

263 Va 586

IN THE
Supreme Court of Virginia

RECORD NO. 011034

JANICE WASHBURN,

Appellant,

v.

**PETER KLARA, M.D.,
PETER KLARA, M.D., P.C.,
BRITT M. BORDEN, M.D., and
VIRGINIA BEACH GENERAL HOSPITAL,**

Appellees.

JOINT APPENDIX - VOLUME II OF II

Judith M. Cofield, Esquire
Judith M. Cofield, P.C.
1321 Laskin Road - Suite 203
Virginia Beach, Virginia 23451
Telephone: (757) 422-4858

Counsel for Appellant

Charles M. Allen
Michael D. Hancock
Goodman, West & Filetti, PLLC
4501 Highwoods Pkwy, Ste. 210
Glen Allen, Virginia 23060
(804) 346-0600

Counsel for Appellee Borden

R. Barrow Blackwell
Jason R. Davis
Kaufman & Canoles, P.C.
Post Office Box 3037
Norfolk, Virginia 23514
(757) 624-3169

Counsel for Appellees Klara

Table of Contents - Volume I

Page

PLEADINGS AND ORDERS:

Motion for Judgment filed September 13, 1999	1
Grounds of Defense, Special Plea and Demurrer (Borden) filed October 12, 1999	11
Grounds of Defense to Motion for Judgment (Klara) filed October 22, 1999	20
Demurrer (Klara) filed October 22, 1999	27
Special Plea of Res Judicata (Klara) filed October 22, 1999	29
Brief in Support of Demurrer (Klara) filed March 3, 2000	32
Defendants' Opposition to Motion to Amend (Klara) filed April 21, 2000	38
Defendants' Opposition to Motion to Amend (Klara) filed April 25, 2000	40
Letter to Counsel from Judge Leafe dated May 19, 2000	42
Defendants' Brief in Opposition to Motion to Amend (Klara) filed May 22, 2000	56
Defendants' Supplemental Opposition to Plaintiff's Motion to Amend (Klara) filed May 31, 2000	246
Order entered June 1, 2000	248
Plaintiff's Designation of Expert Witnesses filed October 10, 2000	251

Defendants' Designation of Expert Witnesses (Klara) dated November 8, 2000	260
Defendant's List of Exhibits and Witnesses (Borden) filed January 19, 2001	267
Plaintiff's Proposed Jury Instructions filed February 2, 2001	275
Order entered February 12, 2001	287
Notice of Appeal filed February 22, 2001	288
Notice of Filing Transcript Excerpts filed March 16, 2001	289
Notice of Filing Transcripts filed March 21, 2001	290
Defendant's Objection to Plaintiff's Incomplete Transcripts (Borden) filed April 5, 2001	291
Objection to Transcript (Klara) filed April 5, 2001	294
Notice of Hearing (Klara) filed April 9, 2001	297
Plaintiff's Reply to Defendants' Objections to Transcripts filed April 11, 2001	299
Notice filed May 23, 2001	302
Amended Notice of Transcripts filed April 24, 2001	303
Order entered May 18, 2001	304
Assignment of Error	306

EXHIBITS:

Surgical Services - Intraoperative Record (Attachment to Pleading) 307

Exhibits introduced during Trial Proceedings on February 6 - 8, 2001:

Plaintiff's Exhibits:

Exhibit 2 - Virginia Beach General Hospital Consent to Operation 308

Exhibit 3 - Klara/Borden invoices 309

Exhibit 4 - Virginia Beach General Hospital Bills 315

Exhibit 13 - Kempsville Radiology Letter 325

Exhibit 15 - Office Note of Dr. Borden dated September 17, 1997 326

Exhibit 17 - Operative Note of September 26, 1997 334

Exhibit 19 - History and Physical of October 10, 1997 upon
admission to Virginia Beach General Hospital 337

Defendant's Exhibits:

Exhibit 7 - Virginia Beach General Hospital Radiology Consultation . . 339

Exhibit 8 - Virginia Beach General Hospital Radiology Consultation
Report 340

Table of Contents - Volume II

Page

TRANSCRIPTS:

Transcript of Trial Proceedings before the Honorable Joseph A. Leafe and Jury on February 6, 2001 (Excerpt)	341
--	-----

Testimony of Janice Washburn:

Direct Examination	345
Cross Examination	407
Redirect Examination	550
Transcript of Trial Proceedings before the Honorable Joseph A. Leafe and Jury on February 7, 2001 (Excerpt)	553

Testimony of John Kellum, M.D.:

Voir Dire Examination	556
Direct Examination	567
Redirect Examination	615
Deposition of Dr. Klara (Excerpt)	619

Testimony of Britt Borden, M.D.:

Direct Examination	621
Cross Examination	625
Redirect Examination	626
Transcript of Deposition of Britt M. Borden, M.D. proffered February 7, 2001 (REFUSED)	699
Transcript of Trial Proceedings before the Honorable Joseph A. Leafe and Jury on February 8, 2001 (Excerpt)	738

Testimony of Britt Borden, M.D.:

Redirect Examination	742
Recorss Examination	756
Redirect Examination	822
Recross Examination	834
Redirect Examination	837
Deposition of Dr. Klara (Excerpt)	841

ORIGINAL

011034¹

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

JANICE WASHBURN,

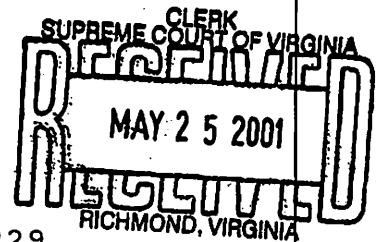
Plaintiff,

v.

PETER KLARA, M.D., et al.,

Defendants.

NO. L99-2229

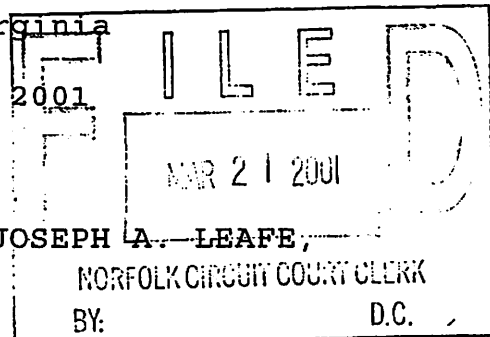


VOLUME II

EXCERPT OF PROCEEDINGS

Norfolk, Virginia

February 6, 2001



Before: THE HONORABLE JOSEPH A. LEAFE,
and a Jury.

Appearances:

JUDITH M. COFIELD, P.C.

By: JUDITH M. COFIELD, ESQUIRE
Counsel for Plaintiff

KAUFMAN & CANOLES, P.C.

By: R. BARROW BLACKWELL, ESQUIRE
JASON R. DAVIS, ESQUIRE
Counsel for Defendant Klara

GOODMAN, WEST & FILETTI, P.L.L.C.

By: CHARLES M. ALLEN, ESQUIRE
Counsel for Defendant Borden

I N D E X

WITNESSESDIRECTCROSSREDIRECTON BEHALF OF THE PLAINTIFF:

JANICE WASHBURN

5

67 (Blackwell)

209

183 (Allen)

E X H I B I T S

NO.	DESCRIPTION	MARKED	RECEIVED
<u>ON BEHALF OF THE PLAINTIFF:</u>			
2	Consent form	24	24
3	Bills, Drs. Klara/Borden	41	41
4	Bills, 9-25-97 surgery	41	41
5	Bills, Dr. Stehlik	43	43
6	Bill, insertion of NG tube	44	44
7	Bill, October MCV admission	49	
8	Bill, November MCV ER bill	52	
9	Bill, Dr. Kellum follow-up	54	
10	Bill, VBGH November admission	56	
11	Bill, Dr. Greenberg	57	

ON BEHALF OF THE DEFENDANT:

1	Letter dated 2-2-98	143	143
---	---------------------	-----	-----

1 EXCERPT OF PROCEEDINGS

2 * * * * *

3 THE COURT: All right. Bring the jury
4 in.

5 (The jury entered the courtroom, and the
6 following proceedings were held:)

7 THE COURT: All right. Good morning,
8 ladies and gentlemen. We are ready to continue with
9 the evidence in this case, a continuation from
10 yesterday.

11 Ms. Cofield, you may call your first
12 witness.

13 MS. COFIELD: Yes, sir. I'm going to
14 call Janice Washburn to the stand.

15 THE COURT: All right. Ms. Washburn, if
16 you will come up and have a seat in the witness box,
17 and keep your voice up so everybody can hear you.

18 All right. You may continue.

19 MS. COFIELD: Thank you, Your Honor.
20 Just bear with me a minute while we find the bills.
21 I think Your Honor has a stack of them up there; is
22 that correct?

23 THE COURT: Well, I don't know.

24 MS. COFIELD: I just wanted the witness
25 to have it in advance.

1 THE COURT: Well, maybe you'd better
2 take what you need, Ms. Cofield. I don't need them
3 until that point in time.

4 MS. COFIELD: Okay. I'm just going to
5 leave that here so you will have a copy as well.
6

7 JANICE WASHBURN, Plaintiff, called as a
8 witness by and in her own behalf, having been
9 previously duly sworn, testified as follows:
10

11 DIRECT EXAMINATION

12 BY MS. COFIELD:

13 Q. Okay. You know something, maybe I'd
14 better move over here. Your name is --

15 A. Janice Washburn.

16 Q. Can you do what you can to keep your
17 voice up, as the court said?

18 A. I'll do my best.

19 Q. You are how old now, Janice?

20 A. Fifty-two.

21 Q. And how were you trained to earn a
22 living?

23 A. I was trained as an LPN through BOCES
24 educational program.

25 Q. Through what educational program?

1 A. The Board of Cooperative Education
2 Services Program.

3 Q. Where is that?

4 A. In Buffalo, New York.

5 Q. How long did you practice as a licensed
6 practical nurse?

7 A. Since 1968.

8 Q. From 1968 through when?

9 A. Through 1997. There were a few brief
10 times that I did not -- was not working through that
11 time.

12 Q. As a licensed practical nurse, take it
13 from the time you were clinically employed as opposed
14 to teaching. When were you clinically employed, and
15 what does that mean to you?

16 A. Clinically employed would have to do
17 with working direct patient care in the hospital or
18 nursing homes or dialysis clinics.

19 Q. Or what clinics?

20 A. Dialysis clinics.

21 Q. Okay.

22 A. Anytime there was direct patient
23 hands-on was the majority of the type of work.

24 Q. And you did that type of work, hands-on
25 from when, '68 through when?

1 A. Basically, outside of the few lapses in
2 working, basically until like 19 -- I believe it was
3 probably '94 when I started the teaching program,
4 somewhere in there.

5 Q. Did there come a time that you were
6 injured on the job?

7 A. Well, yes. I did have a groin pull on
8 the job. My original neck injury was from a car
9 accident, which caused my first neck surgery, and
10 that was in October of '94.

11 Q. Who did your first neck surgery in
12 October of '94?

13 A. Dr. Isabelle Richmond.

14 Q. Okay. And after your surgery in '84,
15 how long were you out of work as a clinical -- or as
16 a licensed practical nurse?

17 A. After the '94 surgery?

18 Q. Yes.

19 A. I think it was eight, maybe nine months.

20 Q. Did you then go back in the same
21 capacity or a different one?

22 A. I went back in a different capacity.
23 Well, actually, it was more teaching, less hands-on
24 but more teaching.

25 Q. What is it that you taught?

1 A. I trained patients to do their own
2 peritoneal dialysis and hemodialysis. In other
3 words, the patients were taught to hook up to a
4 catheter in their abdomen to do dialysis treatments,
5 which cleans the blood for kidney patients that have
6 kidney failure.

7 I also taught the hemodialysis where
8 they use a machine that has a filter, and they insert
9 needles into their arms in order to take blood out of
10 their body and back in to clean it.

11 Q. Okay. Let's stay a little bit away from
12 all those terms of art, and just tell me why is it
13 that you changed from the hands-on to mostly
14 teaching?

15 A. Well, there were a couple of reasons.
16 For one reason I wasn't as able to do a lot of
17 lifting and that type of thing like I did before.

18 Q. Why?

19 A. Because of my neck surgery and, you
20 know, being able to lift with my arms. The other
21 thing was we had established a new home-training
22 program, and my supervisor felt I was the most
23 qualified person to teach it.

24 Q. Okay. And how long were you in that
25 home training program for dialysis patients?

1 A. I was in the teaching aspect of that
2 from about, I think it was '94 until '97 when this
3 happened.

4 Q. All right. So '94 to '97 you were
5 employed by whom in that capacity?

6 A. Hampton Roads Home Dialysis.

7 Q. And previously you were employed by
8 whom?

9 A. Hampton Roads Home Dialysis. I was a
10 coordinator of home nurses at that point. We had a
11 program where nurses went into the home and dialyzed
12 patients in the home, and I supervised those nurses.

13 Q. Okay. So from the time you got your
14 practical nursing degree in 1968 -- well, you
15 graduated high school when?

16 A. 1967.

17 Q. And you immediately went into nursing in
18 '68?

19 A. Yes.

20 Q. Other than a new few lapses, as you've
21 told us, have you always worked as a nurse, either
22 clinical or teaching?

23 A. I worked at two other jobs that I can
24 remember. For a short time when we moved to Illinois
25 I didn't have my nursing license transferred, and I

1 worked as a cashier. And for a short time I worked
2 for Bruce Ford on a part-time basis selling cars.

3 Q. And how long was that?

4 A. Just a couple of months. I didn't like
5 it.

6 Q. And was that also during a move?

7 A. No, actually, it wasn't. It was just
8 something I wanted to try.

9 Q. Then would you tell me if you've held
10 any other jobs in any other field at any other time?

11 A. Nothing that wasn't in the medical
12 field.

13 Q. Now, in 1997 there came a time that you
14 went to Dr. Klara's office; correct?

15 A. Yes.

16 Q. Well, let me even back up further.
17 Somewhere in 1997 were you still in pain?

18 A. Yes.

19 Q. What did you do as a result of finding
20 yourself still in pain?

21 A. I wanted to see another neurosurgeon.

22 Q. What did you do to inquire who you
23 should see, if anything?

24 A. I spoke with some people that I worked
25 with, specifically one of the nurses who worked

1 directly with one of our doctors. And she told me
2 that they referred to Dr. Klara, and that Dr. Klara
3 was a very good physician, very good neurosurgeon.

4 Q. Did you make any other inquiry about Dr.
5 Klara?

6 A. When I phoned the office to talk about
7 getting an appointment, I asked the receptionist or
8 whoever it was that answered the phone if Dr. Klara
9 was a board certified neurosurgeon, and I was told
10 yes.

11 Q. Well, have you ever been familiar in
12 your own practice with that term, board certified?

13 A. Yes. We handled a contract where I
14 worked where we had to have privileges at different
15 area hospitals in order for our nurses and myself on
16 emergency cases to go in and dialyze patients where
17 they did not have a dialysis floor or a dialysis
18 ability to do it at the hospital.

19 And that was at -- Chesapeake General
20 was one of them.

21 Q. That you worked at?

22 A. Well, that I applied for privileges at.
23 And on our form for privileges there is a spot that
24 says are you board certified. Well, I checked no,
25 obviously, because I am not board certified.

1 Q. So what does that term or did it when
2 you applied for privileges mean to you?

3 A. It meant that you had a special
4 certification that you obtained through being very
5 experienced and having a lot of extra training that I
6 as an LPN dialysis nurse do not have.

7 Q. Okay. Why, then, did you inquire of a
8 neurosurgeon, specifically Dr. Klara, if he were
9 board certified?

10 A. It was important to me that whoever did
11 my surgery was going to be the most qualified and
12 experienced. I did not want to have someone that
13 didn't have those qualifications working on me.

14 Q. Did you inquire of Dr. Isabelle
15 Richmond, who did your first surgery in 1994, if she
16 were board certified?

17 A. Yes. My husband and I stood in her
18 office and were looking at some plaques that she
19 had. Some of them were awards for her being involved
20 with the Naval Reserve. I believe it was the Naval
21 Reserve. I won't promise that, but it was one of the
22 services.

23 And she was one of the first female
24 doctors to -- that had held the position that she did
25 of, I think it was chief over the Desert Storm

1 project or whatever. But it was a very high
2 position. At the same time we talked about her being
3 board certified, and we looked at her other diplomas
4 and licenses hanging there.

5 Q. Okay.

6 A. So I knew she was.

7 Q. All right. And when you found out that
8 Dr. Klara was also board certified, what did you then
9 do?

10 A. I completed making the appointment.

11 Q. You did what? I'm sorry.

12 A. I completed making my appointment and
13 went for a visit.

14 Q. Okay. Now, your visit to Dr. Klara,
15 your first one, I believe, is August 1st, 1997?

16 A. I believe that's the right date, yeah.
17 I don't know.

18 Q. Who did you see on that occasion?

19 A. I saw Dr. Klara.

20 Q. What was your complaint on that
21 occasion?

22 A. I had neck pain, arm pain, numbness in
23 my hand, tingling, and just out and out miserable.

24 Q. Okay. Do you recall what you discussed
25 by way of treatment or therapy for those symptoms?

1 A. Yes. At the onset I said to Dr. Klara,
2 my hope was that we would not have to have any more
3 surgery, but that I needed to know if that was what I
4 had to do. I didn't know at that point. That was
5 why I went.

6 He concurred with me that we could try
7 and treat this conservatively.

8 Q. Meaning what? What would that
9 encompass?

10 A. Meaning therapy and medication, and
11 that's what we decided to do. And I entered into
12 physical therapy appointments, and he gave me
13 medications, which I honestly don't remember what
14 they were right now.

15 Q. Okay. On that first occasion did you
16 ever discuss any risks of surgery or contemplate
17 surgery as an alternative, a viable option?

18 A. No. We didn't discuss risks of surgery
19 at all because, as I say, we just -- he examined me,
20 and at that point he said he felt that we could go
21 conservatively for a while and see.

22 Q. Okay. And your next appointment with
23 Dr. Klara -- oh, excuse me. Do you recall that he
24 referred you for an MRI?

25 A. Yes, I went for an MRI. I'm not sure of

1 the date, but I went for it, yes.

2 Q. And then your next appointment with him
3 was September 17th?

4 A. Yes.

5 Q. Was it also with just Dr. Klara, not Dr.
6 Borden involved yet?

7 A. I believe it was just Dr. Klara, but I
8 have to be perfectly honest, I cannot remember. I
9 met Dr. Borden with Dr. Klara at one of the visits,
10 but I'm not sure if it was this one that it occurred.

11 Q. Okay. It seems to have been. You're
12 right; I apologize. So if you met him on that second
13 occasion, would you please tell me how he was
14 introduced to you?

15 A. Dr. Klara brought him in and introduced
16 him to me as an associate. Now, Dr. Klara was -- he
17 apologized, but he was busy with another patient.
18 And he asked me if Dr. Borden could see me that day,
19 and I said yes, that was fine, you know.

20 I assumed he was, you know, a partner in
21 the practice, a partner or an associate of the
22 practice.

23 Q. What was he wearing when you were
24 introduced to him?

25 A. When I was introduced to him he had on a

1 pair of scrubs and a white jacket, and you know, I
2 just --

3 Q. By scrubs you mean like what they wear
4 in the operating room?

5 A. Yeah, the blue ones. I don't remember
6 if they were blue or green that he had on, but I know
7 they were scrubs and a jacket.

8 Q. And his title, was it Dr. at the time?

9 A. Yes. It was Dr. Borden.

10 Q. Did he examine you?

11 A. Yes, he did.

12 Q. And did he prescribe any therapy or
13 medication?

14 A. I believe we continued therapy, and I
15 believe I was already on medication. I don't know if
16 he ordered anything new. I can't really remember.

17 Q. And I'm not sure, again, if that was the
18 second or the third office visit, but certainly that
19 was the first one with Dr. Borden; correct?

20 A. Yes.

21 Q. Okay. And then there was another office
22 visit of 9-22?

23 A. Yes.

24 Q. And on 9-22 do you remember the
25 discussion had between yourself and Drs. Borden

1 and/or Klara?

2 A. Yes. I came in on 9-22, and I was in
3 more pain.

4 Q. What had happened?

5 A. I had been driving my car, and all of a
6 sudden my arm was much worse. The pain increased
7 tremendously, and it was -- I couldn't even bring it
8 away from my body. It was like I had to keep it
9 close.

10 And my husband had to drive me to the
11 visit, because I couldn't do anything with the arm
12 without being in tremendous pain. So when we got
13 there --

14 Q. Excuse me. Let me just ask you when
15 your husband drove you, did he remain in the waiting
16 room or come with you into the exam room?

17 A. No, he came into the exam room with me,
18 because he was upset because I was really, you know,
19 hurting. And he knew that I was upset, so he came in
20 with me. And at that point Dr. Borden said that he
21 felt that I needed surgery.

22 And I think before this I had a bone
23 scan done that showed some pseudoarthrosis.

24 Q. Some what?

25 A. Some pseudoarthrosis.

1 Q. What do you mean by pseudoarthrosis?

2 That's a term that's not common.

3 A. Well, the way that it was described to
4 me, it was like an arthritis type, bony type where
5 the body is trying to produce bone, and it's caused a
6 pinching of the nerve in the disk. I've spent 20
7 years in dialysis, and I'm not really up on the
8 neurological stuff.

9 So he told me that that was
10 pseudoarthrosis, and that it was likely that the
11 nerve was involved, that it happens after you have
12 surgeries, previous surgeries. And it can happen,
13 and that the best -- he felt that the best way to
14 deal with it was to do surgery.

15 Q. Who he?

16 A. Dr. Borden was in the room when we were
17 discussing this. He then told me -- I mean my
18 husband and I said well, you know, if it has to be
19 surgery, it has to be surgery.

20 And then he told me that he believed Dr.
21 Klara was going to be on vacation; he wasn't sure.
22 But it would be like four weeks to six weeks before
23 Dr. Klara would be able to get to me. He didn't know
24 how long his vacation was, but he knew when he got
25 back his schedule was already busy. So he said he

1 could do the surgery if I wanted it done sooner.

2 Now, you have to understand, I've been
3 out of work with this type of surgery before, and it
4 was an extended period of time. I was concerned
5 about getting the surgery done in a reasonable time,
6 so I wasn't going to be off from work six weeks
7 waiting for the surgery and then another six weeks.

8 So I asked him if he was board
9 certified, because if I was going to let him do the
10 surgery, I wanted to know what his qualifications
11 were. So I said are you board certified, and he
12 looked at me and said yes.

13 Brandi was standing -- the hall is here,
14 and there's a door in the exam room. Brandi was
15 standing right at the opening doorway there, and she
16 said with a big smile -- you know, she is a sweet
17 girl, and she said all of our surgeons are board
18 certified.

19 Well, you know, I felt like oh, okay,
20 this guy is very experienced, and I said well, okay.
21 And he must have -- when I asked that question the
22 only thing I can think of is he must have felt that
23 being a nurse, I was maybe nervous about him doing
24 the surgery.

25 MR. ALLEN: Objection.

1 THE COURT: I sustain the objection as
2 to what he would have thought.

3 A. Okay. At that point what he said to me
4 was I've done many of these. This is a simple
5 operation. I've done many of them.

6 BY MS. COFIELD:

7 Q. Did you have any reason to doubt his
8 word at that point?

9 A. No, I didn't. I mean I've seen him in
10 the office, and Dr. Klara has introduced him to me.
11 He is wearing scrubs and a jacket, he was
12 professional, and I thought why would a doctor lie
13 about something like that?

