr. Keeling took caused the perilymphatic fistula,  
3 and he answered yes in that regard.

4 What we have here, Your Honor, is a basis  
5 within the depositions in this particular case on  
6 which the doctor is expressing his opinion in this  
7 record. Now, the mere fact that they have not  
8 gone back beyond for further probing at those  
9 depositions here, it seems to me that that is the  
10 responsibility of counsel in this particular  
11 case. I think it's, I can't remember if it is  
12 Rule 703.

13 THE COURT: Rule 705 that says the cross-  
14 examiner is entitled to elicit the basis for the  
15 opinions. Rule 705 is essentially the same as  
16 Virginia Code Section 8.01, 401.1, and you have a  
17 considerable uphill battle to persuade me that the  
18 rule in FELA cases is that, is different from the  
19 rule in other cases about expert testimony and  
20 disclosure and compliance with pretrial and  
21 discovery orders and the provisions of Rule 703,  
22 704 and 705.

23 MR. SCHMIEDER: There is a rule, I don't  
24 have my book right here, Federal evidence in that

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1 area, 702, 3, 4, 5 in which you can say that a  
2 person can get up on the stand and testify as to  
3 his opinion and he doesn't have to give the  
4 underlying basis, but they may be brought out by  
5 cross-examination of the defendant in the case.

6 So the burden is not on me, it is on the  
7 defendant to do that. All I have to do is put him  
8 on the stand and elicit the information and go  
9 from there. But further, Your Honor, let me get  
10 back to this. As I cited to the Court once  
11 before, there is a case called Hines v. Consolidated  
12 Rail Company, 926 F. 2nd, 261 3rd Circuit 1991.

13 THE COURT: 926 F. 2nd 262.

14 MR. SCHMIEDER: Yes, Your Honor, 926 F.  
15 2nd, 262 3rd Circuit, 1991 Hines v. Consolidated  
16 Rail. In that case the Federal Court said, and I  
17 don't want to belabor this too much, but I would  
18 like to quote from this, "Moreover, a medical  
19 expert can testify that there was more than one  
20 potential cause of plaintiff's condition." For  
21 example, it cites this Sentilles case in that, but  
22 then I want to break down here, where he claimed  
23 that it was, actually caused latent tuberculosis  
24 to become active. "None of the three medical

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1 witnesses testified that the accident, in fact,  
2 caused the illness. The first witness testified  
3 that the tuberculosis might, might be a  
4 consequence of the accident.

5 "The second witness stated that the  
6 accident and plaintiff's preexisting diabetic  
7 condition most likely aggravated the tuberculosis,  
8 although he could not determine which of the two  
9 was more responsible.

10 "The third witness, who had not personally  
11 examined the plaintiff, suggested that the  
12 accident 'probably aggravated' the plaintiff's  
13 condition, although he would not say definitely.

14 "Despite this lack of medical unanimity  
15 over the particular cause of the illness, the  
16 Court concluded that the differences in testimony  
17 did not impair the Jury's ability to draw causal  
18 inferences.

19 "Furthermore, the Court recognized the  
20 general reluctance among experts to state that a  
21 trauma was the cause of a disease. As the Court  
22 explained, 'The matter does not turn on the use of  
23 a particular form of words by physicians in giving  
24 ththeir testimony, since it is the task of the Jury

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1 and not the medical witnesses to make a legal  
2 determination regarding causation. We agree with  
3 Hines that the standard under FELA can  
4 significantly influence a determination of the  
5 admissibility of Shubin's testimony.'".

6 So I must respectfully disagree with the  
7 Court that we are bound by what the Federal law  
8 has stated, what the Supreme Court of the United  
9 States has cited in these particular cases.

10 . And so I feel that based upon the testimony  
11 that the Doctor has given in this particular case,  
12 he has met the standard for such evidence to be  
13 admitted into evidence by the Federal Court, by  
14 the Supreme Court, and by the intent of the United  
15 States Congress.

16 With that in mind, I feel in this  
17 particular case, Your Honor, he has demonstrated  
18 the knowledge that could assist the trier of fact  
19 in reaching their conclusions in this particular  
20 case. So why don't I just stop there.

21 THE COURT: Hines is a case, Hines v.  
22 Consolidated Railway Corporation which you cite is  
23 a case in which differential diagnosis was used to  
24 enable the opinion to be given. That opinion

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1 defines differential diagnosis as the process  
2 whereby medical doctors experienced in diagnostic  
3 techniques provide testimony concerning other  
4 possible causes of the injuries at issue. That's  
5 not what we have here, is it?

6 MR. SCHMIEDER: But it does discuss the  
7 fact that there is a different standard under  
8 FELA. And that the standard is a lot lower than  
9 what we would look to in the common law.

10 MR. PRITTS: Your Honor, if I may, there  
11 are some strange decisions out of the Third  
12 Circuit, a couple of decisions. There are many  
13 decisions from other circuits. I can read from  
14 them. The bottom line if you want me to quote  
15 from these and put them in the record I will be  
16 glad to, bottom line the other courts don't read  
17 the Sentilles case as to overrule the general  
18 medical evidence; it has to have some reasonable  
19 basis and some degree of certainty.

20 THE COURT: Do I read the Sentilles case  
21 that way?

22 MR. PRITTS: The Sentilles, there is no  
23 objection raised to the admissibility of those, of  
24 the testimony of those doctors in that case.

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1           Somebody was asleep at the switch there. When the  
2           case got to the Supreme Court, the concurring and  
3           dissenting opinions they said, "Why in the world  
4           is the Supreme Court of the United States dealing  
5           with the question of the sufficiency of the  
6           evidence?" That is all we have in determining  
7           whether directed verdict should be given there.  
8           You can take the language and twist it as Third  
9           Circuit. They don't address this issue, can you  
10          in FEELA cases put in evidence that doesn't meet  
11          the causal standard because it is speculative.

12                 That is not addressed in those cases. It  
13          is clearly pointed out in other cases. In my  
14          opinion it is a question of Virginia law, it is a  
15          procedure question. Virginia law is clear that  
16          medical testimony that is speculative can't go  
17          in. I am not sure that is the issue we are  
18          dealing with right now. I couldn't let that  
19          stand, Your Honor.

20                 THE COURT: You want to say anything else  
21          on any of these subjects?

22                 MR. SCHMIEDER: Other than the fact, Your  
23          Honor, that I feel in the deposition he has  
24          expressed two opinions. That number one, that



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1 high blood pressure had a causal relationship in  
2 Mr. Keeling's case. And number two, that in his  
3 opinion the doing of pulmonary function test was  
4 a --

5 THE COURT: You've already said that he is  
6 not going to give an opinion about that, the  
7 pulmonary function test should not have been  
8 given.