14 I mean it didn't make sense to me. I
15 would have never even thought of somebody lying at
16 that point. I trusted that I was being told the
17 right thing.

18 Q. Okay. Did you have any reason to
19 disbelieve Brandi? Had you come into any contact
20 with her before?

21 A. Yes. I had seen her in previous visits,
22 and she is very likable. She seems to be very
23 efficient. The office seems to run professionally.
24 I mean, you know --

25 Q. Did you go out in the hallway for any

1 reason?

2 A. Yes. After Dr. Borden talked to us, he
3 wanted to show us some X-rays, and he went out into
4 the hallway. Their X-ray machines were out sort of
5 in a room, a big room where there were desks and
6 stuff, and the hallway led to this open area.

7 And we went out there to look at X-rays,
8 and Dr. Klara was there. And he verified with Dr.
9 Klara, he said, you know, this was what the tests
10 showed that I had, the pseudoarthrosis, and Dr. Klara
11 looked at the film.

12 Q. Did you see all of this occur?

13 A. Yes. My husband and I were both there.
14 And he verified with Dr. Klara that he was going to
15 be out of town.

16 And he told Dr. Klara that he could fit
17 me in his schedule, and Dr. Klara said that would be
18 fine. And he mentioned something about make sure you
19 have some backup. Now, in my head I'm thinking of
20 backup as office backup --

21 MR. ALLEN: Objection, Your Honor.

22 A. -- you know, somebody to cover the
23 office.

24 MS. COFIELD: Wait a second. Janice,
25 wait a second.

1 THE COURT: Just a minute.

2 MR. ALLEN: What she is thinking, Your
3 Honor, is irrelevant about this particular phrase.

4 MS. COFIELD: Your Honor, I don't think
5 what she's thinking is irrelevant at all, because we
6 have a reliance factor here and why she was acting.

7 THE COURT: Well, I'll overrule the
8 objection. As long as it's related to her thought
9 process and not --

10 MR. ALLEN: The reliance, Your Honor, is
11 on board certification, not on any other statement.

12 THE COURT: Well, I'll overrule the
13 objection. You may continue.

14 BY MS. COFIELD:

15 Q. All right. I'm sorry. The judge said
16 you can finish your answer. Can you pick up where
17 you were?

18 A. Basically, I was -- at the time I heard
19 the word backup, I'm thinking office. You know, make
20 sure somebody is available to the office for things
21 that might come up while Dr. Borden is in surgery
22 with me, because Dr. Klara is going to be gone.

23 You know, I wasn't thinking anything
24 else. I wasn't thinking like he had to have somebody
25 or anything. I'm thinking covering the office.

1 THE COURT: All right. I think that
2 we've more than completed the answer.

3 THE WITNESS: Thank you.

4 BY MS. COFIELD:

5 Q. All right. So did you at that point
6 leave the hallway and go back to the exam room, or
7 what happened then?

8 A. No. Actually, we didn't go back into
9 the exam room. Brandi went and got a form.

10 Q. Consent form?

11 A. Consent form. I believe it was the
12 consent form. She had me sign a paper.

13 Q. I'm showing you a consent form and ask
14 if that is your signature on it?

15 A. Yes, it is.

16 Q. And is that dated 9-22-97?

17 A. Yes. She brought it over, and as I
18 said, there were some desks --

19 Q. Just a moment, Janice.

20 MS. COFIELD: Your Honor, at this point
21 I would like to move into evidence as Plaintiff's
22 No. 2 the consent form to the September operation.
23 And Your Honor, I apologize --

24 THE COURT: Yeah, that doesn't do much
25 good.

1 MS. COFIELD: I didn't go to the office.

2 THE COURT: All right.

3 (The consent form was marked
4 Plaintiff's Exhibit No. 2 and received
5 in evidence.)

6 MS. COFIELD: Thank you.

7 BY MS. COFIELD:

8 Q. Is this the consent form that you
9 signed?

10 A. Yes, it is.

11 Q. Where were you physically in the office
12 when you signed it?

13 A. I was still not in a room.

14 Q. The hallway?

15 A. Not actually the hallway, but more the
16 open area where the machines were for the X-rays and
17 stuff. And Brandi brought the form over, Dr. Borden
18 filled out part of it, and then I signed it.

19 Q. Was anybody standing there -- excuse me,
20 not anybody. Did either Dr. Klara or Dr. Borden
21 stand there with you and discuss the risks involved
22 with the operation when you signed that paper?

23 A. Not there.

24 Q. When and who?

25 A. Dr. Borden did talk to me when we were

1 in the office previously. He said, you know, if you
2 decide to have the surgery, the general risks are,
3 you know, we normally worry about infection, bleeding
4 and, of course, the anesthesia.

5 He said, you know, you're pretty
6 familiar with the general risks of surgery, and I
7 said yes, that's the same ones as, you know, normally
8 are told to you when you have surgery.

9 Q. And you had had several?

10 A. Yes.

11 Q. Okay. At any time was there any
12 discussion about injury to any nerve?

13 A. No.

14 Q. At any time were you told there was a
15 chance, however remote, of permanent hoarseness?

16 A. No.

17 Q. Permanent difficulty in swallowing?

18 A. No.

19 Q. Would have you consented to this
20 operation had you been told of those risks?

21 A. No, I would not.

22 Q. Why?

23 A. Because my livelihood depended on my
24 voice and being able to talk.

25 Q. And how long had you survived with neck

1 pain already?

2 A. I'd had it on and off since after my
3 first surgery. I mean it had been -- it had gotten
4 increasingly worse, but it had been probably a year
5 or more that it was bothering me quite a bit.

6 And then, of course, I did have the
7 boating thing where I got bounced around trying to
8 close the hatch, and that made it worse.

9 Q. How many years, in answer to my
10 question, that you had been already living with back
11 pain or neck pain?

12 A. Probably two or three years following
13 the other surgery.

14 Q. Had you been told that this was Dr.
15 Borden's very first revision alone, would you have
16 consented?

17 A. No.

18 Q. Why?

19 A. Because I wanted experience. I wanted
20 somebody that was good and knew -- had the amount of
21 experience to get this fixed right once and for all.

22 Q. Do you recall how long he estimated this
23 surgery would take?

24 A. He told us about two to two and a half
25 hours.

1 Q. How long did this surgery actually take
2 with him?

3 A. Well, I only know because of seeing the
4 reports and people told me that it was about six
5 hours.

6 MR. BLACKWELL: Your Honor, objection to
7 hearsay.

8 A. I was not awake. I don't know.

9 THE COURT: I'll sustain the objection.
10 She doesn't know except for the records, and the
11 objection has been made. You may proceed.

12 MS. COFIELD: Okay. Thank you. Excuse
13 me just a moment.

14 BY MS. COFIELD:

15 Q. Did he ever talk, he being Dr. Borden,
16 about the simplicity or complexity of this particular
17 operation?

18 A. Yes. He said it was a simple operation,
19 and he had done many of them.

20 Q. Did Dr. Klara at any point up until now,
21 and we're up to September 22nd, ever discuss the
22 risks of surgical intervention with you?

23 A. No, because in the previous visits we
24 were treating it conservatively. We hadn't even
25 decided, even talked about that being something we

1 were going to do. We weren't going to do surgery at
2 that point.

3 Q. Did he ever tell you that you were a
4 candidate for revision?

5 A. I believe one time he said that if
6 conservative therapy didn't work, we could revise it,
7 but he felt at that time conservative therapy was the
8 best way to go.

9 Q. Okay. Now, first look at your consent,
10 if you will, and would you please tell me what part
11 of your body you consented to have operated on?

12 A. C6 and 7 anterior cervical diskectomy.

13 Q. So C6 and 7. What part did Dr. Richmond
14 operate on in 1994?

15 A. C6 and C7.

16 Q. Did you ever discuss going anywhere
17 except C6 or C7?

18 A. No.

19 Q. Or and C7, I should say.

20 A. No, ma'am, never.

21 Q. If you had been told that they were
22 going to go to other parts, that is an additional or
23 lower, as it happens, vertebral section down to C7
24 and T1, would you have consented?

25 A. No, I wouldn't have.

1 MR. BLACKWELL: Objection to leading the
2 witness.

3 THE COURT: Yes, it is, and she is your
4 witness, Ms. Cofield.

5 MS. COFIELD: Certainly, sir, but would
6 she have -- all right.

7 MR. BLACKWELL: She didn't discuss this
8 when she was talking about what she discussed with
9 the doctors.

10 MS. COFIELD: What?

11 THE COURT: You can ask her what she
12 discussed with the doctors, but you can't lead her
13 and testify yourself, Ms. Cofield. You know the
14 rules.

15 MS. COFIELD: Certainly, sir.

16 BY MS. COFIELD:

17 Q. Would you please tell me other than C6
18 and C7 if any other part of your anatomy was
19 discussed as a surgical option?

20 A. No, not at all.

21 Q. Would you have consented?

22 A. No.

23 Q. Why?

24 A. Because C6 and 7 were where the problem
25 was at. Nobody ever told me that I had a problem at

1 T1, or nobody said you have a problem at C1, or
2 nobody said you had a problem at L2.

3 I'm not going to consent to working on a
4 healthy part of my body and make it so that I have
5 now three fusion parts, less mobility, the chance of
6 more pain, and the chance of possibly -- you know, I
7 know that the first one of these didn't work, so why
8 would I want to involve a healthy part of my body?

9 Q. Now, when you went there, did you --
10 excuse me, there being Virginia Beach General on
11 9-22, did you understand that Dr. Klara would not be
12 there?

13 A. Yes, I did.

14 Q. When you came out of that procedure and
15 that operation, did you follow up with Drs. Klara and
16 Borden?

17 A. Yes, I did. I followed up.

18 Q. Did you see both or either only, that
19 is, one or did you see both?

20 A. I saw both. Sometimes Borden would be
21 in the room, but then Klara would come in. Or I'd
22 see Dr. Klara, and Dr. Borden was out in the open
23 area again.

24 The office is very informally set up,
25 you know, but Dr. Klara did come in the office on

1 occasion as well.

2 Q. Did you discuss with one or both of them
3 the cause for your hoarseness after the operation or
4 post-operatively?

5 A. I talked with both of them, and I was
6 told --

7 Q. By whom or both?

8 A. -- basically, by both Dr. Klara and Dr.
9 Borden that this is more than likely a temporary
10 problem, that it happens sometimes, and that
11 basically, it usually resolves itself in three to six
12 months.

13 Q. Did they, therefore, in the first three
14 months refer you for any therapy?

15 A. Yes. I was referred in December.

16 Q. All right. That's after the three
17 months. That's what I mean, September, October,
18 November that you waited.

19 A. Well, it's before the three-month
20 deadline, because it's December 24th and the surgery
21 was the 25th. But I did go in for speech therapy,
22 speech and swallowing therapy that Dr. Klara ordered
23 to try and improve it.

24 Q. During the time that you were being
25 followed up, did anybody ever tell you, that is

1 either Dr. Klara or Borden, what they considered the
2 cause of -- or rather what was damaged in you?

3 A. Yes. Dr. Borden told me that the
4 surgery took longer than what they had expected, and
5 that very often having the tools there to move
6 everything out of the way and clamp it very often
7 stretches or damages the laryngeal nerve.

8 Q. Did Dr. Klara ever tell you anything
9 like that, what was damaged?

10 A. Dr. Klara said that very often you have
11 a laryngeal nerve problem from stretching.

12 Q. Now, thereafter when you were in speech
13 -- or excuse me. You said who, Klara or Borden,
14 referred you for speech therapy?

15 A. Klara referred me for speech therapy.
16 Now, I'm sure -- well, I would think they probably
17 both talked about it. I don't know.

18 Q. Okay. Had you ever had speech therapy
19 before 1997?

20 A. Yes, I did.

21 Q. When and why?

22 A. In 1988 I had a possible stroke. And it
23 was mild in nature, but I had trouble forming words.
24 I had a voice, but I couldn't form words well.

25 Q. Slur?

1 A. Yes, and I went to therapy at the
2 hospital for that.

3 Q. For how long?

4 A. I think I had speech therapy -- you
5 know, I think it's 1988; I'm not sure. But I think
6 the speech therapy was around three months, two
7 months, something like that. My speech came back
8 very quickly.

9 Q. Between 1988 and 1997 when Dr. Borden
10 operated on you, were you slurring words?

11 A. No.

12 Q. Were you hoarse?

13 A. No.

14 Q. Could you swallow?

15 A. Yes.

16 Q. Did you aspirate?

17 A. No.

18 Q. Were you ever treated for aspiration?

19 A. Not for aspiration.

20 Q. Now, in 19 -- I think it's '84 you had
21 bariatric surgery or a vertical banded gastroplasty;
22 correct?

23 A. Yes.

24 Q. To lose weight?

25 A. Yes, I did.

1 Q. And that occurred in '84?

2 A. Yes.

3 Q. Where?

4 A. Virginia Beach at Bayside Hospital.

5 Q. By whom?

6 A. By Dr. Robert Brewer.

7 Q. After the operation in 1984 up through
8 September 1997 when Dr. Borden operated, were you
9 ever at that time treated for aspiration?

10 A. Not for aspiration.

11 Q. Did you ever when swallowing food or
12 water be told it went in your lungs?

13 A. No.

14 Q. Did you have a hoarse voice?

15 A. No.

16 Q. Did you, however, have to have
17 dilatations? Do you know what they are?

18 A. Yes, I did.

19 Q. What are they?

20 A. I did have one dilatation.

21 Q. Dilatation.

22 A. An endoscopy was performed, and I'm not
23 sure of the date.

24 Q. And what happened -- to your
25 understanding, why did you have to have that?

1 A. They wanted to go in and see if there
2 was a closing up at the opening to the stomach where
3 food wouldn't be able to pass easily into the
4 stomach.

5 Q. Did you, after you had this stomach
6 stapling type of procedure, have trouble with
7 vomiting occasionally?

8 A. Yes, I did.

9 Q. Did you have trouble with diarrhea
10 occasionally?

11 MR. BLACKWELL: Objection, Your Honor.
12 This is all leading the witness.

13 THE COURT: She can ask the witness what
14 problems she had.

15 MS. COFIELD: I'm sorry.

16 BY MS. COFIELD:

17 Q. What kind of symptoms did you have after
18 the 1984 gastric operation?

19 A. I had occasional vomiting, some
20 vomiting. It had increased somewhat in the '90s,
21 that it had gotten some worse where maybe two to
22 three times a day I would have some vomiting.

23 And I also had occasional diarrhea. I
24 didn't have a lot of diarrhea, unless I ate sugary
25 food. That would give you diarrhea. You had to stay

1 away from anything sugary. But I did have the
2 vomiting, and I had difficulty eating healthy foods.

3 And meats were a problem. They wouldn't
4 pass through that area easily. Raw vegetables were a
5 problem, and fruits like, you know, melon and that
6 kind of thing would be a problem. My understanding
7 is that actually high-carbohydrate foods, which I
8 began eating a lot of, are the most easily digestible
9 food.

10 So I had gotten to a point where when
11 you can't eat healthy food, you are hungry and your
12 body is craving food, so you tend to start into a
13 habit of eating foods that are bad, chips and that
14 kind of thing.

15 Q. Did you eat those type of foods?

16 A. Yes.

17 Q. High-caloric foods?

18 A. Yes, I did.

19 Q. How much did you weigh by the time Dr.
20 Borden operated on you in 1997?

21 A. I don't remember what my weight was at
22 Virginia Beach General Hospital, but within two weeks
23 of his surgery I weighed 214 pounds when I went to
24 MCV when they -- I honestly can't remember. I think
25 it was around 220, you know.

1 So I was eating really well as far as
2 swallowing goes. I mean it was getting down there,
3 because I was a big girl.

4 Q. And how frequently was it coming up?

5 A. Two to three times a day, but normally
6 when I would vomit, it was when I tried to eat
7 something else. I could keep those foods down. It
8 was when I was trying to eat meat or vegetables or
9 things like that that were harder to digest.

10 Q. At any point from 1984 when you had this
11 surgery to the time Dr. Borden operated on you, had
12 you ever had a feeding tube put in you for
13 malnutrition?

14 A. No.

15 Q. Did there come a time, nevertheless,
16 that you wanted this procedure revised so your
17 anatomy went back to normal?

18 A. Yes, I did. I wanted to be able --

19 Q. Why?

20 A. I didn't care if I weighed 300 pounds.
21 I wanted to be able to eat healthy food.

22 Q. Okay.

23 A. I was tired of junk food.

24 Q. Did you ever have that revision surgery,
25 though?

1 A. No, I did not.

2 Q. When is the very first time there was
3 any type of a revision to that surgery?

4 A. It was in October '97 following my neck
5 surgery.

6 Q. October?

7 A. Oh, wait a minute. The surgery may have
8 been in November. No, I can't remember the date, but
9 I went to the hospital October 11th.

10 Q. Oh, I know you went to the hospital.
11 No, I'm asking when did Dr. Kellum --

12 A. Do the surgery?

13 Q. -- do the surgery, actually?

14 A. I think it was October 20th.

15 Q. And where was it done?

16 A. It was done at the Medical College of
17 Virginia.

18 Q. MCV for short?

19 A. Right.

20 Q. Now, at that time were you advised of
21 the risks of that surgery?

22 A. Yes, I was.

23 Q. And were you given really an option for
24 whether or not that surgery would be revised?

25 MR. BLACKWELL: Objection, Your Honor.

1 MR. ALLEN: Objection, Your Honor.

2 THE COURT: I'll sustain the objection.

3 MS. COFIELD: Well, Your Honor, it's
4 more for her state of mind as to why she consented to
5 the surgery at the time.

6 THE COURT: Well, it's not relevant to
7 this, Ms. Cofield. We're talking about a different
8 surgery and a different set of circumstances. It
9 doesn't have anything to do with this.

10 BY MS. COFIELD:

11 Q. All right. I would like you to look, if
12 you will, behind, let's see, Tab 1.

13 And you can take this over here and go
14 behind Tab 1 and tell me if you recognize the bills
15 for Drs. Borden and Klara from date of operation
16 forward, nothing previous, just from date of
17 operation forward?

18 A. Yes.

19 Q. Did you receive those bills?

20 A. Yes, I did.

21 Q. Did you pay those bills?

22 A. Yes, I did.

23 Q. And indeed, were those bills, as I have
24 represented, only from date of surgery forward, the
25 ones you're looking at?

1 A. Yes, ma'am.

2 MS. COFIELD: Your Honor, may I move
3 them in a group so you don't have to mark them
4 individually, jointly as the next --

5 THE COURT: Are you talking about those
6 bills --

7 MS. COFIELD: Correct, sir.

8 THE COURT: -- that you've just referred
9 to?

10 MS. COFIELD: Correct, sir.

11 THE COURT: If you want to offer them,
12 just hand them to me so I can mark them.

13 MS. COFIELD: Well, I mean can I go
14 through a few tabs at once, and you can mark them
15 jointly? That's what I'm asking for.

16 THE COURT: Well, it seems to me that
17 you said all the bills from surgery forward.

18 MS. COFIELD: I'm going to go through
19 other treating physicians, though.

20 THE COURT: No.

21 MS. COFIELD: Okay. Then yes, that's --

22 THE COURT: The series of bills from
23 Drs. Klara and Borden will be marked as Plaintiff's
24 No. 3.

25 (The bills of Drs. Klara and Borden were

1 marked Plaintiff's Exhibit No. 3 and
2 received in evidence.)

3 BY MS. COFIELD:

4 Q. And will you please go behind what is
5 labeled there as Tab 2?

6 A. Yes.

7 Q. Are those the bills from the C6-C7
8 operation of September 22nd -- or 25th, excuse me,
9 1997?

10 A. Yes.

11 Q. Did you receive and pay those bills?

12 A. Yes, I did.

13 MS. COFIELD: I would move those into
14 evidence, sir.

15 THE COURT: All right. They will be
16 received as Plaintiff's No. 4.

17 (The bills from C6-C7 operation of
18 9-25-97 were marked Plaintiff's Exhibit
19 No. 4 and received in evidence.)

20 BY MS. COFIELD:

21 Q. Now, that carried us through September
22 28th when you were discharged. Come October 10th you
23 told us you were in the hospital. Why were you in
24 the hospital? And I believe you were at Bayside.
25 Why?

1 A. Well, I went to Bayside after I saw the
2 ENT doctor, Dr. Stehlik, who Dr. Klara and Dr. Borden
3 sent me to.

4 Q. Did either Dr. Borden or Dr. Klara tell
5 you why they referred you to Dr. Stehlik or why they
6 wanted you to go see him?

7 A. Yes. They said that -- I had gone to an
8 office visit and was having continued difficulty
9 swallowing without choking and choking badly, you
10 know. And they had done a swallowing test at Leigh
11 Memorial Hospital and found that I had some
12 aspiration.

13 So they wanted me to see Dr. Stehlik to
14 see if he could confirm this and confirm the vocal
15 cord problem, and so I saw him.

16 Q. Did you then see him?

17 A. Yes.

18 Q. All right. And is the first office
19 visit you had with him October 10th?

20 A. Yes, and he --

21 Q. Excuse me one moment.

22 A. Okay.

23 MS. COFIELD: Thank you, sir. I would
24 move that into evidence.

25 THE COURT: All right. Plaintiff's

1 Exhibit No. 5.

2 (The bill for Dr. Stehlik was marked
3 Plaintiff's Exhibit No. 5 and received
4 in evidence.)

5 A. He spoke with Drs. Klara and Borden
6 because he felt I needed a feeding tube, an NG tube
7 placed.

8 BY MS. COFIELD:

9 Q. Did you then go to the hospital, Bayside
10 specifically for the insertion of a feeding tube?

11 A. Yes, I did.

12 Q. When?

13 A. Basically, when we left Dr. Stehlik's
14 office we went over there.

15 Q. All right. And the Bayside trip was
16 then on the same date?

17 A. Yes, it was.

18 Q. Was a feeding tube inserted in you?

19 A. They attempted to put an NG tube down.
20 Dr. Berger got it down, but when they tried to put
21 fluid through the tube into my stomach, they couldn't
22 put more than 10 CCs without it coming up around the
23 tube and then going into my airway and choking me.

24 Q. How much is about 10 CCs?

25 A. It's about that much water in a little

1 cup, just about that much, maybe a teeny little
2 spoon.

3 Q. Is this the bill that you were given for
4 the insertion of the nasogastric tube or feeding tube
5 -- or excuse me. It was a J-tube, or it was an NG
6 tube?

7 A. No, it was an NG tube.

8 Q. Okay. Is this the bill?

9 A. Yes.

10 Q. Did you receive and pay this bill?

11 A. Yes.

12 MS. COFIELD: Thank you, sir.

13 THE COURT: All right. It will be
14 received as Plaintiff's No. 6.

15 (The bill for insertion of NG tube was
16 marked Plaintiff's Exhibit No. 6 and
17 received in evidence.)

18 BY MS. COFIELD:

19 Q. And were you then in the hospital that
20 time, October 10th?

21 A. Well, yes. When they couldn't put the
22 NG tube down, they contacted Drs. Klara and Borden.
23 And I was told to go to Virginia Beach General to be
24 admitted, so the surgeons could evaluate me for an
25 actual feeding tube to go into my stomach.

1 Q. And that type of feeding tube directly
2 into your stomach as opposed to your nose is called a
3 what?

4 A. Well, there's a couple of different
5 kinds, but I ended up down the road with a J-tube.

6 Q. Did you do what you were told?

7 A. Yes, I did.

8 Q. And then you were at Bayside from when
9 to when?

10 A. No, I was at Virginia Beach General.

11 Q. I'm sorry, Virginia Beach General.

12 A. From the 10th to the 11th.

13 Q. Did you see Drs. Klara and Borden while
14 you were there?

15 A. I'm not sure if Dr. Klara came in. Dr.
16 Borden came in, but I don't remember Dr. Klara coming
17 in. He may have. There was a lot of doctors coming
18 in and out at that point.

19 Q. Are these the bills that you received as
20 a result of the two-day admission for your second
21 admission at Virginia Beach General Hospital?

22 A. Yes, those are them.

23 MR. BLACKWELL: If I'm reading Ms.
24 Cofield's index correctly, it includes some November
25 bills from a left upper quadrant abdominal pain and

1 exploratory laparotomy and a wound infection in the
2 abdomen following the surgery. Or am I reading this
3 correctly?

4 MS. COFIELD: But you see the bills
5 behind it that only deals with that day.

6 MR. BLACKWELL: But here on your index
7 it shows --

8 MS. COFIELD: You're correct. There is
9 a statement that it's September, and here is
10 November. So you're right, this is going into the
11 third admission.

12 MR. BLACKWELL: I would object to the
13 third admission.

14 THE COURT: All right. I'm not going to
15 admit it at this time.

16 MS. COFIELD: Well, Your Honor, let me
17 go ahead and move into evidence the 665, and I will
18 tie up the other one, and if you would mark that for
19 identification.

20 THE COURT: All right.

21 MS. COFIELD: Thank you. Do you want me
22 to just take off the --

23 THE COURT: We'd better treat them
24 separately, Ms. Cofield. It looks like there are
25 two. If you will do that, then we'll deal with them

1 separately.

2 MS. COFIELD: I'll tell you what. Why
3 don't I even just hold onto it, and maybe I can tie
4 it up later.

5 THE COURT: Well, that's entirely up to
6 you. But there's only a piece that can go in now.

7 MS. COFIELD: All right.

8 BY MS. COFIELD:

9 Q. Let's see, and then after you had a
10 two-day admission at Virginia Beach General, what
11 happened to you then?

12 A. The surgeons from Virginia Beach General
13 felt that my condition was too complicated at that
14 point, and they preferred to have me sent to MCV.
15 And they contacted a specialist there, Dr. Kellum, to
16 take my care over.

17 Q. Okay. You were then sent to MCV on
18 October 11th and remained there through when?

19 A. I think it was December 8th, I believe.
20 Oh, no, excuse me. It was October 11th to October
21 30th.

22 Q. Okay. While you were at MCV, you were
23 admitted for what purpose, your understanding, ma'am?

24 A. To have a feeding tube inserted and to
25 get nutrition. Because they said I was malnourished

1 at that point, and I needed nutrition to heal the
2 surgery I'd had on my neck, that without it I may not
3 heal.

4 Q. From the time that you were admitted the
5 second time to Virginia Beach General and couldn't
6 get 10 CCs of water down to the time you are treated
7 at MCV and your surgery is revised, could you put
8 anything in your mouth orally without it going in
9 your lungs?

10 A. No. Everything I tried to eat or drink
11 made me choke, so I couldn't.

12 Q. Were you fed -- how were you fed during
13 that period of time, then?

14 A. I wasn't.

15 Q. Did you not have a feeding tube?

16 A. From when to when?

17 Q. When you're at Virginia Beach General
18 Hospital on October 11th and 12th to the time you are
19 transferred to MCV.

20 A. Oh, once they did the surgery -- I
21 believe it was October 20th that Kellum did the
22 surgery -- then I had a feeding tube, yes. So there
23 was like nine, ten days in there that all I had was
24 IVs. They didn't give me anything else.

25 Q. And no feeding tube either?

1 A. No.

2 Q. Are these the bills that you were given
3 for your stay at MCV between October 11th and October
4 30th?

5 A. Yes, ma'am.

6 Q. Did you receive and pay these bills?

7 A. Yes, ma'am.

8 MR. BLACKWELL: Your Honor, I think we
9 have to have somebody link up --

10 THE COURT: Well, that's right.

11 MR. BLACKWELL: -- medical necessity. I
12 mean we have evidence that the surgery had been
13 planned just three days before.

14 THE COURT: Right. The court is not
15 going to receive them at this point in time.

16 MS. COFIELD: Will you please mark it
17 for identification?

18 THE COURT: I will mark it for
19 identification.

20 MS. COFIELD: Thank you.

21 (The bill for the October MCV admission
22 was marked Plaintiff's Exhibit No. 7 for
23 identification.

24 BY MS. COFIELD:

25 Q. And you were discharged, I believe,

1 October 30th?

2 A. Yes.

3 Q. How were you being fed on October 30th?

4 A. Through a J-tube into my stomach. It's
5 a rubber tube that's inserted into the stomach so
6 that you can flush liquid food through it.

7 Q. How frequently did you get fed liquid
8 food?

9 A. In the hospital they were doing it, I
10 believe, every two to three hours.

11 When I went home I had instructions,
12 because I couldn't tolerate a lot at any one time and
13 I couldn't tolerate the sugar that was in the feeds,
14 to do it every two hours for the waking hours, the 12
15 waking hours a day. So I did about six feedings a
16 day.

17 Q. How much liquid would go into you each
18 time?

19 A. I was told to get 100 CCs in.

20 Q. Each feeding or total?

21 A. Yeah, each feeding. They preferred you
22 be able to do more, but I couldn't tolerate it.

23 Q. And this went on, that is the home
24 feedings, from what period to what period?

25 A. I believe December -- I'm trying to

1 think of the date. I went to the emergency room, and
2 it may have been December 8th, yes -- or November
3 8th, excuse me. November 8th I went to the emergency
4 room at MCV, because I had drainage and redness
5 around the tube.

6 Q. What had happened? What had you
7 developed?

8 A. I had developed an infection.

9 Q. What did you do when you found out you
10 had that?

11 A. We called Dr. Kellum's service. It was
12 a weekend, and he wasn't available. And his service
13 told us that we needed to go to the emergency room at
14 MCV.

15 Q. Did you do what you were told?

16 A. Yes, I did.

17 Q. And when you went to the MCV emergency
18 room, what was done to you?

19 A. They did some lab work, and they looked
20 at the wound and took a culture of the wound and gave
21 me an antibiotic and told me to go home and do
22 frequent cleanings and dressings and take the
23 antibiotic and follow up with Dr. Kellum in six days.

24 Q. Okay.

25 A. Which I did.

1 Q. All right. Are these the bills that you
2 received as a result of getting the treatment for the
3 infection of the feeding tube?

4 A. Yes.

5 Q. And this was an infection from a feeding
6 tube inserted where?

7 A. At MCV.

8 Q. And you were transferred to MCV by whom?

9 A. By Drs. Borden and Dr. Klara.

10 MS. COFIELD: I would like to move this
11 into evidence at this time, Your Honor.

12 MR. BLACKWELL: Same objection.

13 THE COURT: For identification at this
14 point. They're not in evidence as such.

15 (The November MCV ER bill was marked
16 Plaintiff's Exhibit No. 8 for
17 identification.)

18 MS. COFIELD: All right. Now, the next
19 thing is -- I'm sorry. Should I wait, Your Honor?

20 THE COURT: No. Go ahead.

21 BY MS. COFIELD:

22 Q. The next date here that you see Dr.
23 Kellum, did you do what you were told and follow up?

24 A. Yes, I did.

25 Q. When?

1 A. November 14th.

2 Q. And why?

3 A. Because I was told to follow up with
4 him, and I still had --

5 Q. I mean for what condition? I'm sorry.

6 A. For the feeding tube infection, and I
7 still had drainage.

8 Q. And then are these the bills that you
9 received from Dr. Kellum for the follow-up visit for
10 the infection?

11 A. Yes, it is.

12 Q. What, if anything, did he do on this
13 occasion for the follow-up visit?

14 A. He pulled the J-tube.

15 Q. What was that like?

16 A. It was not a pleasant experience. They
17 do it in their office, and it kind of feels like
18 somebody is pulling your insides out. Because it
19 kind of it heals in there, you know, and it gets
20 tissue around it, and so they just yank it out.

21 It's not, you know, a life-threatening
22 procedure, but it's not very comfortable because
23 you're awake when they do it.

24 Q. Are those the bills that you received
25 when he pulled the J-tube on your follow-up visit?

1 A. Yes.

2 MS. COFIELD: Again, understanding that
3 Dr. Kellum will be here tomorrow --

4 THE COURT: This is for identification.

5 (The bill for Dr. Kellum's follow-up was
6 marked Plaintiff's Exhibit No. 9 for
7 identification.)

8 BY MS. COFIELD:

9 Q. Did that infection go away on November
10 14th when you saw him in the follow-up visit?

11 A. No.

12 Q. What happened to it?

13 A. About 12 hours after I returned home I
14 had severe abdominal pain, and we went to the
15 Virginia Beach General ER, because the pain was so
16 intense I knew I couldn't go all the way to MCV. And
17 when I was there they did --

18 Q. Did you see Dr. Klara, when you say
19 they?

20 A. No. When I was there at the ER, I saw
21 the ER doctors. They called in the surgeon, Dr.
22 Dalton, and they also called in Dr. Greenberg, a
23 pulmonologist. They didn't know if I could have a
24 pulmonary emboli, but I did not.

25 So they did an ultrasound and some other

1 tests and found that I had peritonitis.

2 Q. What is peritonitis, ma'am?

3 A. It's an infection of the lining that
4 covers the internal organs.

5 MR. BLACKWELL: May I object and
6 approach for one second?

7 THE COURT: You may.

8 (Counsel approached the bench, and an
9 off-the-record discussion was held.)

10 BY MS. COFIELD:

11 Q. All right. You used one term. Is that
12 the infection you're still talking about?

13 A. Yes.

14 Q. And were you then treated at Virginia
15 Beach General Hospital between November 15th and 8?

16 A. Yes, I was.

17 MS. COFIELD: The bills, please. Are
18 those them, or did we already -- do you have them,
19 Your Honor? I'm sorry. Is that when counsel and I
20 approached?

21 THE COURT: Well, I have a bill from
22 Virginia Beach General Hospital that looks to be
23 September 22nd to September the 28th.

24 MS. COFIELD: So behind Tab 9. Then I
25 must not have submitted it yet. I'm sorry. Okay.

1 There we go.

2 THE COURT: Again, they will be received
3 for identification, Ms. Cofield.

4 MS. COFIELD: Thank you.

5 (The bill for VBGH November admission
6 was marked Plaintiff's Exhibit No. 10
7 for identification.)

8 BY MS. COFIELD:

9 Q. You saw Dr. Klara during that
10 admission. Do you recall anything he told you at
11 that time about your treatment?

12 A. Dr. Klara?

13 Q. Yes.

14 A. And that's the third admission we're
15 talking?

16 Q. It's the third admission.

17 A. Right.

18 Q. That is, did you discuss why you were
19 there with Dr. Klara?

20 A. Oh, yeah. I mean we talked about the
21 fact that I had the infection from the feeding tube.
22 We talked about the fact that I had had the
23 aspiration and so forth.

24 Q. I'm sorry, the fact that what?

25 A. That I had had the aspiration and

1 everything, and the fact that my voice was still bad.

2 Q. Did he say anything about the fact that
3 it was now three months post-op?

4 A. He just said that sometimes in some
5 people, although it's not very common, but it takes
6 sometimes as much as nine months for it to come back.

7 Q. And Dr. Greenberg you referenced during
8 that visit. He is what type of doctor?

9 A. A pulmonologist.

10 Q. Did you have a pulmonary embolism?

11 A. No, I did not.

12 Q. Did you have tests for that?

13 A. Yes, I did.

14 Q. Would you please turn to that tab? Are
15 those the bills that you received from Dr. Greenberg
16 for the tests during that admission?

17 A. Yes.

18 Q. Okay.

19 MR. BLACKWELL: Your Honor, same
20 objection.

21 THE COURT: All right. Again, this will
22 be received for identification at this point.

23 MS. COFIELD: Thank you.

24 (The bill from Dr. Greenberg was marked
25 Plaintiff's Exhibit No. 11 for

1 identification.)

2 BY MS. COFIELD:

3 Q. All right. And you then went to
4 physical therapy, Tidewater Physical Therapy, and
5 we've talked about that. That was Dr. Klara's
6 referral?

7 A. Yes, it was.

8 Q. And her name is Ms. Luna. Did Ms. Luna
9 give you a referral or did Dr. Klara give you a
10 referral for any other health care provider after
11 that?

12 A. I believe he gave me some referrals for
13 physical therapy as well as voice therapy throughout
14 this.

15 Q. What did you learn to do in voice and
16 physical therapy? What was concentrated on, that is?

17 A. On my voice and techniques for
18 swallowing, so that I could swallow easier and keep
19 food -- take food in orally. And the physical
20 therapy we worked on -- I had been in the hospital
21 for quite a while, and I was really weak.

22 Q. And was really what?

23 A. I was really weak, and of course, my
24 neck was bothering me, you know, still. I hadn't had
25 any therapy following surgery or anything. And so we

1 worked on strengthening and endurance, trying to get
2 me back to being able to function at a better level.

3 Q. Had you ever had physical therapy of
4 that nature before?

5 A. Before my surgery Dr. Klara sent me for
6 physical therapy for my neck, but not since the voice
7 thing, the stroke had I had --

8 Q. I'm talking about the swallowing.

9 A. Oh, the swallowing, no. Oh, wait a
10 minute. I'm sorry. At MCV they did. When I had the
11 surgery following my neck surgery at MCV, they
12 diagnosed the aspiration and had me do some
13 techniques with their speech and swallowing
14 specialist as well.

15 Q. Okay. Now, when you were able to teach
16 as a dialysis nurse, how much a year did you earn?

17 A. Approximately \$33,500 or 600 a year.

18 Q. Are you able to teach?

19 A. No.

20 Q. Were you ever fired from your job?

21 A. No, I was not fired.

22 Q. Was your job -- how is it you came to
23 lose your job?

24 A. What my employer explained to me and
25 what I understood was that we had a patient census go

1 down. There was myself and one other girl that were
2 in that particular department.

3 I wasn't able to come back to work at
4 that time. I was not able yet to come back to work
5 and do my job or any job, for that matter, at that
6 point. And so they had to let me go, because they
7 had to pare down.

8 They had to -- because I couldn't do the
9 job that I had been doing, they could not hold my
10 space for me.

11 Q. Did you have another space?

12 A. Well, yes. She told me that I could
13 have --

14 MR. BLACKWELL: I would object to this
15 as hearsay.

16 MS. COFIELD: What is hearsay?

17 MR. BLACKWELL: What her supervisor told
18 her.

19 MS. COFIELD: I didn't ask that.

20 THE COURT: Well, what did you ask?

21 MS. COFIELD: I asked was there another
22 space for you even if you couldn't teach anymore.

23 THE COURT: Does she know that?

24 MS. COFIELD: Yes, sir.

25 THE COURT: Just calm down.

1 A. I had a --

2 THE COURT: Wait just a minute, Ms.
3 Washburn.

4 MR. BLACKWELL: Just so I can clarify,
5 Ms. Cofield may have asked a question that was not
6 eliciting a hearsay response, but the response was
7 hearsay. She said my supervisor told me.

8 MS. COFIELD: Oh, I didn't hear that.

9 THE COURT: Well, to the extent that
10 it's based on what other people have told you, you're
11 not able to testify to that.

12 I'll sustain the objection on this,
13 because the decision with regard to what was or was
14 not available is not hers to make and not within her
15 knowledge. You may continue on.

16 MS. COFIELD: I'll try to ask a
17 different question.

18 BY MS. COFIELD:

19 Q. Did you have a job for teaching to go
20 back to, teaching dialysis?

21 A. No.

22 Q. Did you have a job to go back to if you
23 could speak?

24 A. Yes.

25 Q. What was the job you could have gone

1 back to if you could have spoken?

2 A. I could have gone back to a lateral
3 position in the company doing some type of nursing
4 care with the patients, be it going to the hospital
5 and dialyzing patients, acute patients. There's many
6 many things that we do there. I could have done
7 those.

8 Q. Are you able to sit for long periods of
9 time?

10 A. No.

11 Q. Why?

12 A. Because my neck hurts me too bad. I get
13 to the point where I'm very uncomfortable.

14 Q. What, if any, other positions impair
15 your capability for earning employment?

16 A. My voice. I can't talk on the phone. I
17 can't take orders from doctors and repeat them to
18 them. I can't call pharmacies. Telephone is out,
19 because people can't understand me over the phone.
20 It's hard unless it's a one-on-one situation where
21 it's quiet for people to understand me in a group if
22 there's other noise going on.

23 I can't keep my arms in one position too
24 long. I can use my arms, but I've never -- you know,
25 I can use my arms, but I couldn't keep my arms above

1 my head for any length of time. I can't keep them
2 out like this for any length of time because it's
3 painful for me.

4 MR. BLACKWELL: I didn't see the last
5 gesture.

6 A. I can't keep my arms like this for any
7 length of time.

8 MR. BLACKWELL: Thank you.

9 BY MS. COFIELD:

10 Q. Do you blame Drs. Borden or Klara for
11 not being able to lift your arms?

12 A. No.

13 Q. Well, tell me, when you came to me, why
14 is it, then, did you first seek me out?

15 MR. BLACKWELL: Objection, Your Honor.
16 What on earth has that got to do with this?

17 THE COURT: I'll sustain that objection.
18 That's really not relevant at all, Ms. Cofield.

19 MS. COFIELD: Well, Your Honor, can we
20 approach for a second?

21 THE COURT: Yes, you may.

22 (Counsel approached the bench, and an
23 off-the-record discussion was held.)

24 BY MS. COFIELD:

25 Q. Now, tell me something. Did I ever ask

1 you to go to the library to check on Dr. Borden's
2 board certification or credentials?

3 MR. BLACKWELL: Judge, let me object to
4 that. Isn't that hearsay? She's got a deposition
5 transcript which she can read to the jury.

6 THE COURT: I'm going to overrule the
7 objection, Mr. Blackwell.

8 MS. COFIELD: Thank you, sir.

9 BY MS. COFIELD:

10 Q. Would you please answer if I ever
11 instructed or asked you to go to the library to check
12 out Dr. Borden's credentials?

13 A. No, you did not.

14 Q. How is it that it came to be that you
15 did that?

16 A. I had been in your office, and we had
17 talked about my case. You didn't recognize Dr.
18 Borden's name, and you had done a lot of cases. And
19 I told you --

20 THE COURT: Wait a minute, now. No
21 discussion or what have you about -- you can answer
22 the question of why you went there without the
23 explanation.

24 BY MS. COFIELD:

25 Q. All right. Why did you go?

1 A. I went to see you because I felt --

2 Q. No, why did you go to the library?

3 A. Oh, why did I go to the library?

4 Q. Yes.

5 A. I went there for myself to check on his
6 board certification.

7 Q. And why is it that you went to the
8 library as opposed to any other place?

9 A. Because I didn't know where else to go.
10 I didn't know what doctors to ask about it. I didn't
11 know who to ask or where to go, so I looked in the
12 library. I didn't have a computer.

13 THE COURT: All right. Ms. Cofield,
14 from there on that's the extent of that subject.

15 MS. COFIELD: All right.

16 BY MS. COFIELD:

17 Q. Now, would you please tell me if anybody
18 has told you that a -- or have you contemplated
19 another operation on your voice?

20 A. I have been told that there is an
21 operation that can be done.

22 MR. BLACKWELL: Judge, I'm going to
23 object to hearsay.

24 THE COURT: I'll sustain that.

25 MS. COFIELD: Your Honor, I'm only

1 inquiring not as to the truth of how the operation
2 works or whatever, but whether she is willing to have
3 a future operation. And if she is not willing, why.

4 THE COURT: That wasn't your question,
5 Ms. Cofield.

6 MS. COFIELD: I have to lay a
7 foundation, Your Honor, to get to the next one.
8 That's all.

9 THE COURT: Ms. Cofield, if you have a
10 question about -- if you want to ask your client
11 whether she's willing to have another operation, you
12 may do so.

13 MS. COFIELD: All right.

14 BY MS. COFIELD:

15 Q. Are you, ma'am?

16 A. No, I'm not.

17 Q. Why?

18 A. Because it's my understanding that if I
19 have that surgery, there is a possibility that my
20 breathing will get worse, that I'll lose more air. I
21 can speak some now, but I don't want -- but my
22 breathing is poor, and I'm not going to chance having
23 more breathing problems.

24 Q. And you have not had any other treatment
25 for your throat or your dysphasia, swallowing

1 problems other than what we have discussed?

2 A. No, ma'am.

3 MS. COFIELD: Okay. I thank you, and I
4 pass the witness.

5 THE COURT: All right. Ladies and
6 gentlemen, let's take a short recess, and then we'll
7 come back for the cross-examination of this witness.

8 And you certainly may step down.

9 (Short recess.)

10 THE COURT: All right. Mr. Blackwell?

11 MR. BLACKWELL: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. BLACKWELL:

14 Q. Good morning, Ms. Washburn.

15 A. Hi.

16 Q. Ms. Washburn, let me take you back a
17 little bit in time, to begin with. The vertical
18 banded gastroplasty, you indicated that you had that
19 in 1984?

20 A. I believe it was sometime around there.
21 I don't know the exact date.

22 Q. And at that time you were weighing what?

23 A. I weighed about 230.

24 Q. About 230? And the surgery was
25 performed by Dr. Brewer in Virginia Beach?

1 A. Yes.

2 Q. And after you had the VBG, I'll call it,
3 how did your weight change?

4 A. I did well. I lost weight.

5 Q. Over the first year, say, how much did
6 you lose?

7 A. I guess it might have been 90 to 100
8 pounds.

9 JUROR: We can't hear her.

10 BY MR. BLACKWELL:

11 Q. If you will move up to the microphone a
12 little bit, and I'll come over this way so you can --

13 A. About 90 to 100 pounds.

14 Q. All right. So within a year after you
15 had the VBG, you had gone from 230 pounds down to --

16 A. Maybe 130 to 140, somewhere in there.

17 Q. What was the lowest weight you attained?

18 A. I think it was probably around 128,
19 something like that.

20 Q. And am I correct that for the first
21 several years you had the VBG, you had good success
22 with it? That is, you were able to eat healthy
23 foods?

24 A. Yes.

25 Q. And you were able to keep your weight

1 down?

2 A. Yes.

3 Q. Now, around 1990, 1991 things began to
4 change with the vertical banded gastroplasty, didn't
5 they?

6 A. Yes.

7 Q. In fact, you began to have a fair amount
8 of swallowing difficulties, did you not?

9 A. I did not have swallowing difficulties.

10 Q. Well, did you not --

11 A. What I had was when the food would get
12 into my stomach, it would start to regurgitate, and I
13 would vomit.

14 Q. Well, in 1992 didn't you undergo a
15 swallowing manometry to see about your swallowing
16 problems?

17 A. Yes, I did.

18 Q. So is it fair to say that in 1992, at
19 least, you were having swallowing difficulties such
20 that you had to undergo a procedure?

21 A. The swallowing difficulty was -- the
22 test was ordered because I wanted to reverse the
23 surgery, and they had to make sure that I didn't have
24 any other problem that would interfere with reversing
25 it.