9 MR. SCHMIEDER: Well, no. I am not going  
10 into that with that witness, you are right, Your  
11 Honor.

12 THE COURT: I think I can fairly well  
13 demonstrate the lack of doctor in me. Mr. Hagie,  
14 you want to rebut?

15 MR. HAGIE: Judge, you had proposed an  
16 alternative if we had that. I would just like to  
17 point out that this is a problem that we saw  
18 looming on the horizon this summer, and we have  
19 been trying for five months now to make sure that  
20 this problem did not come up in the middle of  
21 trial and result in a mistrial because of lack of  
22 evidence concerning the supporting documentation  
23 of Dr. Kohut.

24 We've had this Court order in hearings that

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1 we be provided with that information. And up to  
2 now to come to this point and say the defendants  
3 are going to be given the option of a mistrial at  
4 which point Dr. Kohut can go back and revise some  
5 of his opinions, my proposal would be that  
6 Dr. Kohut certainly is an individual who is  
7 informed and has information on perilymphatic  
8 fistulas. He can give that information to the  
9 Jury because he is certainly qualified to do  
10 that.

11 However, he does not have the expertise and  
12 he has admitted that the subject matter and  
13 expertise is not all there to talk to this Jury  
14 and to link a perilymphatic fistula to a pulmonary  
15 function test through hypertension or blood  
16 pressure.

17 Number one he said, "Well, it is common  
18 sense if you have high blood pressure and it  
19 raises and it starts out -- it is going," he says,  
20 "Just common sense. You can add one and one." If  
21 it is common sense the Jury doesn't need an expert  
22 to tell them about that.

23 Number two, he has admitted what  
24 Dr. Hippensteel has said that at 158 over 102,

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1           unless you have evidence that is certainly not in  
2           this case about a breakdown of this relief  
3           mechanism, the cerebral spinal fluid is at the  
4           normal level. And when you give a pulmonary  
5           function test that pressure starts out at its  
6           normal level regardless of where the blood  
7           pressure is, regardless of where the venous  
8           pressure is. I don't think any expert in this  
9           case is going to argue against the proposition  
10          that if you strain and increase your venous  
11          pressure that that can cause an increase in the  
12          cerebral spinal fluid.

13                 What is at issue and what there has been no  
14          evidence, and Dr. Kohut has said there is no  
15          evidence to support, is that when you start out in  
16          a straining maneuver and your cerebral spinal  
17          fluid is at a resting place, that there is linkage  
18          between how that cerebral spinal fluid increases  
19          in relationship to where that arterial blood  
20          pressure started out at.

21                 We would submit that the proper course for  
22          this Court to take is to limit Dr. Kohut to  
23          testifying about perilymphatic fistulas. If he  
24          wants to tell the Jury that 25 percent of the

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1 people have this genetic propensity to this, he  
2 can certainly do that, but he should not be  
3 allowed to testify about any linkage between blood  
4 pressure and perilymphatic fistulas in this  
5 specific case as it regards Mr. Keeling.

6 THE COURT: You would agree that Dr. Kohut  
7 is qualified to testify to the relationship  
8 between a Valsalva maneuver and the occurrence of  
9 a perilymphatic fistula?

10 MR. HAGIE: Yes, sir.

11 THE COURT: The defendant is not moving for  
12 mistrial, correct?

13 MR. HAGIE: That depends on what  
14 Dr. Kohut's testimony is limited to, Your Honor.

15 THE COURT: Famous have your cake and eat  
16 it too defense. Although judges should respect  
17 scientific opinion and recognize their own limited  
18 scientific knowledge, nevertheless courts have a  
19 duty to inspect the reasoning of qualified  
20 scientific experts to determine, among other  
21 things, whether a case should go to a jury. The  
22 Sixth Circuit Court in Turpin v. Merrell-Dow  
23 Pharmaceuticals, Inc. 1959 F. 2nd, 1349, which  
24 called for a quote, hard look, close quotes, by

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1 courts at the basis of scientific evidence a year  
2 before Daubert v. Merrell-Dow.

3 In the Daubert case Justice Blackman  
4 outlined a nonexclusive list of things that a  
5 trial judge ought to consider in determining  
6 whether scientific evidence under the liberalized  
7 principles that apply to the admission of expert  
8 testimony under Federal rules and in these days is  
9 not only relevant but reliable.

10 . Among these things, the court must, the  
11 trial court must consider whether a theory or  
12 technique can be and has been tested, whether the  
13 theory or technique has been subjected to peer  
14 review and publication, the known or potential  
15 rate of error in using a particular scientific  
16 technique, and the existence and maintenance of  
17 standards controlling the technique's operation,  
18 whether the theory or technique has been generally  
19 accepted in the particular scientific field. The  
20 inquiry must be a flexible one, one whose  
21 overarching subject is the scientific validity and  
22 thus the evidentiary relevance and reliability of  
23 the principles that underlie a proposed  
24 submission.

1                   Virginia Code Section 8.01-401.1 is the  
2                   state law analog to Federal rules 702 and 703.  
3                   703 says, upon which Mr. Schmieder relies, I am  
4                   sorry and 705, "The facts or data in the  
5                   particular case upon which an expert bases an  
6                   opinion or an inference may be those perceived by  
7                   or may be known to the expert at or before the  
8                   hearing. If of the type reasonably relied upon by  
9                   experts in the particular field in forming  
10                  opinions or inferences upon the subject, the facts  
11                  or data need not be admissible in evidence."

12                  Rule 705 goes on, "The expert may testify  
13                  in terms of opinion or inference and give reasons  
14                  therefore without first testifying as to the  
15                  underlying facts or data unless the Court requires  
16                  otherwise. The expert may in any event be  
17                  required to disclose the underlying facts or data  
18                  on cross-examination."

19                  Those words and the words of Section  
20                  801-401.1 on the same subject are substantially or  
21                  completely identical. Dr. Kohut has disclosed in  
22                  examination outside of the presence of the Jury  
23                  that his hypothesis concerning causation has not  
24                  been tested, although he has explained how it

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1           might be tested.

2                   He has explained that this theory or  
3           technique has not been subjected to peer review  
4           and publication, though he has testified out of  
5           the Jury's presence as he could not in the Jury's  
6           presence that he called the world-renowned expert  
7           in the field who said he couldn't punch any holes  
8           in the theory.

9                   The known or potential rate of error in  
10          using a particular scientific technique and the  
11          existence and maintenance of standards controlling  
12          the technique's operation, one of the Supreme  
13          Court's Daubert standards or guidelines is not  
14          something about which Dr. Kohut could offer any  
15          elucidation because there are no standards  
16          controlling hypothesizing.

17                  His theory has not been generally accepted  
18          in a particular scientific field or in medicine,  
19          although he indicates that study might lead it to  
20          be. He articulates beautifully his opinions about  
21          why his theory should be accepted. It is neither  
22          tested nor testable. It is neither accepted nor,  
23          and the prior test was never the test in Virginia,  
24          either accepted nor debated in the medical and

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1           scientific community.