1 Q. When did you first want to reverse the
2 surgery?

3 A. Probably in '91, '92.

4 Q. And by that time, by 1991 you were
5 vomiting two, three, four times a day, were you not?

6 A. Two or three times a day, yes.

7 Q. You were retching a fair amount, were
8 you not?

9 A. I was vomiting.

10 Q. Well, the vomiting would come up in the
11 form of regurgitation, would it not?

12 A. Vomiting is throwing up food.

13 Q. Well, when I have the flu, I throw up.
14 You were experiencing something different, weren't
15 you? You were experiencing reflux because you
16 couldn't get things down.

17 A. They got down, but once they would set
18 there for a couple of minutes, they would come back
19 up.

20 Q. You reached a point in the early '90s,
21 did you not, Ms. Washburn, that when you would try to
22 eat meat, vegetables, fruit, it would feel like it
23 stuck in your throat?

24 A. Not my throat. It felt like it stuck
25 right here in my chest.

1 Q. And you actually went to the doctor with
2 substernal pain thinking you might have some heart
3 problem; correct?

4 A. I don't know whether that's why I went
5 there for that. I went there because I was having
6 chest pain.

7 Q. Okay. But you had chest pain.

8 A. But I didn't relate it to that at that
9 time, no.

10 Q. All right. So were you having acid up
11 in your throat?

12 A. Not really.

13 Q. You were taking antacids, weren't you?

14 A. I believe they told me to take some
15 medication, yes, to see if it would help, but it
16 wasn't like I had -- it wasn't like I could feel
17 anything burning or anything, only when I vomited.

18 Q. Ma'am, didn't you take three different
19 medications for reflux problems?

20 A. I don't remember what they were. I mean
21 you're talking eight, nine years ago. Do you
22 remember what you took?

23 Q. I'm not talking about eight or nine
24 years ago, if you would. I'm talking about just
25 prior to 1997 when you had the revision surgery by

1 Dr. Kellum, you had taken three different medications
2 for your reflux, had you not?

3 A. After I had the revision, they put me on
4 some things to prevent that.

5 Q. Did your doctors at MCV not tell you
6 that you had not been amenable to conservative
7 treatment using three different medications? You're
8 a nurse, ma'am.

9 A. I don't remember. Honest to God, I
10 don't remember.

11 Q. You don't remember what medications you
12 had been taking for seven years, and you can
13 remember --

14 A. I know that at times I took antacids.

15 Q. May I ask my question, please? You
16 can't remember the three medications you had been
17 taking for seven years, but you can remember a board
18 certification conversation?

19 A. I don't remember the specific
20 medicines. I'm on probably 16 medicines now. I
21 can't remember those either without a list.

22 Q. Well, were you taking medications for
23 seven years?

24 A. I was taking medications on and off to
25 see if anything helped with this vomiting problem,

1 but it was not specifically for acid that I'm aware
2 of. I was told it was to see if that would help with
3 the vomiting.

4 Now, you know, if you want to split
5 hairs, I suppose when you vomit you bring up stomach
6 acid with vomit, so yeah.

7 Q. Do you drink coffee?

8 A. I will drink decaf coffee, yes. I don't
9 drink any caffeine coffee.

10 Q. Coffee is an irritant, is it not?

11 A. I've never been told I can't have coffee
12 except for decaf coffee.

13 Q. Did you report to a doctor you didn't
14 drink coffee?

15 A. I don't drink -- I didn't drink coffee a
16 lot when I was having problems.

17 Q. Did you report to Dr. Ton you didn't
18 drink coffee?

19 A. Not caffeinated coffee, but I don't
20 remember saying I didn't drink any coffee, because I
21 do drink coffee.

22 Q. Did you have esophagitis from time to
23 time?

24 A. I don't remember that term being used
25 for it.

1 Q. During this six- or seven-year period
2 you described when you would have the reflux and
3 vomit would come up in your throat, would you get
4 burning in your throat?

5 A. When I vomited, yes.

6 Q. And you would do this two and three and
7 four times a day?

8 A. Two to three times a day.

9 Q. Did you get some irritation in your
10 throat?

11 A. I don't remember it being irritated, but
12 I suppose it's possible to be irritated when you're
13 vomiting, yes.

14 Q. You had some hoarseness from that,
15 didn't you?

16 A. No, I never had hoarseness that I
17 remember.

18 Q. Did you not have chronic hoarseness from
19 the irritation from throwing up?

20 A. No, I did not.

21 Q. You did not?

22 A. I couldn't have held my job if I
23 couldn't talk.

24 Q. Now, with regard to the VBG, did you
25 begin seeing doctors about revising that in the 1991

1 to '97 time frame?

2 A. Yes, I did.

3 Q. And you saw a number of GI people, did
4 you not?

5 A. Yes.

6 Q. You saw Dr. Pike?

7 A. Yes, I did.

8 Q. Dr. Ashman?

9 A. I know I saw Dr. Ashman after this
10 surgery. I don't remember if I saw him before, but I
11 may have.

12 Q. All right. Dr. Berger?

13 A. Dr. Berger I saw at the hospital, yeah.
14 I don't remember if I saw him before that. I do
15 remember seeing Dr. Pike.

16 Q. You'd had to have a couple of procedures
17 before 1997 to try to open a narrowing at your
18 vertical band; correct?

19 A. I had an endoscopy done, yes.

20 Q. The endoscopy was to open up this
21 closure?

22 A. Yes.

23 Q. And the closure had been getting tighter
24 and tighter, had it not?

25 A. That's what they assumed it was, yeah.

1 That's why I was having trouble with the food.

2 Q. And you were unable to eat any kind of
3 healthy food such as meats, vegetables and fruits?

4 A. That is correct.

5 Q. And how long had you been feeding
6 yourself high carbohydrates?

7 A. Probably four or five years.

8 Q. You had lived off Doritos and cheese?

9 A. Not Doritos; I don't like those. I had
10 lived off potato chips, popcorn, cheddar cheese, you
11 know, junk food.

12 Q. And you were anemic, were you not?

13 A. I don't know if I was anemic at that
14 time. I don't know.

15 Q. You don't have any recollection of that?

16 A. I don't. I may have been, but it wasn't
17 enough that I noticed it.

18 Q. And you had worked your way back up to
19 what weight?

20 A. I think I was around 220. I know the
21 one weight that we saw was 214.

22 Q. Since your low of 120, you had put on
23 100 pounds --

24 A. Yes.

25 Q. -- eating primarily potato chips,

1 popcorn, cheese?

2 A. Yes, junk food.

3 Q. You couldn't eat any kind of -- you
4 couldn't eat apples? You couldn't eat oranges?

5 A. Huh-uh.

6 Q. You couldn't eat red meat, you couldn't
7 eat chicken, you couldn't eat cauliflower, broccoli,
8 any of those vegetables, could you? You couldn't get
9 them down.

10 A. I couldn't keep them down.

11 Q. And in fact, when you went to MCV in
12 October, they had placed a nasogastric tube at Beach
13 General, had they not?

14 A. Yes.

15 Q. And a nasogastric tube is to insert the
16 tube up through your nose, down your esophagus, and
17 into your stomach, is it not?

18 A. Yes.

19 Q. And when they poured 10 CCs, you
20 demonstrated for the jury, this much liquid down the
21 tube which was in your stomach, was it not --

22 A. Uh-huh.

23 Q. -- it came right back up?

24 A. Uh-huh.

25 Q. You couldn't even accept 10 CCs into

1 your stomach at that point, could you?

2 A. Not at that point.

3 Q. Not at that point?

4 A. But I hadn't had anything in my stomach
5 for two weeks either.

6 Q. But 10 CCs could not find its way
7 through the opening of your stomach because of that
8 band; right?

9 A. Uh-huh. But you've got to understand
10 when you're not putting anything down there, that
11 allows that restriction to get tighter.

12 Q. So you had an obstruction down there?

13 A. Before I went I was eating junk food,
14 because I weighed 214 pounds.

15 Q. But you were eating, though,
16 carbohydrates, and you were eating milk shakes, were
17 you not?

18 A. I didn't eat milk shakes. I didn't care
19 for ice cream.

20 Q. Didn't you take a lot of liquid in?

21 A. But I could take a lot of liquid in, and
22 I could take a lot of junk food.

23 Q. Now, when you throw up and reflux, when
24 all your food comes back up your throat -- up your
25 esophagus and into your throat, you have a choking

1 sensation, don't you?

2 A. Not a choking. There's not a choking,
3 no. I never choked.

4 Q. You would aspirate from time to time,
5 wouldn't you, ma'am?

6 A. No, I would not.

7 Q. Did you not report aspiration to some of
8 your health care providers?

9 A. No, I did not. I believe Dr. Jalbert
10 wrote that in one note, but that was not --

11 Q. Dr. Jalbert indicated in one of her
12 notes that you had been aspirating since 1991; isn't
13 that right?

14 A. I believe it was in one of her notes,
15 but I didn't ever say aspirating. I said vomiting.

16 Q. Well, you had a good relationship --

17 A. I said vomiting. I have an excellent
18 relationship with her. But I think she
19 misunderstood, or when she sat down to write her note
20 she wrote that versus writing vomiting. But I never
21 aspirated, because if I had aspirated, I would have
22 run into some kind of problem.

23 Q. Well, the problem would be that you
24 would have to take in --

25 A. It would go down but --

1 Q. -- more fluids; correct?

2 A. No. I would feel it go down into my
3 lungs. You know, you're talking about stomach acid
4 coming up. If it goes down the wrong way, believe
5 me, you would know it. It would burn.

6 Q. But Dr. Jalbert you know reported that
7 you had been aspirating since 1991.

8 MS. COFIELD: Your Honor, objection on
9 hearsay. What Dr. Jalbert reported --

10 MR. BLACKWELL: She opened the door,
11 Your Honor.

12 THE COURT: I'll overrule the
13 objection. She may answer the question.

14 BY MR. BLACKWELL:

15 Q. Your family physician said you had been
16 aspirating since 1991, didn't she?

17 A. I don't know if it was 1991.

18 Q. And this is the same doctor that you
19 went to and asked that she write a note in the hope
20 you could settle this case by giving you a note to
21 say you had no gag reflex.

22 MS. COFIELD: Objection, Your Honor.

23 THE COURT: I'll sustain the objection.
24 Now, move on with your question, Mr. Blackwell. The
25 jury will disregard that.

1 BY MR. BLACKWELL:

2 Q. Did you go to Dr. Jalbert and ask her to
3 write up a note saying you had no gag reflex?

4 MS. COFIELD: Objection, Your Honor.

5 MR. BLACKWELL: I can ask this
6 question, Your Honor.

7 MS. COFIELD: Why something is done -- I
8 mean he can certainly ask, if Dr. Jalbert could come
9 here --

10 THE COURT: Just a minute, now. She can
11 answer the question whether she asked for that to be
12 done. And if she didn't, she didn't. If she did,
13 she did.

14 BY MR. BLACKWELL:

15 Q. Did you not?

16 A. Yes, I asked her to check my gag
17 reflex. I was asked to do that.

18 Q. You asked her to write a note so that
19 you could use it to settle this case.

20 A. I asked her to do it.

21 Q. Isn't that right, ma'am?

22 MS. COFIELD: Objection, Your Honor.

23 THE COURT: Mr. Blackwell --

24 A. I don't know why it was done.

25 MR. BLACKWELL: I think it's important,

1 Your Honor.

2 THE COURT: Well, the form of the
3 question -- you can ask the question, but not of her.

4 A. I asked her to perform --

5 THE COURT: The jury will disregard
6 that.

7 BY MR. BLACKWELL:

8 Q. Did you ask her to do that, ma'am?

9 A. I asked her to perform the check.

10 Q. All right. Now, you had actually seen
11 surgeons about revising your vertical banded
12 gastroplasty well before September 25th, 1997; is
13 that right?

14 A. Yes, I did.

15 Q. You saw Dr. Beryl Brown?

16 A. Yes, I did.

17 Q. Did you see any other doctors?

18 A. She sent me to other doctors.

19 Q. Were you evaluated by any other
20 surgeons?

21 A. I don't believe so.

22 Q. And in fact, in October 1996, a year
23 before the surgery performed by Dr. Borden, you had
24 been scheduled for revision of your vertical banded
25 gastroplasty, hadn't you?

1 A. I had been scheduled.

2 Q. And you, in fact, had had the
3 pre-surgery workup for that, had you not?

4 A. Yes, I had.

5 Q. And then it was canceled; is that
6 correct?

7 A. Yes.

8 Q. You wanted to go forward with it in
9 October 1996, did you not?

10 A. Yes, I did.

11 Q. And you wanted to go forward with it for
12 the entire year prior to September 1997, didn't you?

13 A. No, not really. I had a lot going on
14 with my neck and everything. I had just decided that
15 I just needed to address my neck.

16 Q. Well, did Dr. Jalbert write any letter
17 on your behalf on September 22nd, 1997, requesting
18 it?

19 MS. COFIELD: Same objection, Your
20 Honor.

21 BY MR. BLACKWELL:

22 Q. Do you know?

23 A. No.

24 MS. COFIELD: Dr. Jalbert is -- excuse
25 me. Same objection. He certainly can --

1 THE COURT: What she knows of the
2 content of the letter, she can't address. But
3 whether she wrote a letter, if she asked her to --

4 BY MR. BLACKWELL:

5 Q. Up until three days prior to your
6 surgery --

7 A. I don't know when she wrote a letter. I
8 don't know. We had talked numerous times in her
9 office.

10 Q. Ma'am, you were seeing Dr. Jalbert
11 regularly as your physician --

12 A. Yes.

13 Q. -- from October 1996 until the surgery
14 in September 1997; isn't that correct?

15 A. Uh-huh.

16 Q. And Dr. Jalbert was acting on your
17 behalf to try to get you that surgery; is that
18 correct?

19 A. Yes.

20 Q. You wanted that surgery.

21 A. I did.

22 Q. You wanted the surgery because you
23 couldn't eat.

24 A. Right.

25 Q. Your nutrition was terrible, was it not?

1 A. Yes, it was.

2 Q. In fact, you had maladapted with poor
3 nutrition, hadn't you?

4 A. What do you mean by that?

5 Q. Well, I mean you had tried to find other
6 foods that could somehow either quench your appetite
7 or provide you some sustenance.

8 A. Right.

9 Q. When you got to MCV, did you have any
10 discussion with Dr. Kellum about your situation?

11 A. About which situation?

12 Q. About your VBG.

13 A. Naturally, we discussed it.

14 Q. Did you discuss with Dr. Kellum, though,
15 about your history from 1991 to 1997 over the VBG, or
16 did you discuss that with a resident or intern?

17 A. I probably -- I don't know whether it
18 was a resident or Dr. Kellum, but I'm sure it came
19 up. It was part of the history.

20 Q. Do you know whether Dr. Kellum was told
21 by you regarding your history from 1991 to 1997?

22 A. Pardon me?

23 Q. Did you tell Dr. Kellum about your
24 history?

25 A. I'm sure we talked about it.

1 Q. You say you're sure. Did you or did you
2 not, ma'am?

3 A. To tell you the truth, I was so sick at
4 that point I honestly don't remember who I told
5 everything to, but I know that I would have discussed
6 it with them.

7 Q. But you remember, though, telling him --
8 asking him whether he was board certified?

9 A. We did, because of the whole situation
10 of having this surgery go bad we did.

11 Q. You have no recollection of whether you
12 discussed your history with him, but you know that
13 fact?

14 A. I said I know that we would have given
15 him the history. I don't specifically remember
16 saying this between '91 and '97, but I'm sure that we
17 gave him a full history like we always do.

18 Q. Now, do you think you had done that to
19 his resident?

20 MS. COFIELD: Asked and answered, Your
21 Honor.

22 THE COURT: Well, it's cross-
23 examination, Ms. Cofield.

24 A. I saw a bunch of doctors. I'm sure that
25 the resident did a history as well, they usually do,

1 and I'm sure I discussed it.

2 BY MR. BLACKWELL:

3 Q. Now, Dr. Kellum performed the surgery
4 that you had been wanting, which was a gastric bypass
5 procedure?

6 A. He performed a -- he did a revision.

7 Q. Well, you were not expecting a revision
8 of like a VBG, were you? That is to say, he wasn't
9 going to repair the VBG. He was going to be doing a
10 different procedure.

11 A. Yes. He told me they didn't do those
12 anymore.

13 Q. Okay. And when you were looking to have
14 the procedure down here by Dr. Brown, she was going
15 to perform a gastric bypass procedure as well, was
16 she not?

17 A. Yes, because they don't do the others
18 anymore.

19 Q. So the procedure that you had been
20 seeking for a number of years, I think you said since
21 1992 locally, was the very one performed by Dr.
22 Kellum at the Medical College in October 1997?

23 A. Yes, it was but --

24 Q. Do you know whether a feeding tube --

25 MS. COFIELD: Excuse me, Your Honor.

1 She was still answering when counsel interrupted her.

2 A. But my understanding was if he put the
3 feeding tube in, that he would be unable at a later
4 date to do anything with this VBG. And that if I
5 didn't have the revision, that there was a good
6 possibility I would never eat again even if this
7 resolved.

8 And he told me that if I didn't have the
9 revision done, I would be in big trouble, and he had
10 to do it because he was putting in this feeding tube.
11 And there would be scar tissue that may prevent him
12 from ever fixing the other problem, which could lead
13 to me being in big trouble.

14 BY MR. BLACKWELL:

15 Q. Ms. Washburn, I appreciate that, but I
16 didn't ask you that question. I asked you whether or
17 not the feeding tube --

18 A. Well, you asked a lot of things.

19 Q. -- was part and parcel of the gastric
20 bypass.

21 A. But you implied a lot of things too.

22 THE COURT: Ms. Washburn, Ms. Washburn,
23 Ms. Washburn --

24 THE WITNESS: Yes, sir.

25 THE COURT: Listen to the question and

1 just answer the question. Okay?

2 BY MR. BLACKWELL:

3 Q. I asked you whether a feeding tube was
4 part of the gastric bypass procedure?

5 A. No, it was not.

6 Q. Now, with regard to -- you said that
7 when you got there, that you were in dire straits.
8 You were in dire straits because they couldn't get 10
9 CCs down into your stomach; isn't that right?

10 A. I was in dire straits because I hadn't
11 eaten for two weeks, because he screwed up my vocal
12 cord and I couldn't swallow.

13 Q. Well, now --

14 A. That's why I was in dire straits.

15 Q. When you're saying he, are you referring
16 to Dr. Borden?

17 A. I'm referring to them both.

18 Q. Well, now, Dr. Borden saw you for the
19 first time when?

20 A. Dr. Borden, I believe, was in on the
21 second or third visit. I'm not sure which.

22 Q. Well, you were there in August, were you
23 not?

24 A. I was there August 1st with Dr. Klara.

25 Q. And did you come back on August 22nd?

1 A. Yes, I was there August 22nd, and I was
2 there in between one date.

3 Q. Do you know when you saw Dr. Borden?
4 Was it the third visit?

5 A. It was either the second one he was
6 introduced to me or the third. I'm honestly not
7 sure.

8 Q. And Ms. Washburn, when he was
9 introduced, you don't recall how he was introduced,
10 do you?

11 A. I recall him being introduced at this
12 point as an associate. During my deposition I
13 couldn't think of how he was introduced, the actual
14 word that was used. As soon as I left that office, I
15 remembered that it was associate.

16 But let's face it, at the time I had, I
17 don't know how many hours of grilling me, and I could
18 not think of the actual word.

19 Q. You took your deposition in 1998, didn't
20 you?

21 A. I believe it was '98.

22 Q. And that was just a year after the
23 incident; correct?

24 A. Yes, and I could not -- you had me very
25 nervous during that deposition. I couldn't remember

1 the actual word that he used until I walked out of
2 the office. And I was thinking about it, and I said
3 he said associate.

4 But I knew that he introduced him in a
5 way that it made me feel that he was part of the
6 practice.

7 Q. Ms. Washburn, you were asked several
8 times in that deposition about how he was introduced,
9 and said you didn't recall; isn't that right?

10 A. I said I told you --

11 Q. Wasn't your response I don't recall?

12 A. I don't know. There was a couple of
13 responses, but I --

14 Q. You had no recollection one year after
15 the incident as to how Dr. Klara had introduced Dr.
16 Borden, had you?

17 A. I knew that he had introduced him in a
18 way that made me feel that he was part of his
19 practice. I didn't remember the specific wordage.

20 Q. Now, when you came in on 9-17, you saw
21 Dr. Borden for the first time; correct?

22 A. Pardon me?

23 Q. September 17th is the first time you saw
24 Dr. Borden?

25 A. I'm not sure if it was that visit or the

1 next visit. I'm honestly not sure.

2 Q. Well, when you came in that day, Dr.
3 Borden --

4 A. I wasn't planning on having a lawsuit
5 and having to know the dates, you know.

6 Q. Thank you. When you came in that day,
7 were you in pain that day?

8 A. Yes, I was in pain.

9 Q. Was that a visit where you had come in
10 scheduled, or had you come in because you were in
11 intense pain?

12 A. I believe the 17th was scheduled.

13 Q. Okay.

14 A. The 22nd, I believe we called and got
15 the appointment to come in because I was in more
16 pain.

17 Q. All right. So the 22nd you called to
18 say I've got to come in because I'm in pain?

19 A. Yes, I believe so.

20 Q. In fact, when you left on the 17th, you
21 were to be seen back what they call PRN; is that
22 correct?

23 A. I don't remember if we had appointments
24 set up with --

25 Q. What does PRN mean?

1 A. PRN means if necessary. I don't
2 remember if had a scheduled appointment or if it was
3 that.

4 Q. When you saw Dr. Borden for the first
5 time on the 17th, did he examine you?

6 A. I don't know if it was the 17th or the
7 22nd, but when I saw him the first time, he did --

8 Q. Let me refresh your recollection, if I
9 might --

10 A. -- he did examine me.

11 Q. -- so that we're both clear. Let me
12 just show you a record, if I can, Ms. Washburn.

13 MS. COFIELD: May I know where you're
14 looking, counsel?

15 MR. BLACKWELL: I'm going to show her
16 the note from September 17th. Here it is.

17 BY MR. BLACKWELL:

18 Q. Ms. Washburn, can you tell the ladies
19 and gentlemen of the jury if this is a note from
20 September 17th?

21 A. Yes, it is.

22 Q. And whose signature appears on it?

23 A. Borden's.

24 Q. Does that refresh your recollection as
25 to whether you saw him that day?

1 A. I would have to go by the record,
2 because like I say, I couldn't remember the date.

3 Q. And when you came in, you had worsened
4 pain?

5 A. Yes. On the 17th I don't know. On the
6 22nd I know I did.

7 Q. And what was the reason for your visit
8 on the 17th, then?

9 A. I think that was a follow-up visit.

10 Q. Follow-up to do what?

11 A. Well, when I was there on August 1st, I
12 went for some therapy, and I think it was a follow-up
13 visit that it was scheduled for.

14 Q. Now, you had been there August 1st,
15 August 22nd, and now it was September 17th. So
16 you're about a month and a half into your care and
17 treatment with Dr. Klara and Dr. Borden; correct?