2           He can testify that there is some increased  
3 risk and why is that so, it is because common  
4 sense tells us it is so. If common sense tells us  
5 that it is so, and that truly is the case, then it  
6 is not the proper subject of expert testimony.

7           The Court is of the opinion that Dr. Kohut  
8 can tell the Jury about Valsalvas and causes of  
9 perilymphatic fistulas and about the risk of  
10 causation of perilymphatic fistula from Valsalvas,  
11 but that he cannot offer opinion and to a  
12 reasonable degree of medical probability or  
13 otherwise that Raymond P. Keeling Jr.'s primary  
14 hypertension or diastolic hypertension was a  
15 contributing cause to the perilymphatic fistula of  
16 which he complains.

17           Does the defendant have any objection to  
18 that ruling?

19           MR. HAGIE: No, Your Honor.

20           THE COURT: Does that sufficiently address  
21 your concerns about disclosure, discovery and the  
22 like? Give you enough room to cross-examine?

23           MR. PRITTS: Can we consult one second,  
24 Your Honor?



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1                   THE COURT: Yes, sir. And you should feel  
2 free to make any objection that you want to make.  
3 There is no penalty for making objections.

4                   MR. HAGIE: Your Honor, we would certainly  
5 make our objection that we had not been furnished  
6 sufficient information prior to this, but within  
7 the parameters that this Court has set forth at  
8 this point, that will solve the problem in terms  
9 of cross-examining Dr. Kohut, I believe.

10                  THE COURT: Mr. Schmieder, would you like  
11 to state your objections?

12                  MR. SCHMIEDER: Yes, Your Honor. As I  
13 understand the Court's ruling, in this particular  
14 case, I can't even ask him questions in which he  
15 expressed in his deposition in which that he had  
16 an opinion that the doing of the pulmonary  
17 function test caused a perilymphatic fistula.

18                  And also I understand the Court has said to  
19 me that the mere fact that in his deposition  
20 previously he has expressed an opinion that blood  
21 pressure certainly played a role in this, that I  
22 am not allowed to go into that even though those  
23 gentlemen were present; is that correct, Your  
24 Honor?

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1                   THE COURT: You can elicit from him an  
2                   opinion about the causal relationship or probable  
3                   contributing causal relationship between the  
4                   pulmonary function test and the perilymphatic  
5                   fistula.

6                   MR. SCHMIEDER: What about blood pressure?

7                   THE COURT: Not because those gentlemen  
8                   were not present, but because Dr. Kohut has  
9                   satisfied me that he cannot meet the requisite  
10                  standards of scientific reliability. He may not  
11                  testify to a causal relationship between  
12                  Mr. Keeling's blood pressure and the perilymphatic  
13                  fistula.

14                  MR. SCHMIEDER: Your Honor, then, just to  
15                  protect myself for the record, can I have this  
16                  proceeding as an offer of proof of what his  
17                  testimony would be?

18                  THE COURT: Absolutely.

19                  MR. SCHMIEDER: Along with can I offer his  
20                  report as part of an offer of proof?

21                  THE COURT: Any objection to that? It is  
22                  in the record for the Supreme Court to consider.  
23                  You have proffered his testimony through the  
24                  questions you asked, Mr. Pritts asked, Mr. Hagie

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1           asked and I asked.

2           MR. SCHMIEDER: But I would also like to  
3           have his report, plus the deposition.

4           THE COURT: His report is a matter of  
5           record as well. We don't have the deposition, but  
6           if you have any objection to it being part of the  
7           offer of proof, Mr. Pritts?

8           MR. PRITTS: No, Your Honor.

9           THE COURT: You file the deposition and it  
10          will be part of the offer of proof.

11          MR. SCHMIEDER: I am ready to proceed.

12          THE COURT: Do you want Dr. Kohut back on  
13          the witness stand? Unless somebody needs to  
14          break. We will take a brief recess.

15  
16          (A Recess was taken. Following the Recess,  
17          the Parties returned to the room and the Trial  
18          continued.)

19  
20          THE COURT: We are again in session. The  
21          parties are present together with their  
22          attorneys. This is, Dr. Kohut is on the witness  
23          stand.

24          MR. SCHMIEDER: Can I explain to the Doctor

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1 the ramifications of his testimony?

2 MR. PRITTS: It probably wouldn't be a bad  
3 idea so something doesn't get interjected.

4 THE COURT: Before Mr. Schmieder does this,  
5 let me suggest to you, Doctor, that as you know,  
6 it is a real good idea when a witness to listen  
7 carefully to the question asked and answer that  
8 question. And stop. That will be particularly  
9 true now.

10 MR. SCHMIEDER: Doctor, if I ask you a  
11 question, it will not be, there will be no  
12 question I am going to ask you insofar as a causal  
13 relationship between hypertension or high blood  
14 pressure and the development of a perilymphatic  
15 fistula.

16 MR. PRITTS: Either in general or on the  
17 day in question.

18 MR. SCHMIEDER: Yes. But I will ask you  
19 other questions.

20 THE WITNESS: So I will have no statement  
21 relative to blood pressure; is that correct?

22 THE COURT: Mr. Schmieder is not going to  
23 ask you any questions about blood pressure. If  
24 Mr. Pritts cross-examining does so, make sure he

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1 is explicitly doing so before you answer.

2 THE WITNESS: Yes, sir.

3 THE COURT: Thank you, sir. Sheriff, would  
4 you bring the jurors in, please. Here are some  
5 more case cites if anyone wants to hear them, but  
6 we will save them.

7

8 (The Jury returned to the courtroom.)

9

10 THE BAILIFF: Jury is present and seated,  
11 Your Honor.

12 THE COURT: Here it is 1:15 already. I  
13 have asked the bailiff to communicate to the  
14 jurors that we need not worry about the donuts  
15 being supplied in the morning. I apologize to all  
16 of you. I assure you first that everyone in the  
17 courtroom has been diligently trying to work  
18 through legal problems in this case.

19 And secondly, that if we thought the law  
20 would permit you to be in the courtroom any sooner  
21 we would have.

22 A JUROR: I do not mean no harm. Next time  
23 I am on jury duty you will have to come get me.

24 THE COURT: Would you be kind enough to

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1                   leave your home address with the bailiff?

2                   Mr. Schmieder.

3

4

DIRECT EXAMINATION, CONTINUED

5

6           BY MR. SCHMIEDER:

7                   Q        Doctor --

8                   A        Yes, sir.

9                   Q        Now, as I understand it, you saw Raymond  
10                   Keeling, I think it was in November of 1995; is that  
11                   correct?

12                  A        I think so, let me just double check. Yes.

13                  Q        All right. And I think you have told the  
14                   Jury exactly what your findings were and the history and  
15                   the like, okay? What was the recommendation that you gave  
16                   to Mr. Keeling in November of 1995?