18 A. Yes.

19 Q. And your pain had not gotten better, had
20 it?

21 A. Not a lot, no.

22 Q. In fact, your visit on the 17th was for
23 worsening pain, was it not?

24 A. It may have been. I'm not sure what's
25 in the note, but I know the 22nd was.

1 Q. And Dr. Borden examined you on the 17th?

2 A. According to that note, yes.

3 Q. Do you recall anything about his
4 examination that differed from any examination
5 performed by Dr. Klara on August 1st or August 22nd?

6 A. No. He did a neurological check.

7 Q. Did you ask Dr. Borden on the 17th who
8 he was?

9 A. He was introduced to me. I thought that
10 if he was an associate, he was part of the practice.

11 Q. Now, are you sure he was introduced as
12 an associate by Dr. Klara?

13 A. Yes, I remember that.

14 Q. You just couldn't recall that in 19 --

15 A. I just couldn't recall during that
16 depo. I was exhausted, and I just couldn't think.

17 Q. And with regard to the discussion on the
18 17th, do you recall whether surgery was discussed?

19 A. I don't believe -- we may have discussed
20 the possibility of it being something, you know, that
21 we might look at, but we were still looking to treat
22 conservatively.

23 Q. Did you recognize, though, on the 17th
24 that you were being evaluated by Dr. Borden as a
25 potential surgery candidate?

1 A. No, not necessarily. I thought we were
2 still going the other route.

3 Q. Now, the 22nd you came back. Had you
4 had a bone scan?

5 A. Yes, I did. I had a bone scan.

6 Q. Was that done after your 17th visit?

7 A. Yes, it was. It was done between.

8 Q. And you came in then on the 22nd, and
9 you don't recall whether that was by appointment or
10 whether you came in urgently because your pain had
11 worsened?

12 A. I remember my pain had worsened. I
13 don't know if it was scheduled or if I called.
14 Either way I had an appointment, but I don't know
15 when the appointment was set up.

16 Q. And when you came in on the 22nd, you
17 saw Dr. Borden again, did you not?

18 A. Yes, I did.

19 Q. You didn't see Dr. Klara until, as you
20 discussed --

21 A. But I thought I was going to see Dr.
22 Klara, and she put me in with Dr. Borden.

23 Q. You didn't protest that, did you, ma'am?

24 A. No.

25 Q. Dr. Borden examined you on the 17th?

1 A. Yes.

2 Q. You had no problems with Dr. Borden on
3 the 17th?

4 A. No.

5 Q. The examination was just as you had been
6 examined by Dr. Klara?

7 A. Yes.

8 Q. It didn't really differ from Dr.
9 Richmond's, did it?

10 A. Not that I remember, no.

11 Q. Did you like Dr. Borden?

12 A. At that point, yeah, I did. I thought
13 he was a professional gentleman. I didn't --

14 Q. And he handled you professionally?

15 A. Yes, he did. That's why I assumed he
16 was who he said he was.

17 Q. And on the 22nd, that was when you had
18 the discussion in the examining room with Dr.
19 Borden --

20 A. Yes.

21 Q. -- about the results of the test, the
22 bone scan?

23 A. Yes.

24 Q. And it was indicated that the bone scan
25 had shown a hot spot, suggesting some uptake at the

1 C6-7 level; is that right?

2 A. Yes.

3 Q. And surgery was then discussed with Dr.
4 Borden?

5 A. Yes.

6 Q. And did you have occasion to ask Dr.
7 Borden as he began to discuss surgery about his board
8 certification?

9 A. When we talked about the surgery, once I
10 realized that -- when he told me that Dr. Klara was
11 not going to be around and that he could do it,
12 that's when I changed from having him as just
13 somebody looking at me to having somebody actually
14 operate on me. That is when I asked him.

15 Q. How did you ask him?

16 A. I just came out and asked him if he was
17 a board certified neurosurgeon, are you board
18 certified.

19 Q. Did that just sort of come out of the
20 blue?

21 A. Yeah, it did, because up until this
22 point I didn't think he was going to operate on me.
23 I wasn't concerned.

24 Q. Well, what do you think board
25 certification is?

1 A. Board certification, as I see it, and I
2 may not know all the particulars of it, but I see it
3 as an extra certification that shows that a doctor
4 has done more training, more hands-on experience, and
5 he has had -- he has taken some kind of testing.

6 I'm not sure if they take an oral or a
7 written exam but I know they take some kind of
8 testing, and that they are certified at that point if
9 they have met those requirements.

10 Q. You recognized as a nurse that a
11 physician can practice medicine after they finish
12 their residency; correct?

13 A. Correct.

14 Q. And Dr. Borden was holding himself out
15 as a doctor that day?

16 A. Yes.

17 Q. And do you believe that you can only
18 hold yourself out as a doctor if you've completed
19 your residency training?

20 A. I think you can be an M.D. when you
21 graduate, but I don't think that you can -- I think
22 that most people going into specialties will serve as
23 an intern in residency.

24 Q. You had thought that he had completed
25 his residency when you saw him; correct?

1 A. Yeah, I assumed he had. Because when I
2 asked him if he was board certified, I knew he would
3 have gone through a residency first.

4 Q. You worked with doctors all the time as
5 a nurse; correct?

6 A. I worked with doctors, yes.

7 Q. And you know that some doctors who had
8 been practicing for years never become board
9 certified?

10 A. That's right.

11 Q. And you know that some doctors who are
12 not board certified are able to do certain kinds of
13 things that doctors who have board certification
14 don't do?

15 A. That may be so.

16 Q. True?

17 A. True.

18 Q. And in fact, you know in your case that
19 Dr. Neal, who is board certified, has never performed
20 a pseudoarthrosis, don't you?

21 MS. COFIELD: Your Honor, what relevance
22 does this have?

23 THE COURT: What is her basis of
24 knowledge of that?

25 MR. BLACKWELL: I'm asking her if she

1 knows that.

2 BY MR. BLACKWELL:

3 Q. Do you know that?

4 MS. COFIELD: He never operated on her.

5 THE COURT: Let's ask the question does
6 she know. If she knows, I'm not quite sure what the
7 basis would be, but go ahead.

8 MS. COFIELD: My objection is
9 relevancy, because he wasn't a treating physician.
10 He is an expert.

11 MR. BLACKWELL: Well, she signs
12 interrogatory answers that --

13 THE COURT: Well, you don't need to
14 chatter back and forth. I can rule on it okay.

15 If you can answer the question, answer
16 the question.

17 BY MR. BLACKWELL:

18 Q. Is that correct, ma'am?

19 A. Since his depo I know that he has not
20 performed that particular surgery, because he doesn't
21 believe it works.

22 Q. Okay. Well, Dr. Neal does not -- my
23 question to you, Ms. Washburn, and I would ask that
24 you answer my question.

25 A. I did.

1 Q. It will save time and maybe your voice.

2 A. I did.

3 Q. You knew Dr. Neal does not --

4 MS. COFIELD: Your Honor, I would ask
5 counsel to just ask questions.

6 THE COURT: Okay, Ms. Cofield.

7 Please continue, Mr. Blackwell.

8 BY MR. BLACKWELL:

9 Q. Ms. Washburn, you knew Dr. Neal doesn't
10 even perform that procedure; correct?

11 MS. COFIELD: Same objection, Your
12 Honor.

13 BY MR. BLACKWELL:

14 Q. Is that correct?

15 A. Since his depo I do, yeah. I didn't
16 know Dr. Neal before that.

17 Q. If you had gone to him with 30 years of
18 practice and asked him if he was board certified and
19 he said yes, you would have then selected a physician
20 that couldn't do the procedure or hasn't done it.

21 MS. COFIELD: Objection, Your Honor.

22 THE COURT: I'm going to sustain the
23 objection, Mr. Blackwell. Let's move on.

24 BY MR. BLACKWELL:

25 Q. Well, does board certification tell you

1 that a physician can do that particular procedure?

2 A. Probably not, but it tells you that he
3 is more experienced than the average guy.

4 Q. But you indicated to me that some
5 doctors who are board certified don't even do certain
6 things that doctors who aren't board certified do;
7 isn't that right?

8 A. But hopefully, they would be honest
9 enough to tell me they don't do it.

10 Q. Ma'am, I just asked you a simple
11 question. Is that true?

12 A. And I just gave you a simple answer. I
13 believe they would be honest.

14 Q. And you say Ms. Mikovits was present?

15 A. Yes, Brandi.

16 Q. Where was she when this conversation
17 took place?

18 A. She was standing -- the hallway is here,
19 there is a door, and there is an exam room. She was
20 standing right there. The door was open, and she was
21 standing right at the threshold.

22 Q. When did she come into this
23 conversation?

24 A. She had been standing there while we
25 were talking just for a few minutes and --

1 Q. Well, during these few minutes what was
2 being discussed?

3 MS. COFIELD: Your Honor, he keeps
4 interrupting her. I know she goes slowly, but she
5 was still talking when he asked her the next
6 question.

7 THE COURT: Well, if she hasn't
8 finished her answer, Ms. Cofield -- we don't need a
9 long dissertation.

10 If you haven't finished your answer,
11 you're entitled to complete your answer, ma'am.

12 BY MR. BLACKWELL:

13 Q. When in this conversation with Dr.
14 Borden about your examination on the 22nd did Ms.
15 Mikovits appear?

16 A. When I asked him if he was board
17 certified and he said yes, she just interjected that
18 all of our doctors are board certified.

19 Q. So Ms. Mikovits just happened to be
20 there at the moment you asked this question about the
21 board certification?

22 A. She had been standing there for a few
23 minutes. I mean, you know, she --

24 Q. Do you have any recollection of what
25 else was discussed with Dr. Borden during the few

1 minutes Ms. Mikovits was present?

2 A. I guess we were talking about the
3 surgery. He was telling me about the report and --

4 Q. I don't want you to guess

5 A. -- and about Dr. Klara. That was the
6 conversation that was before.

7 Q. Now, when you left the examining room
8 with Dr. Borden, did Ms. Mikovits follow?

9 A. Yes, I believe she did, and she went up
10 into the upper part of the office, I believe.

11 Q. And where was Dr. Klara?

12 A. Dr. Klara was standing at the X-ray
13 machines.

14 Q. And did you ask Dr. Klara anything about
15 Dr. Borden's board certification status?

16 A. No, I did not.

17 Q. Did you ask Dr. Klara anything about Dr.
18 Borden's credentials?

19 A. No, I did not.

20 Q. Did you understand Dr. Borden was going
21 to perform the surgery at Virginia Beach General
22 Hospital?

23 A. That Dr. Borden was going to perform --
24 yes, I did.

25 Q. And as a nurse do you understand that

1 hospitals credential physicians to perform certain
2 kinds of surgery?

3 A. I didn't know that they credential the
4 doctors. I know that they have to have privileges.

5 Q. Your assumption in this case was that
6 Dr. Borden had the credentials to perform the surgery
7 at Beach General Hospital; correct?

8 A. Well, I assumed that or they wouldn't
9 have scheduled it, I didn't think.

10 Q. Now, when you came on the 22nd and you
11 began to discuss the surgery, you wanted that
12 surgery, didn't you?

13 A. On the 22nd when he said I needed it?
14 Yeah, I wanted the C6-C7 fixed.

15 Q. You had been in a lot of pain?

16 A. I was in pain, yes.

17 Q. You had been in pain since 1994?

18 A. Not to the degree I was then, but yes, I
19 had had problems all along.

20 Q. And the precipitating event was that you
21 were on your cabin cruiser with your husband?

22 A. That was what brought me to them in the
23 first place in August.

24 Q. Where were you? Were you on the high
25 seas or in the bay or --

1 A. We were on the bay.

2 Q. And did you bounce around?

3 A. What happened was I went down in the
4 cabin, and I laid on the V-berth to close the hatch.
5 We were coming in from the bay into the inlet, and
6 right there the current got kind of choppy. And when
7 I reached up to close the hatch, we hit either a wake
8 or a wave or something, and it bounced.

9 Q. But you didn't actually hit anything,
10 did you?

11 A. My head went up and down. It was like
12 almost a whiplash.

13 Q. Did you say in your deposition, though,
14 it was not the trauma, that it was actually just the
15 bouncing that was the cause?

16 A. Well, I think it was the idea that I
17 bounced up and down like this, yeah.

18 Q. But you did not give a history of --

19 A. And the bouncing motion caused me to
20 maybe get worse.

21 Q. All right. You still go out on your
22 boat, though, don't you?

23 A. Occasionally.

24 Q. Well, I mean most recently --

25 A. Yeah, we do.

1 Q. -- last month, didn't you?

2 A. I don't know if I was out on my boat
3 last month. It's been up in dry storage for a while.

4 Q. Where do you and your husband launch the
5 boat?

6 A. At Lynnhaven.

7 Q. And how large a boat is it?

8 A. I think it's a 28-foot.

9 Q. So you still go out on the boat?

10 A. Yes, I do.

11 Q. Even though you may be at some risk for
12 further bouncing?

13 A. Well, we don't go out if the weather is
14 bad. We stay in the bay or in the inlet.

15 Q. Well, you have enough confidence that
16 your neck is going to remain intact while you go out
17 on your boat, don't you?

18 A. I usually have my brace and wear that.

19 Q. You don't have all the pain on the boat,
20 do you?

21 MS. COFIELD: Excuse me. I'm sorry,
22 counsel, relevance and materiality. We're not here
23 complaining about a neck surgery or back pain or
24 anything which pre-existed. We're here complaining
25 about the vocal cords.

1 THE COURT: Well, that's not the way
2 that --

3 MR. BLACKWELL: We're talking about the
4 inability to work, Your Honor.

5 THE COURT: I'll overrule the objection.

6 MR. BLACKWELL: We're going to have
7 evidence of that from a rehabilitation counselor.

8 BY MR. BLACKWELL:

9 Q. Does it cause neck pain when you go out?

10 A. Sometimes, yeah. Sometimes it gets
11 worse.

12 Q. You have not had any doctor tell you
13 that there is anything loose or unfixed about your
14 plate?

15 A. No. I've never claimed that.

16 Q. It's remained stable, has it not?

17 A. Yes.

18 Q. And in fact, by October 8th, 1997, after
19 the surgery, all of the pain and numbness in your
20 arms was gone, wasn't it?

21 A. Yes, I was much better.

22 Q. Now, you've testified that the wrong
23 space was fixed?

24 MS. COFIELD: Your Honor, if we're going
25 to get into what happened intraoperatively when she

1 was unconscious, I think we have a problem.

2 THE COURT: Well, let's let her answer
3 the question, because she did -- well, she is not
4 going to talk about what happened in the operating
5 room. She can answer this question, though.

6 A. I don't know firsthand that the wrong
7 one was fixed. I've been told that by the medical
8 doctors, but I don't read X-rays.

9 THE COURT: All right. She can't
10 testify at all about the procedure.

11 MR. BLACKWELL: I'm only going to ask
12 her one follow-up question, Your Honor.

13 THE COURT: She can talk about her
14 symptoms and what her problems were.

15 MR. BLACKWELL: I'm going to ask her one
16 follow-up question, Your Honor, if this is proper.

17 BY MR. BLACKWELL:

18 Q. Do you know why your symptoms resolved
19 if the wrong space was operated on?

20 MS. COFIELD: Obviously, Your Honor,
21 that calls for a medical opinion, and she is not
22 qualified as an expert.

23 MR. BLACKWELL: She is a nurse.

24 THE COURT: She can answer the question,
25 if she knows.

1 BY MR. BLACKWELL:

2 Q. Do you know why you became pain free on
3 October 8th, 1997, if the wrong space was operated
4 on?

5 A. I wasn't totally pain free, but I was
6 better. I don't know.

7 Q. You didn't go back to another
8 neurosurgeon until after you filed a lawsuit in this
9 case, did you?

10 A. No, actually, I think I made an
11 appointment to see Dr. Waters before that. I'm
12 pretty sure I did.

13 Q. Do you recall going to see Dr. Waters on
14 August 22nd, 1999? Does that ring a bell?

15 A. Yeah.

16 Q. Do you recall telling him that after
17 having relatively no pain, all of a sudden you had
18 excruciating pain that day?

19 A. August 22nd?

20 Q. Yes, ma'am.

21 A. I don't really remember.

22 Q. And do you recall whether or not the
23 first time this case was set for trial was the first
24 week of September 1999?

25 A. No. But I know it was September, yeah.

1 Q. Dr. Waters told you that he couldn't
2 determine what was wrong with you that day; is that
3 right?

4 MS. COFIELD: Your Honor, objection.

5 THE COURT: I'll sustain that.

6 A. I don't know.

7 THE COURT: I'll sustain the objection.

8 BY MR. BLACKWELL:

9 Q. What is the impression you formed from
10 that visit that day, Ms. Washburn, as to whether
11 anything was wrong with you when Dr. Waters saw you a
12 week before the first trial was scheduled?

13 A. I know he told me that I had a
14 disastrous result. That's all he said.

15 Q. But you hadn't had any treatment by him
16 other than to come back periodically prior to this
17 August 22nd visit; is that right?

18 MS. COFIELD: Of what year?

19 MR. BLACKWELL: '99.

20 A. I really can't tell you. I don't
21 remember the first time I saw him. I've been seeing
22 him for a couple of years. I don't remember.

23 BY MR. BLACKWELL:

24 Q. Did you ask him whether he was board
25 certified?

1 A. Yes, I did.

2 Q. Now, let's go back a little bit in time
3 again and talk about some of the things that you're
4 complaining about today. Do I understand you to say,
5 Ms. Washburn, that you can't reach?

6 A. No, I didn't say that.

7 Q. Well, how is your --

8 A. I said I can reach.

9 Q. How is your reach limited?

10 A. I can move things, and I can do things.
11 I can't do anything for a long period of time. I
12 couldn't stand with my arm above my head for five
13 minutes.

14 Q. When would you --

15 A. It would start to hurt.

16 Q. When in the dialysis clinic did you
17 stand with your hand above your head for five
18 minutes?

19 A. Well, there's a lot of hanging of IV
20 bags, repetitive motion. I can't do things that
21 require me to keep doing it and keep doing it --

22 Q. How about carrying?

23 A. -- if it's an all day thing.

24 Q. How about carrying?

25 A. I can carry probably eight or ten

1 pounds, no more than that.

2 Q. How far and how long?

3 A. Probably, I don't know, maybe -- I could
4 probably carry five pounds about 100 yards or
5 more.

6 Q. Do you have difficulty walking?

7 A. I don't have difficulty walking. I have
8 difficulty sometimes with shortness of breath when I
9 walk a long distance, and as far as the jarring of
10 walking makes my neck hurt.

11 Q. Did you see a Dr. Ton, T-o-n?

12 A. Yes.

13 Q. You saw him in October of 1999, didn't
14 you?

15 A. Yes.

16 Q. Did you tell him that you had chronic
17 diarrhea?

18 A. Yes, I did.

19 Q. Nausea and vomiting?

20 A. No nausea and vomiting. Very seldom do
21 I ever get that. If I eat a wrong --

22 Q. My only question, Ms. Washburn, to you
23 -- respectfully to you is did you tell Dr. Ton you
24 suffered from nausea and vomiting?

25 A. I probably told him that I had that

1 before I --

2 Q. You're still having problems from your
3 VBG, aren't you, and from your gastric bypass?

4 A. No, I'm not. I eat fine and do fine
5 except --

6 Q. You had to have three dilatations?

7 A. -- the diarrhea. Yeah, I had to have
8 those because I didn't take food in for so long that
9 what he did closed up.

10 Q. So you had to have three dilatations for
11 your strictures down here?

12 A. Yes. That was right after this surgery.

13 Q. There are strictures associated with the
14 gastric bypass as well?

15 A. I haven't had one since probably '98.

16 Q. And did you tell Dr. Ton you also had
17 restless leg syndrome?

18 A. Yes, I was told I had restless leg
19 syndrome.

20 Q. What is that?

21 A. It's where my legs at night when I go to
22 bed, they get really jumpy, and they feel like little
23 electric shocks.

24 Q. You don't attribute that to your neck
25 surgery, do you?

1 A. No, I don't, not at all.

2 Q. Did you tell Dr. Ton you also
3 suffered --

4 A. I saw him for pain management, not
5 specifically related to any --

6 Q. I'm just asking you these questions.
7 Did you tell him you had chronic headaches?

8 A. Pardon?

9 Q. Chronic headaches?

10 A. Yes, I do have headaches.

11 Q. And you've had those for years, have you
12 not?

13 A. No.

14 MS. COFIELD: Your Honor, relevance and
15 materiality, because none of these are in evidence or
16 in the complaint.

17 THE COURT: I'll overrule the objection,
18 Ms. Cofield. Ms. Washburn has put her health care
19 and her ability to earn a living in issue, and these
20 are appropriate questions. I'll overrule the
21 objection.

22 MS. COFIELD: Yes, sir.

23 A. I have chronic headaches, and it's from
24 the neck pain.

25 BY MR. BLACKWELL:

1 Q. How many years have you had those?
2 Since before 1994?

3 A. No, I don't think so, I mean not the
4 same kind of headaches. I had some migraines before,
5 but this is just chronic all the time from my neck:

6 Q. I thought you said you injured your neck
7 in 1994?

8 A. I did.

9 Q. You had surgery from Dr. Richmond in
10 1994, didn't you?

11 A. Yes.

12 Q. And it didn't work, did it?

13 A. No.

14 Q. And you went to Dr. Klara at that point;
15 correct?

16 A. In 1997, yes.

17 Q. Right. Three years you had chronic neck
18 pain.

19 A. Yeah.

20 Q. Have you had headaches before that time?

21 A. Yeah.

22 Q. And you've had headaches during the
23 three years from 1994 to 1997?

24 A. Yeah. I don't --

25 Q. And you still have headaches?

1 A. -- blame those on him.

2 Q. You still have headaches, don't you?

3 A. Yes, I do.

4 Q. Okay. And you said you also suffered
5 from gas? Did you tell Dr. Ton that?

6 A. I don't remember telling him that.

7 Q. How about memory loss?

8 A. Yeah, I do have some memory loss, and
9 that's from, I think, my medications. It's very hard
10 for me to remember things if -- like if I take my
11 medicine and then I have to do anything, it's hard
12 for me to keep things straight.

13 Q. How long have you had memory loss?

14 A. Since I've been taking all this medicine
15 for chronic pain.

16 Q. Well, you've been taking medicine for
17 chronic pain since 1994 at least, have you not?

18 A. No, I have not been taking a lot of
19 medications, and I never had that problem when I was
20 working. It's because I take so many now.

21 Q. Well, have you been taking medications
22 -- you've taken medications for your VBG. You're on
23 a number of medications for that; correct?

24 A. The only thing I think I'm on for that
25 is my Prevacid, and that's for the stomach and --

1 Q. And you were on medications from Dr.
2 Richmond?

3 A. Right after the surgery, yes.

4 Q. In fact, you didn't --

5 A. But I didn't take pain medicines for
6 that long.

7 Q. Well, you didn't go back to Dr. Richmond
8 because she wouldn't prescribe --

9 A. No, that is not right. That's a lie,
10 out and out.

11 Q. Didn't you say that in your deposition?

12 A. No, I did not. I didn't go back to her
13 because she discharged me on a Friday from having
14 neck surgery, sent me home with a prescription for
15 Ativan and --

16 Q. Ma'am, didn't you -- you had the surgery
17 on November 23, 1994, didn't you?

18 THE COURT: Make sure she's finished
19 with her answer, Mr. Blackwell, and then ask your
20 next question.

21 BY MR. BLACKWELL:

22 Q. Well, I just want to make sure we have
23 the chronology straight, because we may not be on the
24 same page here.

25 A. In 1994 on a Friday I didn't have -- I

1 went home from the hospital. She sent me home on
2 Ativan. The Ativan made me crawl the walls. I was
3 crying, and I was upset, and I couldn't think.

4 My husband called her on Saturday
5 morning to get the prescription changed to something
6 else, and her answering service took the message. He
7 called her numerous times, and she never called us
8 back until Monday.

9 Q. That was in '94?

10 A. Yes, on Monday.

11 Q. Ma'am, you saw her until November of
12 '95, didn't you? You saw her for a full year after
13 that.

14 A. But I wasn't taking that medication for
15 a full year.

16 Q. But you didn't discharge her for a year.

17 A. I know that. What are you going to do,
18 go to a new doctor? Who is going to see you after
19 somebody else has operated on you?

20 MS. COFIELD: Your Honor, what relevance
21 does this have?

22 THE COURT: It's her answer, Ms.
23 Cofield.

24 A. I didn't want to go back to her with a
25 new problem.

1 MS. COFIELD: I just don't think -- why
2 she left Dr. Richmond, I don't see how that's
3 relevant or material in this case.

4 MR. BLACKWELL: Well, it is relevant,
5 because she's talked about not being able to work and
6 not being able to use her hands.

7 MS. COFIELD: What does that have to do
8 with why she changed doctors?

9 THE COURT: Well, she brought the issue
10 up. That was part of her answer. She can answer the
11 question as it relates to that. It's come up in
12 terms of why she went to Dr. --

13 BY MR. BLACKWELL:

14 Q. You actually went to see another doctor
15 during the time you were with Dr. Richmond; is that
16 correct?

17 A. Yes.

18 Q. And that was Dr. Magness?

19 A. Yes. I wanted a second opinion.

20 Q. And then in March 1996 you went on a
21 cruise on your boat to Mexico?

22 A. We didn't go on a cruise to Mexico, not
23 on my boat. Would you go to Mexico on a 28-foot
24 boat?

25 Q. But you went on a cruise, and you came

1 back in March of '96 and you had a lot of leg
2 weakness; is that correct?

3 A. Uh-huh.

4 Q. And you had a lot of lower spine
5 weakness?

6 A. I had lower back problems.

7 Q. And you went to see Dr. Dan Dillon at
8 that time, did you not?

9 A. Yes, I did.

10 Q. And Dr. Dillon followed you, and at the
11 time you were missing a lot of work because you
12 couldn't walk well?

13 A. No, I didn't miss a lot of work, but I
14 did miss a few days. My back was hurting.

15 Q. Well, you were out a fair amount in
16 1996, were you not?

17 A. I really couldn't tell you how many
18 days.

19 Q. Well, between your VBG and your --

20 A. I didn't have the VBG in '96.

21 Q. You had the vertical banded
22 gastroplasty, I thought, until October of 1997.

23 A. Yes, but it didn't keep me out of work.

24 Q. Okay. But you were having problems with
25 that, were you not?

1 A. I was having problems with it, but it
2 didn't keep me out of work.

3 Q. And Dr. Dillon sent you to Dr.
4 Mallenbaum, a neurologist?

5 A. Yes.

6 Q. And he worked you up extensively;
7 correct?

8 A. Yes.

9 Q. He couldn't find anything wrong with
10 you, could he?

11 A. No, he couldn't do anything for my back
12 pain.

13 Q. And he sent you to Dr. Sherwood, an
14 arthritis doctor, and he couldn't find anything wrong
15 with you, could he?

16 A. She said it was probably related to some
17 kind of inflammatory process. That's all she told
18 me.

19 Q. So all the problems with your lower back
20 and your legs which prevents you from walking well --

21 A. Well, I don't have that anymore.

22 Q. It just went away?

23 A. It went away after they took the ovaries
24 out that I had big tumors in. It was much better
25 after that.

1 Q. Did you file an application, in fact,
2 for benefits?

3 MS. COFIELD: Your Honor, may we
4 approach?

5 THE COURT: Yes, you may.

6 (Counsel approached the bench, and an
7 off-the-record discussion was held.)

8 BY MR. BLACKWELL:

9 Q. Now, you indicated Dr. Mallenbaum could
10 not help you, the neurologist. The year before you
11 had gone to see Dr. William Reed, also a neurologist,
12 is that correct, in 1995?

13 A. No, he is a rheumatologist.

14 Q. And you had gone there for apparently a
15 workup for arthritis?

16 A. Dr. Magness sent me there.

17 Q. And Dr. Reed couldn't find anything
18 wrong with you, could he?

19 A. He said it was -- he said he thought it
20 was just inflammatory.

21 Q. So you went the one time to Dr. Reed in
22 '95 and didn't go back?

23 A. It might have been one time or two
24 times. I don't know.

25 Q. No follow-up with him?

1 A. No. When they tell you --

2 Q. No follow-up with Dr. Magness?

3 A. No. He was just a second opinion; that
4 was it.

5 Q. No follow-up with Dr. Dillon, the
6 neurosurgeon, in '96?

7 A. Dr. Dillon I saw a couple of times. And
8 he left --

9 Q. No follow-up after you went to see Dr.
10 Mallenbaum?

11 A. -- left the area, and I wouldn't want to
12 go back to him. He left.

13 Q. Did you follow up with him after you saw
14 Dr. Mallenbaum?

15 A. I think Dr. Mallenbaum sent me to him.

16 Q. Dr. Dillon couldn't find anything wrong
17 with you to explain your weakness in your legs and
18 your lower spine problems, could he?

19 A. He thought that it was -- he just
20 thought that it was inflammatory. That's all they
21 told me, and I was --

22 Q. Did you follow up with Dr. Sherwood, the
23 arthritis specialist?

24 A. Yes, I did.

25 Q. How many times did you see Dr. Sherwood?

1 A. I'm not sure, maybe twice, three times.

2 Q. That's it?

3 A. Yeah. I mean if they can't do anything
4 for you, what's the point?

5 Q. And you were out of work as a result of
6 these various problems in 1995 and 1996, were you
7 not?

8 A. I may have been out a few days, but not
9 a lot.

10 Q. Now, let me go back for a second with
11 you, if I can. You indicated you can't sit for any
12 length of time?

13 A. Not without getting up and moving around
14 a little bit. It hurts my neck. My neck gets to
15 bothering me.

16 Q. Do you drive?

17 A. Yes, I do.

18 Q. You do drive?

19 A. Yes, I do. Not a lot of distance,
20 usually, but I do drive.

21 Q. And you said you can lift about eight
22 pounds?

23 A. That's what I was told to lift.

24 Q. Can you stoop?

25 A. I can stoop, but it makes it harder for

1 me to breathe because I push the air out of me.

2 Q. Can you rotate your torso?

3 A. I can turn, yes, I can.

4 Q. Can you do that without any difficulty?

5 A. Basically, yeah.

6 Q. Can you carry?

7 A. I can carry as long as it's not heavy.

8 Q. Can you bend?

9 A. Again, bending is hard because it makes
10 me short of breath.

11 Q. Now, your shortness of breath, you've
12 had a problem with shortness of breath over the
13 years, have you not?

14 A. When I was very heavy, I mean, because I
15 was carrying so much weight.

16 Q. Well, you are an asthma patient, aren't
17 you?

18 A. Actually, there's two opinions on that.
19 It depends on where you go.

20 Q. Well, let me ask you this.

21 A. Dr. Greenberg told me I don't have
22 asthma. Dr. Jalbert says I do.

23 Q. Well, Dr. Jalbert has treated you with
24 hand-held nebulizers, hasn't she?

25 A. Yes, she has.

1 Q. That's a medication whenever you get --

2 A. Yes, and that's why I said --

3 Q. And you've been seeing her since 1991,
4 haven't you?

5 A. Yeah, but I didn't start that medicine
6 until a year or two ago.

7 Q. Before that, though, you were on
8 Prednisone, weren't you?

9 A. I was on Prednisone not for my
10 breathing. I was on Prednisone for that inflammatory
11 process that they thought I had.

12 Q. But Dr. Jalbert has been following you
13 for asthma, has she not?

14 A. Just the past year or two.

15 Q. Had she done any pulmonary function
16 studies back before 1997 to see what your function
17 was?

18 A. I don't know if was before '97.

19 Q. Do you know whether your pulmonary
20 function has improved?

21 A. It's improved since the last one.

22 Q. In fact, they found no obstructive
23 disease; is that right?

24 A. That's correct. I just lose air because
25 my vocal cord doesn't close.

1 Q. Now, you had the surgery with Dr.
2 Richmond in 1994, we've established. And at that
3 time you underwent an anterior, meaning from the
4 front, cervical diskectomy to remove the disk on
5 November 23, 1994?

6 A. Yes.

7 Q. And that was at the C6-7 level?

8 A. Yes.

9 Q. And Dr. Richmond, I take it you sat down
10 with her, and you had some discussion about informed
11 consent?

12 A. Yes.

13 Q. Now, with regard to informed consent, I
14 take it you as a nurse have worked in hospitals and
15 seen informed consent forms?

16 A. Uh-huh.

17 Q. And no doubt you've written informed
18 consent forms, have you not?

19 A. Uh-huh.

20 Q. You've signed them with the patients
21 present?

22 A. Uh-huh.

23 Q. And you understand there are risks
24 involved in surgery?

25 A. Yeah, the general risks.

1 Q. Do you understand that death is a
2 potential risk?

3 A. Yes.

4 Q. Do you know what percentage of persons
5 die undergoing surgery of any type?

6 A. I don't know the exact percentage, no.

7 Q. Now, if the percentage was one out of
8 1,000, one-tenth of 1 percent, would you still
9 undergo the surgery?

10 A. One-tenth of 1 percent? Probably.

11 Q. Ma'am, if you were in excruciating pain
12 that brings you back without an appointment to your
13 doctor and you ask Dr. Borden whether he can do it,
14 knowing Dr. Klara is not available --

15 A. I didn't ask him. He offered.

16 Q. Well, you knew at the time, though, that
17 Dr. Klara was not going to be available.

18 A. I knew that Dr. Klara was not
19 available.

20 Q. And Dr. Klara said that he could do it
21 when he got back; isn't that correct?

22 A. He could.

23 Q. Correct?

24 A. Yes.

25 Q. So Dr. Klara offered you the opportunity

1 to wait until he got back?

2 A. He didn't offer me; I knew. Dr. Borden
3 had told me and Dr. Klara confirmed that he wasn't
4 going to be back.

5 Q. Ms. Washburn, you were offered the
6 opportunity by Dr. Klara to wait until he got back;
7 isn't that right? You testified to that before.

8 A. I don't believe he said I could wait;
9 maybe he did. He told me it would be four to six
10 weeks.

11 Q. But you understood that Dr. Klara could
12 do the surgery if you could wait?

13 A. Well, yes. Common sense let's you know
14 if you wait six weeks, he would do it.

15 Q. But you were in excruciating pain.

16 A. I was in pain, yes.

17 Q. And you decided to have Dr. Borden do
18 it?

19 A. Based on his representation of being who
20 he was, yes.

21 Q. Well, if death is one of the potential
22 risks of a surgery, you would still have that in the
23 face of that risk if your pain caused you to have it;
24 isn't that right?

25 A. I was willing to risk that, yes, so I

1 could have a normal life.

2 Q. Now, when you had your discussion with
3 Dr. Richmond about the surgery, Dr. Richmond covered
4 with you death, infection, injuries from anesthesia?

5 A. She covered the fact that the anesthesia
6 can cause death. She covered infection. She covered
7 bleeding. She didn't say anything about a vocal
8 cord.

9 Q. Did you ask about any risks?

10 A. I don't know. I can't honestly tell you
11 that. I assume that they're telling me the risks
12 that are involved.

13 Q. Are you saying that Dr. Richmond told
14 you the same risks that Dr. Borden said?

15 A. I don't know of any other risk of
16 neurosurgery, so I wasn't expecting them to tell me.

17 Q. Ma'am, my question is simple for you.
18 Did Dr. Richmond tell you the same risks as Dr.
19 Borden?

20 A. She told me -- in fact, what I recall is
21 infection, bleeding, death, the normal risks. He
22 told me the same thing.

23 Q. When you say the normal risks, where are
24 you getting the word normal?

25 A. I'm talking about -- well, that's my

1 understanding of the surgical risks that were told to
2 me, that there was death, infection, bleeding. Those
3 are considered normal risks of surgery.

4 Q. Were those told to you, or did you
5 assume those to be risks --

6 A. No, those were told to me.

7 Q. -- based on what you considered to be
8 normal?

9 A. And that's the ones I'm familiar with.

10 Q. Now, are you sure as we sit here that
11 you told Dr. Richmond -- or excuse me, Dr. Richmond
12 told you that there were just those four risks?

13 A. I'm not sure that those are the only
14 ones she told me, but I know nobody has ever said
15 vocal cord to me.

16 Q. How does your memory loss affect you?

17 A. My memory loss?

18 Q. Yes.

19 A. It's basically things that I'm doing at
20 that time. I have a problem if I take my medicine
21 like I'm supposed to, it does make it hard for me to
22 retain things. If I read, it's hard for me to go
23 back and remember what I read. It's hard for me to
24 retain things.

25 Q. Now, what risks did Dr. Borden actually

1 tell you about on September 22, 1997?

2 A. I wasn't taking medicine of that kind
3 then.

4 Q. You were not taking medicine?

5 A. He told me bleeding -- I was not taking
6 the medicine I'm taking now. It's the medicine I
7 take now.

8 Q. All right. Let me see if I can -- did
9 you prepare a list for Dr. Jalbert of medications you
10 were taking?

11 A. I probably did. I usually do.

12 MS. COFIELD: Time frame?

13 MR. BLACKWELL: It's not dated.

14 A. I probably did. I always give her an
15 updated list.

16 Yeah, this list is -- let me see. This
17 list is probably from a couple of months ago, because
18 I no longer take this. That's not on there. But
19 this is just since I've been seeing pain management,
20 Dr. Hansen the last year.

21 BY MR. BLACKWELL:

22 Q. All right. Well --

23 MS. COFIELD: I'm sorry. So is the
24 answer it's a recent list?

25 THE COURT: Well, I think he is going to

1 ask, Ms. Cofield.

2 A. It's a couple of months old, a few
3 months old.

4 BY MR. BLACKWELL:

5 Q. What is Carafate?

6 A. Can we do one thing? Can I just take a
7 break?

8 Q. Absolutely.

9 A. I've got to get a drink.

10 Q. I have a few more minutes with you, and
11 that's it.

12 A. I have to get a drink of something.

13 Q. Sure.

14 MS. COFIELD: May I, Your Honor?

15 THE COURT: You certainly may.

16 BY MR. BLACKWELL:

17 Q. You let me know when you're ready, Ms.
18 Washburn.

19 A. That's fine.

20 Q. Now, you say you have some memory loss,
21 and that's brought on by medication?

22 A. Yes.

23 Q. You also have blurred vision?

24 A. At times I do.

25 Q. Have you seen anybody about that?

1 A. No. I think it's just the medications
2 that's causing it. I've talked with Dr. Hansen.

3 Q. Now, how many medications are you taking
4 for your neck problem?

5 A. I'm taking Oramorph. I'm taking --

6 MS. COFIELD: I'm sorry, I can't hear
7 her at all.

8 A. I would have to look at the list,
9 because I can't remember all of them.

10 THE COURT: Ms. Washburn, lean forward
11 and speak into the mike, please.

12 BY MR. BLACKWELL:

13 Q. Let me move this for you.

14 A. I would have to look at the list,
15 because I can't remember all of them. But there's
16 Oramorph, and there's -- let me think. Oh, I get
17 magnesium. Well, that's not really for the neck.

18 I would have to look at the list. I
19 can't think of the names.

20 THE COURT: Does she have the list with
21 her?

22 A. There's about 16 or 17 medicines.
23 They're not all related to my neck.

24 BY MR. BLACKWELL:

25 Q. Okay. Do you know which ones produce

1 your memory loss?

2 A. I know that taking the Oramorph and
3 taking -- I'm on Neurontin for nerve pain, and I'm
4 on --

5 Q. You're on that for nerve pain throughout
6 your entire body; is that right?

7 A. Yes.

8 Q. In fact, you've been seeing Dr. Hansen,
9 a neurologist, for treatments for --

10 A. That's the restless leg and stuff.

11 Q. He has diagnosed a fibromyalgia?

12 A. Yes.

13 Q. And that is a toe to head kind of
14 chronic inflammatory process?

15 A. Yes. He said it often follows an injury
16 to the body, and he said that it was probably
17 secondary to my neck surgery.

18 Q. He has also indicated it's an
19 ill-defined chronic process, didn't he?

20 A. Yes, he did.

21 Q. And you receive those treatments how
22 often?

23 A. I go for magnesium infusions once a
24 month now, but I did go every two weeks.

25 Q. All right. Now, in 1996 you asked Dr.

1 Dillon to help you retire, did you not? You wanted
2 to retire at that time?

3 A. No, I did not.

4 Q. Were you not seeking in 1996, a year
5 before this surgery, to cut back at work so that you
6 could retire?

7 A. No, I was not.

8 Q. Was your husband retiring at that time?

9 A. My husband retired at that time.

10 Q. Did you not tell Dr. Dillon that you
11 wanted to retire in 1996 so you could be with your
12 husband more?

13 A. No, I did not tell him I wanted to
14 retire. I told him my husband was retiring.

15 Q. Did you tell your employer you wanted to
16 retire?

17 A. I didn't tell my employer I wanted to
18 retire.

19 Q. Okay. And --

20 A. I mean, now, maybe jokingly we were all
21 saying man, he is retiring; I wish I could retire.
22 But --

23 Q. Did your request to retire come as a
24 result of the leg weakness and the spinal problems
25 for which you had gone to see Dr. Dillon in March of

1 1996?

2 A. I never asked him to retire me.

3 Q. Ma'am, is it your testimony here under
4 oath that you never sought to retire in 1996?

5 A. No, I did not.

6 MS. COFIELD: Your Honor, she's answered
7 it twice.

8 THE COURT: Well, she can answer the
9 question. What was the answer?

10 BY MR. BLACKWELL:

11 Q. You did not?

12 A. No, I did not want to retire. My
13 husband was retiring, and we may have talked about
14 that.

15 Q. And you didn't seek to cut back either
16 at work or seek to have Dr. Dillon assist you in
17 retiring for medical reasons?

18 MS. COFIELD: Your Honor, it's been
19 asked three times.

20 THE COURT: It has been asked and
21 answered, Mr. Blackwell.

22 BY MR. BLACKWELL:

23 Q. And after Dr. Dillon worked you up for
24 this weakness in your legs, your aching back, your
25 difficulty to walk, your difficulty to climb up

1 stairs and couldn't find any problem with you, you
2 went to Dr. Mallenbaum; is that correct?

3 A. He told me -- I think he asked me to go
4 to Dr. Mallenbaum.

5 Q. And when Mallenbaum couldn't find
6 anything wrong with you, you went to Sherwood?

7 MS. COFIELD: Your Honor, I think we've
8 been over this.

9 A. Somebody sent me to Sherwood. I didn't
10 just go.

11 MS. COFIELD: Excuse me, Ms. Washburn.

12 THE COURT: I agree with that. It's
13 been asked and answered, Mr. Blackwell.

14 BY MR. BLACKWELL:

15 Q. And one more question. When Sherwood
16 couldn't do anything for you, did you go back to
17 work?

18 A. I think I was back to work at that
19 point.

20 Q. Have you applied for any position with
21 any company anywhere in this area since 1998?

22 A. No, I have not.

23 Q. And you were given a letter, were you
24 not, by your employer that said that your job --

25 MS. COFIELD: Your Honor, whatever the

1 letter said would be hearsay.

2 MR. BLACKWELL: I'm not offering it for
3 the truth, just what her impression is. She opened
4 the door.

5 MS. COFIELD: Wait a minute.

6 THE COURT: Wait just a minute. Counsel
7 approach.

8 MR. BLACKWELL: Yes, sir.

9 (Counsel approached the bench, and an
10 off-the-record discussion was held.)

11 BY MR. BLACKWELL:

12 Q. Ms. Washburn, did you receive a letter
13 on February 2, 1998, from your employer advising you
14 that effective --

15 MS. COFIELD: Objection, Your Honor.

16 BY MR. BLACKWELL:

17 Q. Let me ask you, did you get this letter?

18 MS. COFIELD: If I understand Your
19 Honor's ruling --

20 THE COURT: She can testify as to her
21 job and how it terminated, so let's move on.

22 BY MR. BLACKWELL:

23 Q Did you receive that letter?

24 A. Uh-huh.

25 Q. Can you read the letter for us, please?

1 MS. COFIELD: Same objection, Your
2 Honor. She is under --

3 THE COURT: I'll overrule the
4 objection. Go ahead.

5 MS. COFIELD: Okay. May I just note my
6 exception? She is under subpoena.

7 THE COURT: Note your exception. Go
8 ahead.

9 BY MR. BLACKWELL:

10 Q. First of all, is that addressed to you?

11 A. Yes, it is.

12 Q. Can you read the letter, please?

13 A. Yes. I also had a visit with her --

14 Q. Ma'am, can you please read the letter?

15 A. -- prior to this where she told me what
16 was going on.

17 THE COURT: Ms. Washburn, just read it.

18 A. It says: Please be advised that
19 effective March 16, 1998, the home training
20 coordinator position held by Janice Washburn will be
21 eliminated. This position is being eliminated due --

22 MS. COFIELD: Same objection, Your
23 Honor.

24 MR. BLACKWELL: I'll offer it.

25 THE COURT: I'll note your exception,

1 Ms. Cofield.

2 MS. COFIELD: Thank you.

3 MR. BLACKWELL: Judge, do you want us to
4 number these D-1 or something?

5 THE COURT: D-1. I'll number it, just
6 as long as you have it marked.

7 MR. BLACKWELL: Yes, sir.

8 (The letter dated 2-2-98 was marked
9 Defendant's Exhibit No. 1 and received
10 in evidence.)

11 BY MR. BLACKWELL:

12 Q. Now, after your job was eliminated, did
13 you ever apply anywhere --

14 MS. COFIELD: Objection, Your Honor. It
15 wasn't the job that was eliminated; that position
16 was. And she testified there was another position
17 open with the same employer.

18 MR. BLACKWELL: Is this an objection or
19 a speaking objection?

20 THE COURT: I'm not sure, but you can --

21 MS. COFIELD: Form.

22 THE COURT: If you can just ask the
23 question whether the position, if that's what was in
24 the letter --

25 MS. COFIELD: It's not the job.

1 THE COURT: The position, ask about the
2 position.

3 MR. BLACKWELL: I'll rephrase, Your
4 Honor. I just want to move it along.

5 THE COURT: Rephrase the question.
6 Let's move along now.

7 BY MR. BLACKWELL:

8 Q. Ms. Washburn, did you apply anywhere
9 else after you received that letter?

10 A. No, I have not.

11 Q. You've never applied for any position,
12 have you?

13 A. No, I have not.

14 Q. You have not sought any kind of position
15 within your profession?

16 A. No, I have not.

17 Q. Have you sought a position, for
18 instance, to audit bills and what have you, an
19 auditor position that some nurses hold?

20 A. No, I have not.

21 Q. That would not involve much speaking,
22 would it?

23 A. I really don't know. I don't know the
24 job description.

25 Q. And that would be largely a sedentary

1 position, would it not?