17                  A        To have modified activity. In other words,  
18                   avoid -- keeping his head higher than his heart, not, by  
19                   putting the head of the bed up six inches so that his head  
20                   was always, even when lying down, higher than his heart  
21                   and to lift nothing over 20 pounds.

22                  Q        Okay. So then, Doctor, when is the next  
23                   time you see Mr. Keeling?

24                  A        In January.

Kohut - Direct

1           Q       Okay. And briefly what do you do for him  
2       in January?

3           A       I noted and recorded that all of these  
4       tests that we did were negative. That is, you know, the  
5       MRI and so on were not relating it to the current  
6       symptoms. And I noted that there was no improvement with  
7       modified activity. And I suggested surgery for the left  
8       ear. Forty percent of people will clear up on their own  
9       if you give them this modified activity. If they don't,  
10      then you have surgery.

11          Q       Did Mr. Keeling undergo surgery?

12          A       On February 21 I explained the surgery and  
13      the risks, and we set it up. They had some vestibular  
14      tests or vestibular tests or physical examination at that  
15      time and we set up the date for -- no, that was his day of  
16      admission. And I explained the surgery to him that day  
17      and told him the risks, reinforced that, and tested him to  
18      make sure that there was nothing that had changed that  
19      would make me reconsider the surgery. Then on the 22nd,  
20      the next day of February, I did the left ear exploration.

21          Q       Let me hand you, I don't know if this will  
22      help or not, Plaintiff's Exhibit Number 2. Can you  
23      identify that for us, please?

24          A       Yes. You mean the parts here?

Kohut - Direct

1 Q Yes. Can you identify it?

2 THE COURT: Can you tell the Court and Jury  
3 and counsel what it is you are holding in your  
4 hand?

5 THE WITNESS: Yes, I am holding a picture,  
6 artist's rendition of an ear but --

7

8 BY MR. SCHMIEDER:

9 Q Would that exhibit be helpful to you in  
10 explaining your surgery, Doctor?

11 A Yes.

12 MR. SCHMIEDER: Your Honor, I would offer  
13 Plaintiff's Exhibit Number 2 into evidence only  
14 for the purpose of demonstrative evidence.

15 THE COURT: Any objection?

16 MR. PRITTS: No, Your Honor.

17 THE COURT: It is admitted.

18

19 (The above-mentioned document was marked as  
20 Plaintiff's Exhibit Number 2 and entered into the  
21 Trial.)

22

23 MR. SCHMIEDER: Your Honor, I can ask him  
24 to step down here to try to explain the surgery



Kohut - Direct

1           and what you did.

2           THE WITNESS: Now, this is a cutaway  
3 picture of the right ear, of a right ear. This is  
4 the outer ear, the pinna, this is the ear canal  
5 and the eardrum right here. This area between  
6 here and here is the middle ear.

7           The middle ear has three little bones that  
8 I mentioned to you, inner bone being the stirrup  
9 or the stapes. This is the portion that's  
10 embedded in this walnut-sized piece of bone. This  
11 is the inner ear. This component, all of this is  
12 smaller than a dime, okay. So you have an idea of  
13 relative size. This is the nerve leading from the  
14 ear to the brain, okay. The brain stem would be  
15 right here.

16           What you do when you want to look in an ear  
17 is numb this up, the patient may have some  
18 sedatives, but particularly we like to avoid  
19 sedatives that would affect the balance  
20 mechanism. We want to know if the middle ear,  
21 more dizzy, less dizzy.

22           We inject this, make it numb, and then make  
23 a cut in the posterior half of the back half of  
24 the ear canal. Then that's a skin flap, and roll

Kohut - Direct

1           that down until you get to the eardrum. And then  
2           there is a little fibrous ring around the edge of  
3           the eardrum and you lift that up and push it  
4           forward so now you can see behind the eardrum.

5                     You have made a cut in the ear canal,  
6           brought everything down against bone, and then  
7           pushed the eardrum forward and now you can see  
8           behind the eardrum. All of this is done as you  
9           are looking through a microscope. You can't do it  
10          with the naked eye.

11                    And so then you look in here, and we know  
12          where the areas are where these perilymph fistulas  
13          occur almost 90 percent of them, 99 percent  
14          occur. So you pay particular attention to those  
15          areas. You want me to describe the surgery?

16  
17 BY MR. SCHMIEDER:

18                   Q       Please.

19                   A       What you look for is clear fluid. Now,  
20          remember the inner ear, total volume of perilymph in the  
21          inner ear is 76 microliters. That would be one-fourth of  
22          the smallest, about one-fourth of the smallest dew drop  
23          you have ever seen on your windshield, okay? So we are  
24          not talking about a gallon of fluid.

Kohut - Direct

1                   Then you clear these areas and you look for  
2 fluid, the clear fluid to come up, to reaccumulate.  
3 Sometimes you have difficulty seeing that little bit of  
4 fluid. So you have to touch it with a needle, just  
5 special instrument to change the reflection.

6                   You will, there are different explanations  
7 and so on on how that is a definitive sign because it will  
8 flash differently every time that you touch it with a  
9 needle. The flash back of light is like touching a top of  
10 a water full of glass, glassful of water, excuse me. Then  
11 you suck that away, a little bit of fluid that you have  
12 there, and you wait for it to reaccumulate again. And  
13 then you touch it again.

14                  Now you have documented, and you may do  
15 that several times, you've documented the presence of this  
16 fluid. Sometimes you have to take the lining tissue out  
17 and using a laser or whatever your implement you want to  
18 use, and where that thin layer that lines the middle ear,  
19 you have to take that away but make sure it is very dry so  
20 you don't get fluid leakage from the tissue. That is  
21 easily done.

22                  MR. PRITTS: In the interest of time, if  
23 the question is what did you do in the surgery,  
24 maybe we could stick more to that.

Kohut - Direct

1                   THE COURT: That is an objection addressed  
2                   to the Court. The objection is overruled. But it  
3                   is time perhaps for you to ask another question.

4  
5 BY MR. SCHMIEDER:

6                   Q       Take your seat again, Doctor, because I  
7                   think you have explained the type of surgery. Did your  
8                   operation confirm the fact that he had, he being  
9                   Mr. Keeling, had a perilymphatic fistula?

10                  A       . Yes, it met the surgical criteria and  
11                  diagnostic criteria.

12                  Q       What is the basis of that, Doctor, that you  
13                  expressed that opinion?

14                  A       Well, I saw this fluid reaccumulation.

15                  Q       All right.

16                  A       And my resident saw it, too.

17                  Q       Now, Doctor --

18                  A       I had it on TV. The nurse saw it, too.

19                  Q       After this operation was over and  
20                  everything else like this, I assume that Raymond goes  
21                  home; is that correct?

22                  A       Not immediately.

23                  Q       Okay.

24                  A       Not from the operating room, no.

Kohut - Direct

1                   Q       But how soon after the operation does he go  
2 home?

3                   A       Several days, five days.

4                   Q       During those several days, what, what  
5 restrictions is he placed on at that time?

6                   A       Modified bed rest. He has bathroom  
7 privileges with help and then a very gradual increase in  
8 activity. And then on the fifth day he is allowed to be  
9 in the hall or walking close to the railings.