2 A. I don't know. You might have to carry
3 things. I don't know.

4 Q. Can you not think of any position within
5 your profession that you could do?

6 A. I can't think of any position where they
7 wouldn't want me to be able to communicate.

8 Q. How about a medical transcriptionist
9 where you would be listening and typing up medical
10 reports?

11 A. I don't think I could type that long.

12 Q. Have you sought any retraining?

13 MS. COFIELD: Excuse me. I think she
14 was again in the middle of a sentence.

15 MR. BLACKWELL: I'm sorry. I didn't --

16 THE COURT: Let her finish the answers,
17 but I think she was finished.

18 BY MR. BLACKWELL:

19 Q. I apologize, ma'am. Finish your answer.

20 A. I was evaluated for retraining and told
21 that I was not -- that I wasn't at a point in time
22 where they would retrain me.

23 Q. Ma'am, have you applied anywhere?

24 A. I haven't applied. I was evaluated for
25 retraining.

1 Q. Have you gone to any additional
2 training?

3 A. Pardon me?

4 Q. No additional training?

5 A. No, because I was evaluated and told
6 that I --

7 Q. Ma'am, have you sought any additional
8 training?

9 A. No, I have not, because I was told
10 that --

11 Q. Have you applied for any additional
12 training?

13 A. No, I have not.

14 Q. Did you seek any accommodation in your
15 workplace from your employer to go back under the
16 Americans With Disabilities Act?

17 A. No, because there is nothing they do in
18 that job that I could do.

19 Q. Ms. Washburn, did you seek any
20 accommodation?

21 A. I didn't specifically bring up the
22 Americans With Disabilities Act. But I'm not able to
23 do patient care, and that's what they do.

24 Q. You can't do anything?

25 A. I can do things. I can't do things for

1 long durations.

2 Q. Okay. If we can bring the monitor --

3 A. And you sent me to a place to be
4 evaluated who told you the same thing.

5 Q. Well, let me see what you can do.

6 A. Are you going to bring that into
7 evidence?

8 Q. I can't argue with you, Ms. Washburn.

9 (Counsel approached the bench, and an
10 off-the-record discussion was held.)

11 THE COURT: All right. You may step
12 down, Ms. Washburn.

13 All right. Ladies and gentlemen, it's
14 about 20 minutes to 1, and it's going to take a
15 little bit longer to finish the examination here.
16 And there are a couple of things that we need to take
17 up, so I'm going to let you go to lunch at this
18 point.

19 I would ask that you please be back at
20 20 minutes to 2. Just like yesterday, if you would
21 when you come back, just come directly into the jury
22 room here in Courtroom 6, and again, don't discuss
23 any aspects of the evidence or the case.

24 Enjoy your lunch, and we'll see you back
25 here in an hour.

1 (The jury left the courtroom, and the
2 following proceedings were held:)

3 MS. COFIELD: Your Honor, my objection
4 is pretty basic. It's a classic hearsay objection.
5 To just be able to run a video, I mean you could just
6 have the whole trial by video if that were the case.

7 We certainly need to have the person
8 here so I can cross-examine him, that's rather
9 fundamental, and I would be deprived of that. And I
10 do object on that basis, just to have it run without
11 any of that.

12 I could have gotten all my bills in
13 evidence if it weren't for that same objection, but I
14 have to lay the foundation.

15 THE COURT: Okay. Mr. Blackwell?

16 MR. BLACKWELL: Judge, first of all, to
17 authenticate a photograph or anything you have to
18 show that it accurately depicts what it's showing.

19 And Ms. Washburn is in these videos, and
20 she can say that's me or can say it's not her. We
21 all know sitting here --

22 THE COURT: And she is supposed to be
23 able to testify as to when it was taken and where it
24 was taken?

25 MR. BLACKWELL: I'm not sure you even

1 have to have that.

2 THE COURT: Well, I guess maybe --

3 MR. BLACKWELL: Let me just throw one
4 more thing up there while you're considering, because
5 I see the court moving quickly on me.

6 I think I can certainly use it to -- she
7 has now talked about various things she can't do, and
8 I can ask whether or not this refreshes her
9 recollection as to whether she can do certain
10 things.

11 So you can use anything under -- the old
12 law school thing was you can use --

13 MS. COFIELD: Only if it was done
14 contemporaneously with the event by the person in
15 question.

16 THE COURT: The court is not suggesting
17 at all, Mr. Blackwell, that you can't use the video.
18 But as far as just putting it out there, showing the
19 jury the video and then cross-examining her with
20 regard to it, you do not have sufficient foundation
21 for doing that.

22 MR. BLACKWELL: I will have to recall
23 her then, I think, after I put the individual on who
24 did the video.

25 THE COURT: Well, you may very well,

1 and we'll deal with that at that point in time. But
2 raw that way without regard to the basic foundation
3 that relates to time, place, authenticity and so
4 forth, the court is not going to permit that.

5 MR. BLACKWELL: We have one other
6 objection, if this is a good time to do it.

7 THE COURT: Sure.

8 MR. BLACKWELL: Two subpoenas have been
9 issued by Ms. Cofield for additional witnesses not
10 included on her exhibit and witness list, and we
11 would move to quash those this morning.

12 She has now subpoenaed two radiologists
13 whose names do not appear on her exhibit list, except
14 in the very end she says and all treating providers.
15 Judge, we've got seven volumes. She was to list the
16 witnesses she was to have here. We've been hoisted
17 on our petard by filing our answer designating expert
18 witnesses when we didn't have to.

19 I think for us to try to prepare trial
20 notebooks and prepare witnesses and rebuttal
21 witnesses and then have two witnesses subpoenaed --
22 and they don't even appear on her bills except as
23 Hampton Roads Radiology, no doctors' names.

24 I would respectfully request that the
25 court quash -- and 8.01-407 of the code requires five

1 days' notice on subpoenas for trial that are attorney
2 issued. We haven't received that at all. They were
3 issued today.

4 THE COURT: All right. Ms. Cofield,
5 what about it?

6 MS. COFIELD: Yes, sir, I can easily
7 respond to that. That's one of those straw dolls
8 they like to set up, and that is simply that they are
9 just two subpoenas to get in two readings of two
10 films.

11 Because if you will recall on Monday,
12 the first day of trial, under section or paragraph 10
13 of the pretrial order I had prepared what they
14 submitted as the agreed upon exhibits, and they have
15 these readings in there. I have the readings.
16 Everybody had the readings in there.

17 But Your Honor did rule that even though
18 they were agreed upon, that's how he is saying --
19 counsel and I have argued. And I know it's not
20 binding, but I did in reliance on other arguments of
21 the court -- say if you submit the exhibit yourself
22 and you tender it, you can't proffer it and object to
23 it simultaneously.

24 And I brought that up with Your Honor,
25 but you said if it contained an opinion, I would have

1 to have that person here. So all this is, is two to
2 get in the readings submitted by all three parties.

3 And I did reserve my objection -- or
4 excuse me, preserve the ability to call them by
5 saying the treating guys in order to cure McMunn,
6 and Your Honor ruled that I would have to cure McMunn
7 because it contains an opinion.

8 And it is to get two readings in, and
9 that is all it is. And if counsel didn't object to
10 the readings and they tendered the exhibits, I would
11 be happy to excuse the doctors.

12 THE COURT: Well, let's see what's in
13 the -- who has the order?

14 MR. BLACKWELL: Here is the witness
15 list, Your Honor.

16 MS. COFIELD: These are the two.

17 THE COURT: Let's see what's in the
18 exhibit list that we've got. What was your exhibit
19 list?

20 In spite of this, I take it there is no,
21 quote, agreed exhibit list where the parties agreed?

22 MS. COFIELD: Well, I don't know how to
23 say that. We all submitted it.

24 THE COURT: Well, that's not agreed, Ms.
25 Cofield. I mean each side submits their list of

1 witnesses and --

2 MS. COFIELD: No, I mean documents.

3 Some of them certainly were not --

4 THE COURT: -- and exhibits --

5 MR. BLACKWELL: But they're not agreed
6 upon.

7 THE COURT: -- but that doesn't make
8 them agreed upon, and it doesn't put them in evidence
9 without proof at all. It's just a question of these
10 are the exhibits that you are going to use in some
11 fashion.

12 MS. COFIELD: And I did, and here are
13 the exhibits I tendered and preserved. These are the
14 two or rather three --

15 THE COURT: Well, that's fine, but
16 somebody needs to be able to --

17 MS. COFIELD: Authenticate, and then I
18 said up above to get these three exhibits in. And I
19 did tender them, and I did designate them
20 specifically by date right there on page 2.

21 I said --

22 THE COURT: Wait just a minute. Let me
23 catch up with you.

24 Okay. Which ones are we talking about?

25 MS. COFIELD: Here, I'll show you these

1 are from mine; this is my designation. And in
2 paragraph two I said the office chart including these
3 three X-rays, and I dated them.

4 And then I've said that I reserve the
5 right, if I have to call -- to get these in evidence,
6 I would call the treating physicians whose names
7 appears there.

8 THE COURT: Let me see it. I can't read
9 that from here, Ms. Cofield.

10 MS. COFIELD: I'm sorry.

11 THE COURT: Is this your order? Is this
12 part of your submittal?

13 MS. COFIELD: Yes. And at the bottom
14 you see those three X-rays are tabbed, and they were
15 submitted.

16 THE COURT: Did you have something you
17 wanted to add?

18 MR. ALLEN: No. I just wanted to be at
19 the party. That's all.

20 THE COURT: I certainly don't want you
21 to be excluded from the party.

22 MR. BLACKWELL: When you're ready for
23 me, Your Honor, I have just a few things to add.

24 THE COURT: All right. Go ahead. I'm
25 ready for you.

1 MR. BLACKWELL: Judge, the plain intent
2 of the order was that you list witnesses so that
3 counsel could prepare and counsel could prepare
4 rebuttal witnesses.

5 To simply list every medical record and
6 say I might call somebody who generated a medical
7 record at some point in time during eight years, nine
8 years of treatment is simply too burdensome.

9 The court says in its order that you are
10 to file your list of exhibits and your list of
11 witnesses, and except in rebuttal, surrebuttal or
12 impeachment any exhibit not so identified and filed
13 will not be admitted into evidence, and any witness
14 not so identified and filed will not be able to
15 testify.

16 Now, she has listed her witnesses there,
17 and we have prepared for those witnesses. But to
18 simply say now I am going to bring in some doctor
19 from somewhere along the way and make him a witness
20 with a subpoena served on the second day of trial
21 when there was no agreed upon exhibit for this is
22 unfair to us.

23 We now have to go out and we may have to
24 find a rebuttal witness to this particular
25 radiologist. It's not fair. I mean this is the

1 order, and the order is list your witnesses. Judge
2 Griffith had a case --

3 THE COURT: I'm really not interested in
4 what other judges had. You know, you've got nine
5 opinions that you can throw around here at any time.

6 MS. COFIELD: I didn't list just
7 anybody, sir. I only listed three people to get
8 these exhibits in evidence. I designated and
9 produced timely these three X-rays.

10 Ordinarily, these three X-rays -- I
11 shouldn't even say ordinarily. But all three of us
12 designated the same three X-rays, and they designated
13 in addition these same doctors. And I reserved the
14 right to call on anybody that they designated, and
15 they had their names on there.

16 And they're acting like seven years'
17 worth of --

18 THE COURT: This really isn't a
19 surprise. But for the X-rays, I expect that from the
20 doctors in the room to the other doctors, others as
21 they call them can also read X-rays. But for that
22 purpose I'm going to permit it.

23 MR. BLACKWELL: That's not consistent
24 with 8.01-407, Your Honor. She is required to issue
25 her subpoenas five days before trial. That's an

1 attorney-issued subpoena, and I don't think that --

2 MS. COFIELD: Insofar as practical, it
3 says.

4 THE COURT: Well, let me suggest this.
5 If the doctors that come in object to the fact that
6 they didn't get the subpoena until today, then my
7 guess is they're on pretty sound ground. Okay.

8 But I don't think that's an objection
9 reserved to you, but I'll note your exception to the
10 court's ruling as it relates to that.

11 MR. BLACKWELL: Thank you, Your Honor.

12 MR. ALLEN: Your Honor, there is one
13 other small matter we probably should take up now,
14 and that is I understand the plaintiff intends to
15 call Mr. Owen and Ms. Powell, who are physical
16 therapists this afternoon.

17 And counsel has stipulated and
18 stipulated on the record that the reason why Ms.
19 Washburn is not employable is not because of the
20 range of movement of her cervical spine. It's simply
21 a voice issue, and that, in fact, the cervical spine
22 limitations weren't caused by this particular
23 surgery.

24 In light of that, I don't know why we
25 need to have and should hear from these witnesses on

1 the issue of what her limitations are, physical
2 limitations.

3 These people aren't going to testify
4 about her voice. We've already heard from Celeste
5 Luna on that issue, but Owen and Powell are physical
6 therapists. They're going to talk about functional
7 limitations with regard to her spine.

8 I might also say that I don't think
9 there is going to be any testimony from them that's
10 going to indicate that she is in any way different
11 from where she would have been -- from a person who
12 had two spine surgeries like she did have.

13 In other words, that she is different
14 from a normal -- from the person who has had no
15 surgery, but she is not different in any material way
16 from a person who has had these two kinds of surgery.

17 THE COURT: We had this side bar up here
18 in terms of the fact that there wasn't going to be
19 any expert testimony as it relates to her
20 disability. And we were talking about her wages, and
21 we disagreed on whether she could do that or not,
22 beyond the vocal cord problem.

23 MS. COFIELD: Well, Your Honor, that's
24 my issue here. And if I had been sustained, for
25 example, on these other things don't come into

1 evidence, everything pre-1997 is immaterial because I
2 am not claiming it as a damage, I don't claim you
3 hurt my back, I don't claim you hurt my legs, I'm not
4 claiming any of that, then if counsel had not been
5 allowed on cross-examination to go into those seven
6 doctors I wrote down, or eight of them, and hadn't
7 been allowed to go into all of those other symptoms
8 that I wasn't claiming bills for over my objection, I
9 would understand them now standing up.

10 But they are saying I get to inquire on
11 cross why you haven't done all these other things.
12 You have all these other symptoms, you're seeing all
13 these other doctors, and you haven't done any other
14 training. Guess what? This is why. This is my
15 response in my case in chief.

16 Why? This is, most interestingly, an
17 IME. They requested it, and it shows on their
18 request and over plaintiff's objection that an IME
19 was performed that she does have functional motor
20 limitations that do --

21 THE COURT: Related to her neck?

22 MS. COFIELD: Yes, sir, that she cannot
23 do other tasks, which is directly related to their
24 cross-examination of why don't you go do other
25 things.

1 So I don't think they can tie my hands
2 on the testimony of saying why don't you do it and
3 not let me explain why she doesn't do it, especially
4 when they paid for it and they did it over
5 plaintiff's objection.

6 THE COURT: All right.

7 MR. DAVIS: We join in the objection.

8 THE COURT: I understand.

9 MR. DAVIS: And just for the record, the
10 cross-examination is meant to show that it's just not
11 the voice problem that's preventing her from working.
12 She's got many other problems. Now, that's clearly
13 appropriate cross-examination.

14 But to bring in a witness in the
15 plaintiff's case in chief who says this woman has got
16 problems -- and this is all these people are saying.
17 They admit in their depositions we didn't do any
18 evaluation of her voice. In fact, we communicated
19 with her right well.

20 But they did range of motion testing,
21 lifting, bending, et cetera, that's all they're going
22 to say, and they say in their report she can't work
23 because of that. That's completely irrelevant in
24 this case if the only claim is -- as counsel and Ms.
25 Washburn have stated, the only claim is the voice.

1 MS. COFIELD: How could they say it's
2 irrelevant?

3 THE COURT: Just a minute.

4 MR. ALLEN: What Ms. Cofield is arguing
5 to the court is that she should be permitted to
6 anticipate and present her rebuttal case. She is not
7 allowed to do that. Massey versus Firmstone says
8 plaintiff can't rise above her own evidence.

9 If the plaintiff says the reason why I
10 can't work is just my voice, we can assault all day
11 long that proposition. And until we present
12 evidence, until there is evidence outside the prima
13 facie case of the plaintiff, she is not allowed to
14 rebut that.

15 She might want to bring in rebuttal of
16 Ms. Powell and Mr. Owen or Ms. Owen and Mr. Powell,
17 whichever the gender is. But at this point all she
18 has got is a hoarse voice, and that's her claim. I
19 can't speak --

20 MS. COFIELD: Your Honor, he is totally
21 misunderstanding, because I fully concede they're
22 pre-existing injuries. And as I got out on my direct
23 with her, you couldn't because of pre-existing
24 injuries continue as a clinical licensed -- an LPN,
25 and that was taken away by other things.

1 Now you went into teaching, and that's
2 taken away by these doctors. They exacerbated a
3 pre-existing injury. I have every right now when
4 they have very clearly put on the table her alleged
5 refusal, inabilities to do anything else, any other
6 training and brought that up, explain to the jury
7 that indeed she did have other pre-existing -- these
8 other pre-existing.

9 As I had told you in opening, we are not
10 claiming it but do prevent her from doing other
11 things. Here is the proof positive that what I said
12 in opening is true. She does have pre-existing
13 injuries. Indeed, they do prevent her from holding
14 other jobs. She had one option left. That option
15 was then removed.

16 The jury instructions are also perfectly
17 clear on this when you exacerbate a pre-existing, you
18 may not be responsible for the condition itself, but
19 you are responsible for the consequences that result
20 even when they're not foreseeable.

21 So even though they couldn't have
22 foreseen they would have removed her last option in
23 life, that's what happened. And that is my case, and
24 that is why it is important to have these people.
25 They were timely designated, they were deposed --

1 THE COURT: Okay. Well, that's not the
2 issue. That is not an issue, and I would ask the
3 defense to address this.

4 Assuming that we're not relating these
5 injuries to the surgery in any way, shape or form and
6 assuming that we take plaintiffs as we find them,
7 then why should there not be the ability to say she
8 was a basket case in a sense before, and therefore,
9 the voice is a more difficult problem, then?

10 MS. COFIELD: That's the plaintiff's
11 case.

12 THE COURT: No, I hear you. I want them
13 to tell me why that's not so.

14 MR. DAVIS: The only relevance, then,
15 under Your Honor's -- and that's exactly right. We
16 take the eggshell plaintiff as we find them. But the
17 only relevant evidence would be what exacerbated your
18 inabilities? Okay. It's my voice problem.

19 She's got witnesses -- she's testified
20 regarding her voice problem. She's got witnesses to
21 come in, medical witnesses to talk about that. We've
22 got a videotape she is going show.

23 How is it relevant, though, to come in
24 and say oh, I've also got arm problems, and I've also
25 got bending problems, lifting problems? It has

1 absolutely no bearing on the exacerbation issue.

2 THE COURT: Well, but again as we get
3 back to the -- again, we take the plaintiff where you
4 find them, and that because of other physical
5 disabilities she has, in effect -- and we can carry
6 it to an extreme that someone has no ability other
7 than to do telephones.

8 MR. DAVIS: And you take away the voice,
9 and you get --

10 THE COURT: And you take away the voice.
11 Then I mean I'm going to -- let me hear you, Mr.
12 Allen.

13 MR. ALLEN: The only other thing I was
14 going to say, Your Honor, is there's nobody to tie
15 this all up with. There is no vocational rehab
16 person that's going to come in here and say a person
17 with this kind of cervical spine limitation is
18 unemployable in the following dictionary of
19 occupational titles.

20 So there is no one that's going to come
21 in here and say okay, given that, you can't get to
22 here. So all you really have is the plaintiff's
23 testimony, and that's out there.

24 THE COURT: Well, the court agrees with
25 that piece of it too, Ms. Cofield. In terms of --

1 no, just listen to me.

2 MS. COFIELD: I just don't know what
3 piece.

4 THE COURT: Okay. You need to listen to
5 me, in terms of the foundation. I agree with you in
6 your theory as it relates to her inability -- that if
7 she is down to the voice as her employable
8 characteristic, then the court would agree with you.
9 You know, that the loss of the voice then maybe
10 becomes a much more serious thing.

11 But I do not think at this point in time
12 that you have established from the standpoint of a
13 physical disability point of view, i.e., there has
14 been no medical testimony that has said from a
15 physical point of view she is unable to be employed,
16 and therefore, this voice -- and the therefore we can
17 deal with after the fact.

18 MS. COFIELD: This is part of that.
19 This is the functional evaluation that they requested
20 to show what are her physical capabilities. And that
21 is the exact test they perform ordinarily, so that is
22 what I am tendering it for.

23 And then, of course, if I don't succeed
24 because the jury believes their rehab specialist
25 instead of this functional evaluation capacity test

1 saying that she can't do it, their rehab guy saying
2 even though they had the functional evaluation saying
3 she shouldn't be able to -- or rather, she can't do
4 other tasks but I think she can do other tasks, I
5 mean that's for the jury, for the trier of fact.

6 But it doesn't make my evidence
7 inadmissible that there are restrictions on her, that
8 this is the condition that she is in, and that she is
9 not able to lift more than four pounds or push more
10 or do other things. It is medical evidence, and it
11 was requested by them.

12 THE COURT: Well, okay.

13 MR. DAVIS: The problem is, is these
14 witnesses are not going to say she can't do any work.
15 In fact, they say she can do a sedentary to light
16 amount of work.

17 The plaintiff does not have any witness
18 then to come in and say there is no sedentary and
19 light job that Ms. Washburn can do with the voice the
20 way that it is, so there is no link there. These
21 witnesses then become irrelevant, because all they
22 say in their report is she can't do her old job
23 because of her limitations.

24 We've now found out her limitations
25 physically are the same as they were before when she

1 was doing that job. That has nothing to do with how
2 the voice has made it any worse, and that's why these
3 witnesses are irrelevant.

4 MR. ALLEN: And I would also add, Your
5 Honor, if I may, that there is a temporal gap here as
6 well. Powell and Owen saw the plaintiff after this
7 surgery was completed.

8 Ms. Cofield's theory is that as of
9 September of 1997 Ms. Washburn was disqualified from
10 every job save the one she had. That's her theory.
11 So the relevant issue is not where is she today,
12 because as it turns out, she is actually better today
13 than she was back then.

14 So the issue isn't where is she today,
15 but where was she when Powell and Owen saw her. But
16 where was she in 1997 Ms. Cofield wants to say, here
17 is the only job she could have done.

18 MS. COFIELD: Your Honor, this is the
19 whole point here. Motions in limine cutoff under
20 this pretrial order were January 24th. I'm sorry it
21 wasn't briefed then, but I can tell you it wasn't
22 briefed by anybody. And the cutoff has elapsed.

23 THE COURT: Well, I'm hearing it, so
24 it's not -- you know, it's not handled as a motion in
25 limine if -- it's an interesting question, and I'll

1 let you all use your lunch hour to try to convince
2 me.

3 I think there is an interesting
4 evidentiary question here as it relates to these
5 individuals and whether they have the ability to
6 speak to --

7 MS. COFIELD: Well, Your Honor, that may
8 go to the weight. It may go to whether they're
9 qualified.

10 But indeed, as I say, these are tests
11 that were specifically requested not only by the
12 defense; that's not my only point. It was to
13 evaluate what else she can do physically, and that is
14 what they did to evaluate her abilities on a motor
15 skill basis and on a whole physical basis as to what
16 type of jobs she could do.