10                  Q       Now, Doctor, is there any restriction at  
11 that time put on his lifting when he goes home?

12                  A       Oh, yes.

13                  Q       And again what is that?

14                  A       Ten pounds, 20 pounds; it depends on the  
15 size of the person.

16                  Q       Now, Doctor, so basically what I would like  
17 you to do, if we can, first of all, did there come a time  
18 that you noticed some improvement in --

19                  A       Yes, except for right after surgery, except  
20 for a, he had a several hour period or something where he  
21 had an episode of dizziness, which is not unusual post  
22 operatively.

23                  Q       I would like you to take a look at your  
24 records there and can you tell us how many times after the

Kohut - Direct

1 operation that you saw Raymond Keeling and what was the  
2 last time that you saw him?

3 A Let's see; nine, I saw him nine times, I  
4 think. I don't think these are just telephone notes. And  
5 oh, wait a minute. We changed our forms, 10, 11, 12, 13,  
6 14, 14. And the last time was June 8, 1999.

7 Q Okay. And then after that period of time  
8 he was followed by Dr. May; is that correct?

9 A Yes.

10 Q Doctor, during this period of time that you  
11 saw Raymond Keeling, do you have an opinion to a  
12 reasonable degree of medical certainty as to whether or  
13 not he could return to his work as a locomotive repairman?

14 THE COURT: As an electrician.

15 MR. SCHMIEDER: You are right.

16

17 BY MR. SCHMIEDER:

18 Q Locomotive electrician, I apologize.

19 A No, I think it would be, if he had to lift  
20 things heavy or bend low, he couldn't do it.

21 Q What about climbing?

22 A No, that was too risky. If these people or  
23 some people have scaffolding to walk on, if they had a  
24 recurrence, it would be lethal or it could be lethal.

Kohut - Direct

1           Q       Now, Doctor, basically can you tell us the  
2       last time that you saw him what Raymond's condition was  
3       like at that time?

4           A       The last time I saw him, patient has been  
5       falling the last month. Problem when turning or getting  
6       up fast. Crick's test was normal. I said, "Status for  
7       perilymphatic fistula, possible exacerbation."

8           Q       Okay. Now, Doctor, with regard to  
9       perilymphatic fistulas, is there a recurrence ratio with  
10      regard to them?

11          A       Yes, overall it appears that it is about 15  
12      percent, okay, after surgery. Maybe after surgery and  
13      modified activity. But there are two facets to  
14      recurrence. One is if you take how many of all the people  
15      recurring, that is 15 percent. But of that 15 percent,  
16      those that initially recur will more than likely recur  
17      more than once.

18          Q       Okay. Now, Plaintiff Keeling in this case,  
19      if I understand, has been operated on twice for  
20      perilymphatic fistula, one by Dr. Chen?

21          A       And one by me.

22          Q       Is there an increased risk there now?

23          A       Yes, he goes in the category where if you  
24      have one recurrence your chances of getting a second

Kohut - Direct

1 recurrence, multiple recurrences are greater. The person,  
2 better than 15 percent. And those that recur tend to  
3 recur more than once.

4 Q All right. What is the chance of  
5 recurrence for a person who has had two operations?

6 A Well, it tends to reoccur, I would say my  
7 best estimate, this has never been measured by anybody,  
8 that is.

9 MR. PRITTS: It is going to be a never  
10 measured and a guess, I am afraid I would object  
11 to the speculative --

12 THE COURT: You are going to have to lay a  
13 foundation.

14 THE WITNESS: Well, there is --

15 THE COURT: Let Mr. Schmieder ask you a  
16 question.

17

18 BY MR. SCHMIEDER:

19 Q Doctor, in your opinion to a reasonable  
20 degree of medical certainty is there a chance of  
21 recurrence?

22 A Yes.

23 Q I want to go on to something else. Now,  
24 you talk about Mr. Keeling falling and you talk about



Kohut - Direct

1       dizziness and the like, okay?

2               A       Yes, sir.

3               Q       Now, we know that Mr. Keeling has multiple  
4       sclerosis, okay?

5               A       Yes.

6               Q       How do we know, Doctor, these symptoms that  
7       you saw him for 13 or 14 times are not related to, are not  
8       primarily related to multiple sclerosis as opposed to ear  
9       problems or peripheral --

10               . MR. HAGIE: I object to the form of the  
11       question.

12               THE COURT: Overruled. Well, I will  
13       reverse myself and sustain the objection. Assumes  
14       facts not in evidence.

15

16       BY MR. SCHMIEDER:

17               Q       Doctor, are you aware that Mr. Keeling has  
18       multiple sclerosis?

19               A       Yes.

20               Q       Were you aware of that on the first visit?

21               A       Yes.

22               Q       What are the symptoms of multiple  
23       sclerosis; what are some of the symptoms of multiple  
24       sclerosis?

Kohut - Direct

1           A       A neurologic deficit that is over separated  
2 by time and space that is the heralding point of multiple  
3 sclerosis, time being day one it is one space in the brain  
4 and figuratively, day two, it may be a month or two or  
5 year a two, it may be day two, it's in, affecting another  
6 part of the brain. The first part may be healing up.

7           Q       What are the symptoms; are there some  
8 symptoms that relate to multiple sclerosis?

9           A       Any symptoms that a brain lesion can cause.

10          Q       Is dizziness a symptom?

11          A       Yes, it can be a symptom.

12          Q       Is falling or imbalance a symptom?

13          A       Yes, it can.

14          Q       Now, let's go to perilymphatic fistulas;  
15 what are the symptoms regarding them, Doctor?

16          A       There are three conditions: One is  
17 constant disequilibrium, no matter how mild. The second  
18 is a positional vertigo or nystagmus, that special eye  
19 movement that I mentioned to you. And the third is a  
20 positive fistula test.

21                   However, if you have those three, you must  
22 rule out granuloma by syphilis, that kind of thing,  
23 inflammation, neurologically, anatomically-based related  
24 deficit.

Kohut - Direct

1           Q       And that was ruled out in Mr. Keeling's  
2 case?

3           A       Yes.

4           Q       So now, now we have a person that is  
5 imbalanced, that is dizzy. How do you as a physician make  
6 a reasonable medical judgment as to whether it is related  
7 to multiple sclerosis or related to a perilymphatic  
8 fistula?

9           A       He had those criteria. The MRI, the MRI  
10 that I asked for at the time I saw him had no lesions  
11 anatomically related to the balance, central balance  
12 mechanism. And the tests, the balance tests that he had  
13 could not be mimiced. The entire rate of balance tests  
14 could not be mimiced by a central lesion.

15                   There were specific portions of the balance  
16 test, vestibular tests, if taken in isolation, you would  
17 say that is a central lesion. But where you see the ear  
18 disorder affecting those results, you know that this is  
19 just a reflection of the overriding of the ear portion.

20                   Taken as a bundle, taken as a whole area,  
21 everything pointed, could be attributed to the balance  
22 mechanism of the ear. Could you pluck out certain little  
23 portions of the test and say, "Gee, this is due to a  
24 central" -- yes, if I showed you one in isolation. If I

Kohut - Direct

1       showed you the whole array you would be compelled to see  
2       that it was due to the ear.

3               Q       Well, then, Doctor, do you have an opinion  
4       to a reasonable degree of medical certainty as to whether  
5       or not Raymond Keeling's dizziness, vertigo or imbalance  
6       was related more to the perilymphatic fistula which as I  
7       understand it is peripheral as opposed to MS which as I  
8       understand it is central?

9               A       Yes.

10              Q       Do you have an opinion?

11              A       Yes.

12              Q       What is that opinion?

13              A       He had a perilymphatic fistula. It was  
14       causing the preponderance of his signs and symptoms at  
15       that time. They were even different in character.

16              Q       The signs and symptoms were --

17              A       Balance and dizziness.

18              Q       Finally, Doctor, do you have an opinion to  
19       a, do you understand that Raymond Keeling underwent a  
20       pulmonary function test?

21              A       Yes.

22              Q       That was on August 16, 1994?

23              A       Yes, I think so.

24              Q       Doctor, do you have an opinion to a

Kohut - Direct

1 reasonable degree of medical certainty as to whether or  
2 not the pulmonary function test of August 16, 1994 caused  
3 or contributed to the development of his perilymphatic  
4 fistula which you subsequently operated on; do you have an  
5 opinion?

6 A Yes.

7 Q What is that opinion, Doctor?

8 A That it was directly related. Positive.

9 Q And Doctor, with regard to his employment  
10 and the like, is it your opinion that he has got to avoid  
11 what, around machinery, high places and --

12 A Whatever.

13 Q Heavy lifting?

14 A Anyplace that --

15 MR. PRITTS: I am sorry to interrupt,  
16 Doctor. I am not sure the foundation for the  
17 question about testimony about employment, I am  
18 not sure if he is talking about the time period up  
19 until he last saw the patient or trying to  
20 speculate to the time period.

21 THE COURT: Rather than, as I know you were  
22 for the Jury's interest trying to move it along,  
23 why don't you take it step by step.

24

Kohut - Direct

1 BY MR. SCHMIEDER:

2 Q Doctor, as of the last time you saw Raymond  
3 Keeling, okay, do you have an opinion to a reasonable  
4 degree of medical certainty as to whether or not he could  
5 return to railroad work as an electrician, which required  
6 him to bend, stoop and climb and lift heavy objects?

7 A Yes.

8 Q What is that opinion?

9 A The reason is that he could do nothing that  
10 would place himself or others in jeopardy if he should  
11 have a recurrence of vertigo.

12 MR. SCHMIEDER: I have nothing further.

13 Thank you, Doctor.

14

15 CROSS EXAMINATION

16

17 BY MR. PRITTS:

18 Q Again, Doctor, we have met before. I am  
19 Matt Pritts, I represent the railroad. Would you restrict  
20 Mr. Keeling from driving? He was still able to drive,  
21 wasn't he?

22 A Yes.

23 Q Now, would you agree that dizziness from MS  
24 typically fluctuates in character and intensity?

Kohut - Cross

1           A       Can it do that, yes.

2           Q       Typically does, doesn't it?

3           A       Well, yes, because it could be in more than  
4 one part of the vestibular system.

5           Q       You agree these perilymphatic fistulas are  
6 hard to diagnose, don't you?

7           A       I don't think so.

8           Q       Well, isn't the only definitive way to  
9 diagnose them post-mortem, after someone is dead, and you  
10 look at the bone. You have said that, haven't you?

11          A       I said the only way to be more certain  
12 would take an examination of the temporal bone after life.

13          Q       That is the only definitive way of  
14 diagnosing; isn't it?

15          A       No, that is the way to be more certain.  
16 Definitive diagnosis is made with the surgical criteria  
17 not defined by me. Defined by Brian McKay and Selzer,  
18 Dr. Selzer, the surgical criteria of seeing this fluid.  
19 We've gone further with that, in fact, actually sampling  
20 the fluid microbars and doing an analysis on that fluid,  
21 research wise, and we find actual --

22          Q       Let me ask you this, Doctor. You are  
23 talking about a small hole in an area the size of a dime,  
24 correct?

Kohut - Cross

1           A       Um-um.

2           Q       And you said it's 50 one-thousandth of a  
3 millimeter. I don't remember the meter scale.

4           A       Twenty-five millimeters in an inch.

5           Q       So like if you look at the ruler and look  
6 not on the inch side and you see centimeters and --

7           A       One 25th of an inch.

8           Q       You are talking about 50 one-thousandths?

9           A       Of a millimeter. That is why you don't see  
10 the hole, but the fluid that comes through that hole. It  
11 is sort of like looking at the spring out in the woods.  
12 You don't see the hole from whence it comes; you see the  
13 fluid.

14          Q       Doctor, your operative notes, can you look  
15 at your operative notes?

16          A       Sure.

17          Q       February 1996. By the way, while you are  
18 looking at that, I think you testified you first saw  
19 Mr. Keeling in November of 1995, correct?

20          A       That is what my records say.

21          Q       And so then you waited six weeks, saw him  
22 again, see if his symptoms would resolve, and then only  
23 then did you decide to do surgery?

24          A       Yes, that is typical.



Kohut - Cross

1                   Q       It wasn't a situation where he came to  
2       Winston-Salem and you said, the first time you saw him,  
3       you thought we need to do surgery on you right away?

4                   A       No. The only time that one would do that  
5       would be, with a perilymphatic fistula, if the hearing was  
6       in jeopardy.

7                   Q       The hearing was not in jeopardy?

8                   A       No, so we give those patients with hearing  
9       we admit right away.

10                  Q       . But you didn't do that here?

11                  A       No, you did not have to.

12                  Q       Did you ever tell Mr. Keeling he had nine  
13       holes in his head?

14                  A       Nine holes?

15                  Q       Yes.

16                  A       I don't think I ever said that to anybody.  
17       I don't know.

18                  Q       On your operative note under indications  
19       for procedure, it says, "The patient is a 47-year-old  
20       black male. First episode of vertigo approximately one  
21       and a half years prior." You are saying the first  
22       episode, you mean the first episode of vertigo he ever  
23       had?

24                  A       No, related to this disorder.

Kohut - Cross

1           Q       That is what you meant?

2           A       Sara actually dictated this and Dr. Jacob,  
3       the resident, generally as part of their education  
4       probably helped the professor for many reasons. They will  
5       generally dictate the operative note, and Sara did. And  
6       then that is sent to me for my perusal.

7           Q       But that is not correct, his first episode  
8       of vertigo happened from the MS back in the 1980s, didn't  
9       it?

10          A       . We, I think that the first episode of  
11       vertigo to this disorder.

12          Q       I am asking you the first vertigo that he  
13       ever had.

14          A       When he spun around as a child in the  
15       school ground, okay? Now, the thing is, the meaning of  
16       this, I do not mean to be argumentative, but the meaning  
17       of this is the vertigo related to this disease.

18          Q       I understand. But would you agree that he  
19       had vertigo from MS?

20          A       Oh, did he have vertigo and --

21          Q       I am not trying to argue with you. I am  
22       just trying to point out some things for the Jury. You  
23       haven't looked at Dr. Burch's notes to see what type of  
24       vertigo and dizziness and things he complained of in the

Kohut - Cross

1 time period from the 1980s, mid early 1980s up until the  
2 early 1990s, have you?

3 A No, I spoke with Dr. Burch at length over  
4 the phone, but I never saw his notes.

5 Q And would you agree without looking at his  
6 notes that -- let me strike that question. Let me ask you  
7 this: Have you, you would agree that fistulas can be  
8 caused by something as simple as a sneeze or a cough?

9 A Yes, vigorous sneeze or cough.

10 Q I think, haven't you stated in your  
11 deposition that using the diagnostic criteria you can only  
12 identify 57 percent of the people that have these  
13 fistulas?

14 A Fifty-seven or 59; I can't remember the  
15 exact figure.

16 Q So --

17 A So it is under diagnosed.

18 Q So you are saying 43 of the people that  
19 have fistulas, it is never picked up necessarily?

20 A That is correct.

21 Q It may, it is not picked up at a later  
22 date?

23 A But if we say they have them, we know that  
24 there is less than one chance in a thousand we are wrong.

Kohut - Cross

1           Q       My point is it is your opinion there is 43  
2 percent of the people with fistulas that doctors may not  
3 catch?

4           A       That's right.

5           Q       You diagnosed that he had fistulas in both  
6 ears, didn't you?

7           A       No, he had a positive fistula test in both  
8 ears, but one was dramatically positive.

9           Q       Positive fistula test doesn't necessarily  
10 mean someone has a fistula, does it?

11          A       That is correct.

12          Q       Are you aware when Mr. Keeling was taking  
13 the pulmonary function test that he reported that he had  
14 sweating and chest tightness; are you aware that he  
15 reported that happening?

16          A       If I recall correctly.

17          Q       Those aren't typical symptoms of perilymph  
18 fistula, are they?

19          A       No, unless it would be anxiety related to  
20 the dizziness and the kind of response some of us would  
21 get.

22          Q       You had never, let me get this, you never  
23 before heard of a patient getting a fistula from the  
24 pulmonary function test, have you?

Kohut - Cross

1           A       No.

2           Q       Would you agree with me that pulmonary  
3 function tests are routine tests?

4           A       In summary, yes.

5           Q       They are common, they are done all the  
6 time, routine, they are common?

7           A       They are not as common as  
8 electrocardiograms and not as common as MRIs. In certain  
9 foundries or things like that they would, certain segments  
10 of our society they would be more common.

11          Q       They have been given for years, haven't  
12 they?

13          A       Sure, I had one when I was in medical  
14 school.

15          Q       Probably hundreds of them given every day  
16 across the country, including your hospital?

17          A       I imagine.

18          Q       You talked about a Valsalva maneuver.  
19 Isn't it true that Valsalva, if I take a deep breath and I  
20 am going to try to pick up this table and I strain and  
21 don't breathe out, correct, that is a Valsalva maneuver?

22          A       That is a pure Valsalva movement.

23          Q       Where the airflow was not coming out of my  
24 chest that's quote, unquote, a Valsalva maneuver?

Kohut - Cross

1           A       Correct.

2           Q       Wouldn't you agree that some patients,  
3 maybe a cardiac patient in the hospital, if there is some  
4 fear that they could hurt themselves or hurt their heart  
5 from a Valsalva maneuver, they are told not to do it but  
6 to exhale; like if they have to lift something or roll  
7 over in bed they are told not to strain like that but to  
8 exhale?

9           A       That's right. Can I expand on any of those  
10 answers?

11          Q       No. Well, if you think you can fairly  
12 answer the question whether it is yes or no, I think that  
13 is all you need to do.

14          A       When the cardiac patient goes to lock their  
15 chest, they don't want to lock it with their larynx closed  
16 and hold that pressure in. On the other hand, they are  
17 not, they would be equally instructed not to forcefully  
18 exhale the last little bit of air as is true in pulmonary  
19 function.

20          Q       You weren't there?

21          A       You have to train your --

22          Q       You weren't there when Mr. Keeling took the  
23 pulmonary function test?

24          A       No, sir.

Kohut - Cross

1           Q       And you haven't read his deposition in this  
2 case, have you, where he describes how he took the test?

3           A       No, I don't think so.

4           Q       You talked about the MRIs and what you  
5 interpreted on the MRIs; do you remember that in your  
6 testimony?

7           A       Yes.

8           Q       You didn't look at the actual films?

9           A       No.

10          Q       . So it was something somebody else had read?

11          A       Yes.

12          Q       Would you agree with me as far as looking  
13 for MS that an MRI is somewhat crude in trying to show MS?

14          A       No.

15          Q       Well --

16          A       An MRI is a standard of, the standard for a  
17 neurologist.

18          Q       Does the MRI look to the level of, cellular  
19 level? Does it show you everything that is going on in  
20 the cell?

21          A       Everything that is going on in each cell?  
22 No, it takes an aggregation of cells of demyelination --  
23 the myon is the insulating material over a nerve fiber.  
24 And when you lose than insulation, it is called

Kohut - Cross

1 demyelination. That is what the MRI can say. Can you see  
2 a cell with, a single cell with an MRI? The resolution  
3 isn't great enough.

4 Q Let me ask you this, Doctor. You saw  
5 Mr. Keeling up until, I believe you said 1999, July of  
6 1999.

7 A Yes, that was right.

8 Q And then you retired at that time and he  
9 began being treated by Dr. May?

10 A . Yes.

11 Q At that time when you last saw him, is it  
12 your opinion that he had an open fistula in his head at  
13 that time?

14 A No, I said it was possible. This meant in  
15 my note, I said a possible exacerbation. What that  
16 heralded was for Dr. May to look, see what of these  
17 elements that we are dealing with is the cause.

18 Q Then you defer to his diagnosis of what was  
19 causing Mr. Keeling's problems?

20 A At that time?

21 Q After the time you quit seeing him in  
22 July.

23 A Yes. And what was happening because he had  
24 two things that could possibly cause dizziness.



Kohut - Cross

1           Q       Now, let me ask you about the restrictions  
2       after surgery, you talked about restrictions on  
3       Mr. Keeling. You said he, in your opinion, you mentioned  
4       some of the restrictions. You are not saying he couldn't  
5       do any work whatsoever, such as a desk job or cashier job  
6       or something like that?

7           A       No, only that there were things that he  
8       could safely perform, that he could safely perform wherein  
9       he wouldn't cause himself or other people jeopardy.

10          Q       . He could work as a cashier or maybe a  
11       security guard or unarmed security guard, something like  
12       that?

13          A       No, not a security guard. He would have,  
14       his places to go unless he had full light at all times,  
15       and that is unusual in the security guard situation. But  
16       there would be things that he could do, but not safely as  
17       a security guard.

18          Q       He certainly wasn't disabled from all  
19       employment because you said there are things --

20          A       No.

21          Q       He could drive and do things?

22          A       Yes, he could drive with caution and pull  
23       over as patients have done.

24          Q       And people with fistulas that are repaired

Kohut - Cross

1 go back to work all the time, don't they?

2 A Yes, but we are very careful about what  
3 type of work they are going back to. For instance, a  
4 house inspector, you know, an estimator or whatever, that  
5 is, they have to crawl around in crawl spaces and so on.

6 Q That is not what I am asking you about, but  
7 I understand your point. Now, it's, is it your  
8 understanding that Mr. Keeling had surgery prior to the  
9 time you did surgery on him?

10 A Yes, Dr. Chen.

11 Q But even though he had two surgeries, he  
12 kept having these positive fistula tests, didn't he?

13 A Those were performed with caution. They  
14 weren't performed every time he came in because you can  
15 break a seal that way.

16 Q I am not saying that every time you saw him  
17 he had a positive fistula test. But you would agree he  
18 had surgery twice to repair a fistula, but he nevertheless  
19 continued after the surgeries to have positive fistula?

20 A When he had evidence of a recurrence, then  
21 you would, at that time you would take the bull by the  
22 horn and say, "I have to know what this finding would be."  
23 Then you would do a fistula test. So everything else  
24 matched up. You had to have that bit of information and

Kohut - Cross

1       you would do a fistula test then.

2               Q       And he had two fistula surgeries; the  
3       problems didn't go away?

4               A       They did initially in both instances.

5               Q       Well, he still complained, did he not, a  
6       couple of months after the surgery, he was still light-  
7       headed on occasion, wasn't he, in June of 1996?

8               A       Well, the thing is that you are talking  
9       about complete resolution of in April, which was two  
10      months or so, a month and a half after surgery, better --  
11      no more falling, balance is better. Then in June he does  
12      well unless he gets up quickly from a stooped position.  
13      Once in a while he would get dizzy.

14                      Then in December, eight months after, he  
15      noticed that the balance is bad again, okay. So  
16      everything is an improvement up to then, not a complete  
17      cure. You, that is reasonable because there is usually a  
18      little residual injury.

19                      What you look for is relief, and then when  
20      you see, we go from this period, from this relief, and  
21      then you get bad again, you suspect a recurrence. And I  
22      had at that time vestibular testing, I had the impression  
23      there are no vestibular testing routes consistent with MS  
24      at that time I had written down.

Kohut - Cross

1           Q       Let me ask you this: If he had two  
2       surgeries to close fistulas and after the surgery he still  
3       had a positive fistula test, wouldn't you agree that that  
4       could be consistent with a proposition that he never had a  
5       fistula to begin with?

6           A       No, on the contrary. I know of --

7           Q       If he didn't have fistula the fistula  
8       surgery wouldn't fix it, would it?

9           A       You are saying a positive fistula test or  
10      the three conditions?

11          Q       I said --

12          A       The one fistula test, you can get a false  
13      positive fistula test in MS patients is what you are  
14      asking.

15          Q       No, it is not. I apologize if I am not  
16      making myself clear.

17                   THE COURT: Maybe a shorter question.

18

19      BY MR. PRITTS:

20          Q       My question is if he has had two fistula  
21      surgeries, but still had positive fistula signs after  
22      that?

23          A       Okay, recurrence, okay. Had a positive  
24      clinical criteria, meaning the --

Kohut - Cross

1           Q       Let me finish the question. If he had two  
2 fistula surgeries and still had a positive fistula test  
3 after that, isn't that consistent with the proposition  
4 that maybe he never had a fistula to begin with?

5           A       No, it is consistent most with the  
6 recurrence of fistula, which if it occurs in 15 percent of  
7 people that have a fistula, and it recurs in more than 15  
8 percent of those that had one recurrence.

9           Q       If he had a recurrence of fistula?

10          A       . Yes, he had recurrence and from Chen to  
11 me. And you are saying if a person has signs of a  
12 recurrence, could it be that something else is causing  
13 those signs?

14          Q       Well, it could be.

15          A       MS doesn't cause that.

16          Q       I am asking --

17               THE COURT: Move on, Mr. Pritts.

18               THE WITNESS: Was a wrong diagnosis --

19               MR. PRITTS: Let me see if I have anything  
20 else.

21               THE COURT: Doctor, I think you have  
22 responded to the question.

23

24

Kohut - Cross

1 BY MR. PRITTS:

2 Q You never operated a third time, you never  
3 saw a need to do that?

4 A Well, in Mr. Keeling the question was, he  
5 would have a 40-percent chance of it clearing up by  
6 modified activity. We do that first, the most  
7 conservative thing.

8 Q You would agree it couldn't occur  
9 spontaneously even the first time?

10 A . Nothing occurs spontaneous now.

11 Q It could be idiopathic?

12 A Meaning we don't know the cause.

13 Q Correct. Thank you.

14

15 REDIRECT EXAMINATION

16

17 BY MR. SCHMIEDER:

18 Q One or two questions. Can fistulas recur  
19 and then reheel on its own?

20 A Oh, yes.

21 THE COURT: Thank you very much, you are  
22 excused, you may leave.

23 THE WITNESS: Thank you, sir.

24

1 (The witness was excused.)

2

3 THE COURT: Call your next witness. We  
4 will do our very best to move right along.

5 MR. SCHMIEDER: At this time I can't find  
6 Dr. Chen. If I could read the deposition of Linda  
7 Thacker. I would like to have Lisa --

8 THE COURT: Ladies and gentlemen, as I told  
9 you yesterday morning, it was just yesterday,  
10 deposition testimony is testimony that has been  
11 given another time or place. Consider the  
12 testimony of a witness who appears by deposition  
13 in the same way that you consider any other  
14 testimony.

15 In examining witnesses in Mr. Keeling's  
16 case, there were times when lawyers for the  
17 companies hired by Norfolk and Western to give the  
18 pulmonary function test or monitor the pulmonary  
19 function test were asking the questions sometimes,  
20 and I don't know whether this is one of those  
21 depositions or not.

22 Sometimes you will hear questions that were  
23 asked by the lawyer for Quality Services or by the  
24 lawyer for TK, what is TK's name, TK Group. We've