17 Now, they don't go through like an
18 occupational rehab person, but what they do end up
19 with is certain opinions. And they're qualified to
20 render them, I would submit, based on their training
21 and their experience and certainly upon that proper
22 foundation being laid.

23 To say that her primary occupational
24 concern is the ability to effectively utilize upper
25 extremities in a productive fashion as repeated

1 motion intolerance is seen -- now, they go on, but
2 that is exactly what they have been talking about.
3 She should be doing all these other things.

4 We knew this going into and preparing
5 for this case, which is why I timely designated them
6 and why they were deposed. These were going to be my
7 people for why she was in this condition and she
8 couldn't do other skills.

9 I would ask the court not to cut out
10 from under the plaintiff on the second day of trial
11 experts timely designated on that very topic.

12 THE COURT: But it's not the designation
13 of experts. I'm interested in the evidentiary piece,
14 not the timeliness of designations and that sort of
15 thing. That's not an issue here, Ms. Cofield.

16 You can designate, either side can
17 designate a bunch of experts, and that doesn't mean
18 that they automatically get to testify.

19 We have a situation here where the
20 plaintiff has testified that she is not able to do
21 anything, in essence, and then you are going to put
22 on testimony that she can do these things. And then
23 you want it to go to the jury on whether she can't or
24 whether she can.

25 MS. COFIELD: I'm sorry. I'm not sure I

1 followed Your Honor.

2 THE COURT: Do the experts say she can
3 do sedentary things?

4 MS. COFIELD: With certain limits, yes,
5 motion limits. First of all, she had to be
6 sedentary, and then after being sedentary, she can't
7 -- she would have certain motion limits. So she
8 can't do repetitive typing skills. She can't do
9 anything that lifts her arms up.

10 Yes, they do go to these type of issues,
11 and that's what they're trained to do. And they are
12 the people that were hired by -- they chose them. We
13 didn't. The defense chose these people as qualified
14 for this purpose.

15 So I mean it would be strange if after
16 they chose them, and I had no part in choosing them,
17 to say if they are qualified to make these
18 assessments, the court would say then plaintiff can't
19 call an IME result.

20 THE COURT: Okay. Well, then, if you
21 put it on, then you would be prepared -- assuming
22 that it came to the court's conclusion, that the jury
23 is not going to be able to consider whether she is
24 totally disabled from work, because the plaintiff's
25 case and the plaintiff has put on experts to say that

1 she can do these other things.

2 MS. COFIELD: Again, sir, so I'm on the
3 same page, I'm not sure I follow you.

4 THE COURT: All right. Why should I
5 permit the jury to speculate on whether she can do
6 something or whether, as she testified, she can't if
7 the plaintiff's case itself -- if you have put on the
8 evidence that says she can?

9 MS. COFIELD: The evidence that says she
10 can or can't?

11 THE COURT: Can.

12 MS. COFIELD: Can?

13 THE COURT: Right.

14 MS. COFIELD: Again, I hope I'm being
15 responsive because --

16 THE COURT: Can I let the jury speculate
17 on whether they want to believe the plaintiff's own
18 case or not?

19 MS. COFIELD: It's totally consistent.
20 See, that's what I guess I'm not following. This is
21 where she was to begin with, and it isn't a time
22 warp. It is what are her motion or motor
23 capabilities. It has nothing to do with her vocal
24 cords.

25 THE COURT: All right. Well, I'm going

1 to dwell on it at least during my lunch time. And if
2 anybody has any brilliance that may come from
3 something that the Supreme Court of Virginia has said
4 or anything else that may help me on this -- I mean
5 there's no point in us bantering it about.

6 There is an evidentiary question here
7 and I'll resolve it, but I would be assisted by
8 anyone.

9 MS. COFIELD: Can you focus at all, if I
10 went to the computer, as to exactly what your concern
11 from the plaintiff's perspective is?

12 THE COURT: Well, we've talked about
13 this for the last 30 minutes or so. And if I haven't
14 been able to articulate in that period of time the
15 nature of my concerns, then I'm not going to be able
16 to do it in the next five or ten minutes as it
17 relates to the evidentiary question.

18 MS. COFIELD: Okay.

19 MR. BLACKWELL: Your Honor, when are we
20 due back?

21 THE COURT: How about 45 minutes?

22 MR. BLACKWELL: Thank you, Your Honor.

23 (At 1:10 p.m. the trial was recessed to
24 reconvene at 2:00 p.m.)
25

1 AFTERNOON SESSION (2:05 p.m.)

2 MS. COFIELD: Your Honor, I don't know
3 if it's brilliance, but I certainly went to the
4 library.

5 THE COURT: Okay. Does someone have
6 something for me?

7 MS. COFIELD: Yes, I think I do. I read
8 both Rule 4:10, which states in subpart two that the
9 written report of the examination that's filed, if
10 asked by the defense, may be read into evidence if
11 offered by the party who submitted to the
12 examination. And that, of course, is the plaintiff.

13 And then when I go to the only annotated
14 case after that, it's Virginia Linen Service, Inc.
15 versus Lennon, 198 Virginia 700.

16 And you will find there on page 703 the
17 statement that it is not the purpose of the rule to
18 create a final arbiter of medical disputes nor to
19 provide a new way of settling conflicts between
20 medical witnesses. That must remain the function of
21 the jury, or the court if there is none.

22 The person appointed to make the
23 examination is necessarily the selection of the
24 court, but that is not to invest it with the quality
25 of inerrancy. He may be called as a witness by

1 either party and examined and cross-examined as any
2 other witness. If his report is put in evidence by
3 the party examined, here the plaintiff, the other
4 party may then cross-examine him.

5 And so I do believe once we have to
6 submit, under order of court under Rule 4:10, to an
7 independent medical exam, since we were the party who
8 submitted to it, we are the party who can submit it
9 into evidence at this juncture, and that we may call
10 him as a witness and then can be cross-examined.

11 THE COURT: All right.

12 MR. DAVIS: I believe that falls under
13 part four of the rule of the Supreme Court of
14 Virginia on discovery, Rule 4:10, and Rule 4:1 says
15 it's got to be relevant. That's the basis for all
16 discovery and evidence in this courtroom. That's the
17 basis of our objection.

18 THE COURT: All right. Mr. Allen?

19 MR. ALLEN: Your Honor, I was just going
20 to say it's a relevance issue first and foremost.

21 THE COURT: Okay. Here is the way the
22 court -- you can sit down, Ms. Cofield -- the court
23 comes down on this, and it is a little bit of a
24 dilemma.

25 Because it's not a Massey v. Firmstone.

1 It's almost a reverse in the sense that the plaintiff
2 has testified to a higher degree of disability than
3 the individuals who did the examinations have given
4 her. I do think that her condition is relevant, so
5 the court is going to permit them to testify as to
6 what they found.

7 Now, there is no testimony, there is no
8 connection as to causation, and so the court is
9 clearly not permitting them to testify in any way,
10 shape, or form as to causation.

11 MS. COFIELD: Correct.

12 THE COURT: They're also not the
13 defendant's witnesses. They're plaintiff's
14 witnesses.

15 So they're not subject to either
16 cross-examination or impeachment by plaintiff's
17 counsel in terms of how we ultimately -- I think it
18 raises somewhat of a credibility question for the
19 plaintiff that we may or may not have to deal with at
20 a later time in terms of the plaintiff's witnesses
21 testifying as to a level of physical capacity beyond
22 what the plaintiff testified to herself.

23 But that being said, the court is going
24 to -- within the parameters of that is going to
25 permit the testimony.

1 MS. COFIELD: Just one other
2 housekeeping issue, sir, and it is discombobulating,
3 to put it mildly. On Monday, as we earlier
4 referenced, I issued the subpoenas to the two doctors
5 and cleared it with them as to when they wanted to
6 come.

7 I have spoken personally to Dr. Stitik.
8 He says there is no problem, and he will be here at
9 about 2 o'clock, worked with me in the past, glad to
10 help out, been out of town.

11 I did not personally speak to the other
12 doctor, my secretary did, and she arranged the time
13 and said that if there is any problem, please call
14 Judy Cofield at home. And that would have been last
15 night, because she spoke Tuesday -- or Monday when we
16 issued the subpoenas. Excuse me.

17 He did not speak. Silence was
18 everything was fine, and the time was arranged.

19 I called my office to check up during
20 lunch, and I find that defense counsel have now
21 called him to advise him that he has now grounds to
22 complain about coming, because he has not had five
23 days' notice under the subpoena according to this
24 court's ruling.

25 That is interfering with witnesses

1 coming to court. They were arranged, the time was
2 put to bed, and they were both fine with it. Now, I
3 don't know to my knowledge that they have yet reached
4 Dr. Stitik, because I personally spoke to him when
5 you saw me on the phone ten minutes ago to confirm
6 everything was still fine.

7 I have a problem once things are put to
8 bed with calling the other party's witness to try to
9 give them grounds to get out of this.

10 THE COURT: The court thinks it has a
11 problem with that too. Let me hear from the defense.

12 MR. BLACKWELL: I think, first of all, I
13 can represent to the court I have not called anybody.
14 So I'm not sure who she is talking about, but I have
15 not called anyone.

16 MS. COFIELD: Did you or anybody at all
17 tell anybody else to call that doctor, who now calls
18 my office and says --

19 MR. BLACKWELL: I have not. I have
20 not.

21 MS. COFIELD: -- that ten minutes ago I
22 was just advised by counsel I have to have five days'
23 notice?

24 MR. BLACKWELL: I can represent to the
25 court I have not done so.

1 MS. COFIELD: Has Mr. Davis?

2 MR. BLACKWELL: I don't know.

3 MS. COFIELD: Have you asked anybody to?

4 MR. ALLEN: Not me, Your Honor. I was
5 at Starbuck's.

6 MR. BLACKWELL: In fact, we talked at
7 lunch, and we decided we would not even think about
8 doing that, absolutely.

9 MS. COFIELD: The happenstance is beyond
10 credibility.

11 THE COURT: Well, I don't know. I mean
12 all I can get -- what you get is hearsay, and all I
13 can get is the representation of counsel. I don't
14 know what representatives have been in the courtroom,
15 and I don't know whether anything like that has been
16 done.

17 But I'll tell you that anybody who does
18 anything like that has got some difficulties as far
19 as this court is concerned.

20 MR. BLACKWELL: The very reason I would
21 not do so, Your Honor.

22 THE COURT: I understand that, and I
23 accept that.

24 MS. COFIELD: Can I just ask if either
25 doctor has asked anybody on their staff to do that?

1 DR. BORDEN: I haven't had time to --

2 THE COURT: No, you really can't.

3 Okay?

4 MS. COFIELD: All right.

5 THE COURT: But if there is any question
6 about the doctors needing to be here or somebody has
7 canceled who previously said that they would be here,
8 on that basis then the court will order them here.

9 MS. COFIELD: Thank you, sir. That's
10 all I can ask.

11 THE COURT: Now, is everybody clear on
12 what we're doing as far as these witnesses are
13 concerned?

14 MR. BLACKWELL: Judge, may I just renew
15 my request with regard to the video on this different
16 ground?

17 THE COURT: Okay.

18 MR. BLACKWELL: That I would use it as
19 demonstrative evidence in the same way I would use an
20 anatomical chart or a graph to cross-examine the
21 witness, to show her a demonstrable piece of
22 evidence.

23 It may not be admissible at this point
24 absent some foundation, but just to say is this you,
25 are you doing X and Y.

1 THE COURT: I appreciate you putting
2 that in the record for maybe somebody some day will
3 say that's the right way to use it, but my ruling
4 remains the same as far as that is concerned.

5 Clearly, these type of videos are
6 admissible evidence with the proper foundation.
7 Usually, they're handled in a pretrial way. I
8 understand in this case from past hearings that there
9 was no discovery request made by the plaintiff.

10 Therefore, there was no basis for the
11 court to deal with the videos which would normally
12 require a sharing of the video, and then if there are
13 not other questions raised as it relates to
14 authenticity and those sorts of things.

15 MR. BLACKWELL: And we did provide the
16 videos to counsel as part of our exhibits.

17 THE COURT: Okay. But in terms of use
18 in this way, the court believes that that is not
19 appropriate, and so you will have to use them at a
20 different stage.

21 MR. BLACKWELL: Yes, sir.

22 THE COURT: And I'll note your exception
23 to that.

24 MR. BLACKWELL: Yes, sir.

25 THE COURT: All right. Let's bring the

1 jury in. We'll continue if you have additional
2 cross-examination, Mr. Blackwell.

3 MS. COFIELD: Now, I excused those
4 people who were out waiting. In light of Your
5 Honor's ruling, I just want to tell them yes, they
6 should be here, and I'm going to send Ms. Washburn
7 out to do that.

8 THE COURT: Excused who?

9 MS. COFIELD: Powell and Owen, who were
10 sitting here waiting since about 1 o'clock just for
11 the lunch hour. So they have another -- she is up
12 again, so there is a half hour lag time. And I'm
13 just going to tell her to have those same people
14 here, the rehab people.

15 THE COURT: You're going to tell the
16 witness to tell them that? Well, how is she going to
17 testify if she is doing that?

18 MS. COFIELD: Can I make the phone call,
19 then, so we don't have a lag?

20 THE COURT: Yes. I really don't --
21 these are not always easy to work through. But you
22 know, the court expects people, the witnesses to be
23 here. And counsel on either side, nobody needs to be
24 excusing witnesses and saying we're not going to need
25 you until a certain time.

1 The court said it was going to reconvene
2 as far as the jury was concerned at 20 of and as far
3 as everybody else was concerned at five of, so 45
4 minutes from when we adjourned. We're well behind
5 that now.

6 And I'm not going to take up a whole lot
7 of time with my own talking, but you know, if you're
8 going to excuse people to go, you're going to do it
9 at your own peril.

10 MS. COFIELD: I can fill it in. I just
11 want to be sure she is right behind it.

12 THE COURT: You know, that's not the way
13 we're going to work it, so let's go. If you want to
14 take two minutes and make a telephone call -- I don't
15 know who she is going to go out and speak to if
16 they're not out there.

17 MS. COFIELD: I'll just make it in two
18 seconds, and as I say, I can fill it in.

19 MR. BLACKWELL: If Your Honor please,
20 when the jury comes back in, Mr. Allen will take it.
21 I have nothing further, and I will announce that for
22 the record if you would like.

23 MR. ALLEN: With the court's permission,
24 these are my exhibits, and they're tabbed.

25 MS. COFIELD: Thank you, sir.

1 THE COURT: All right. Ms. Washburn,
2 come on back to the stand, please.

3 Bring the jury in.

4 (The jury entered the courtroom, and the
5 following proceedings were held:)

6 THE COURT: All right. Mr. Blackwell,
7 you've concluded your cross-examination?

8 MR. BLACKWELL: I have for the moment,
9 Your Honor.

10 THE COURT: All right. Mr. Allen, you
11 may cross-examine.

12 MR. ALLEN: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. ALLEN:

15 Q. Ms. Washburn, when you went to see Dr.
16 Richmond for your neck problems back in 1994, when
17 you first went to her, the reason why you went to her
18 is because you had neck pain and arm pain; is that
19 correct?

20 A. Yes.

21 Q. And on that occasion you went to the
22 doctor and you said I've got neck pain and arm pain,
23 and I want you to fix it, essentially. That's what
24 you were representing to her; correct?

25 A. Yes. I had been in an auto accident.

1 Q. And you consented to the treatment that
2 she was going to provide in order to fix that
3 particular ailment; right?

4 A. She was doing, she told me, a C6-C7
5 repair, yes.

6 Q. And at some point in time in the course
7 of her treatment, she identified through her
8 diagnostic techniques evidence that she thought your
9 problem was at the level of C6-C7; correct?

10 A. Yes.

11 Q. And when she did that, she told you, I
12 think your problem is at C6-C7; correct?

13 A. Uh-huh.

14 Q. Yes?

15 A. Yes.

16 Q. And you understood that she was going to
17 do surgery to repair that problem at C6-C7; correct?

18 A. Yes.

19 Q. But you were still consenting at that
20 point to surgery on your neck to alleviate the pain
21 that you were experiencing; correct?

22 A. Yes --

23 Q. You didn't tell her --

24 A. -- at C6-C7.

25 Q. You didn't tell her on that occasion if

1 you find something wrong at the level of C7-T1, don't
2 fix it; correct?

3 A. No.

4 Q. You you didn't have that conversation
5 with her, and you didn't say if you find something
6 higher than what you suspect when you go in for
7 surgery, don't fix that; correct?

8 A. No, I didn't.

9 Q. You understood that even though she was
10 going to go in and fix you at C6-C7, that that might
11 entail when she got in there looking at different
12 levels, and you consented to that; correct?

13 A. I don't remember her discussing
14 different levels. I don't remember that.

15 Q. You never discussed that with her?

16 A. I don't believe so.

17 Q. But that was your understanding; right?

18 A. No. I understood we were doing C6-C7.
19 She showed me on the X-ray and --

20 Q. And the same thing happened when you
21 talked to Dr. Kellum about your stomach surgery;
22 right?

23 That is, when you talked to him about
24 your stomach surgery, you knew that he suspected you
25 had a stenosis because of your vertical banded

1 gastroplasty, that VBG that we've talked about;
2 right?

3 A. Yes.

4 Q. You knew that; right?

5 A. Right.

6 Q. But you knew that when he got in there,
7 he might find some other things wrong that he might
8 have to address; correct?

9 A. He told me -- he showed me a diagram of
10 what he was going to do when he was in there.

11 Q. But you understood, though, that that's
12 the best knowledge he had before he opened you up;
13 right?

14 A. Yes.

15 Q. And that there might be something else
16 wrong in there that he might have to address;
17 correct?

18 A. I believe he even said something about
19 that to me.

20 Q. Right, and you understood that's the
21 case in every surgery; isn't that correct?

22 A. Not necessarily.

23 Q. You understood that in 1997, didn't you,
24 Ms. Washburn?

25 A. No, I did not. I thought we were

1 talking about a C6 --

2 Q. I haven't asked you --

3 MS. COFIELD: Your Honor, relevance and
4 materiality.

5 THE COURT: He hasn't finished his
6 question yet, so let's slow down and let's finish the
7 question.

8 Go ahead, Mr. Allen.

9 BY MR. ALLEN:

10 Q. You understood in 1997 that when a
11 surgeon like Dr. Borden goes to operate, frequently
12 they will find things are a little bit different than
13 the diagnostic things that they identified earlier
14 and told you about; correct?

15 MS. COFIELD: Now, Your Honor, again the
16 objection is to relevance and materiality, because
17 there is going to be absolutely no evidence from
18 these people that they intended to be there.

19 THE COURT: All right. Well, I'll
20 overrule the objection at this point and note your
21 exception, Ms. Cofield.

22 You may answer the question.

23 A. When I was in the operating room, I was
24 under the understanding we were operating on C6-C7.

25 BY MR. ALLEN:

1 Q. And you didn't have any --

2 A. I didn't know anything about T1. No one
3 had said anything. That's what I understood.

4 Q. You didn't have any discussion with Dr.
5 Borden or Dr. Klara where you said to them whatever
6 you do, don't go to T1; correct?

7 A. I didn't have that discussion, no. I
8 expected them to operate where they told me they
9 were.

10 Q. And you didn't have any discussion with
11 them where you said don't go to C5, one level higher;
12 correct?

13 A. No, I did not.

14 Q. Your discussion with them was, first of
15 all, when you first came to see Dr. Klara you said
16 I've got neck pain and arm pain, and I want you to
17 address this; correct?

18 A. Yes.

19 Q. You had neck pain and left arm pain,
20 and you were consenting to whatever these gentlemen
21 could do to help you get over that pain, weren't you?

22 A. I was there for an opinion on what they
23 thought we should do, yes.

24 Q. And you never told any of them --

25 A. But I never signed anything.

1 Q. Right. You never signed anything that
2 said T1; right, Ms. Washburn?

3 A. I never signed anything when I went to
4 see him either that said -- I went for their opinion,
5 like I think everybody does when they have a problem.

6 Q. And you never told them if my neck pain
7 and my arm pain comes from T1-C7 instead of from
8 C6-C7, don't do anything about it; right?

9 A. No, I didn't. It didn't come into play.

10 Q. And in fact --

11 MR. ALLEN: Your Honor, may we have
12 Plaintiff's Exhibit 2?

13 THE COURT: Yes. These are the -- well,
14 counsel is using the table over there. Normally, I
15 keep all the exhibits over on the table, but since
16 you all are using these, be careful you don't get it
17 mixed up with your own.

18 MR. ALLEN: I will, Your Honor.

19 THE COURT: I think that's all of the
20 exhibits that have been introduced.

21 MR. ALLEN: I'm not finding the one I
22 need, Your Honor.

23 THE COURT: Well, let's see. I don't --

24 MR. ALLEN: It's the consent form dated
25 September 22nd, 1997.

1 THE COURT: That was used at some point
2 in time.

3 BY MR. ALLEN:

4 Q. Actually, Ms. Washburn, if you would
5 turn to Tab 2 in the book in front of you --

6 THE COURT: It's over on the table, Mr.
7 Allen.

8 MR. ALLEN: Thank you, Your Honor.

9 THE COURT: All right.

10 BY MR. ALLEN:

11 Q. Let me show you what was admitted as
12 Plaintiff's Exhibit 2, Ms. Washburn. And if you
13 would just remind the jury, is that the consent form
14 that you signed on September 22nd, 1997?

15 A. Yes, it is.

16 Q. It is?

17 A. Yes, it is.

18 Q. And in fact, Ms. Washburn, you didn't
19 fill out the portion that says: I hereby authorize
20 Dr. Borden, slash, Klara and/or associates as may be
21 selected by him to C6-7 anterior cervical diskectomy
22 with autograft and A-line plate. You didn't write
23 out that language; correct?

24 A. No, I did not.

25 Q. That was written out by the physician?

1 A. Yes, it was. I believe he was the one
2 who wrote it on there.

3 Q. I'm sorry?

4 A. I believe he is the one that wrote it on
5 there.

6 Q. In fact, the only handwriting on this
7 page that belongs to you is the signature; correct?

8 A. Yes.

9 Q. Now, when you discussed with Dr. Borden
10 the surgery he was going to do, he told you that he
11 thought it was going to be about two and a half
12 hours; correct?

13 A. Yes.

14 Q. You didn't tell him that if you can't
15 finish it in two and a half hours, you've got to
16 stop; right?

17 A. No.

18 Q. You knew that it might take longer than
19 that.

20 A. A little while longer, yeah.

21 Q. In 1997, Ms. Washburn, when you went to
22 see Dr. Borden, it was your understanding that in
23 order for a person to hold themselves out to the
24 community as a neurosurgeon, that that person had to,
25 first of all, complete medical school; secondly

1 complete an internship; thirdly, complete a
2 residency; and fourthly, complete a fellowship; and
3 finally, pass their boards just to be able to hold
4 themselves out as a neurosurgeon. Right?

5 A. When you were asking me those questions,
6 I thought that you were talking about a specialist
7 with board certification. I didn't know that -- we
8 went around and around on that question, and I was
9 confused.

10 All I know is that they have to do a
11 residency in that field as a specialist, but I'm not
12 on the board certification board. I mean I'm only
13 doing what I know.

14 Q. I understand that, Ms. Washburn. And
15 I'm not asking you about what you told me at your
16 deposition, although I certainly intend to have you
17 give us some information about that.

18 But what I am asking you is in 1997 when
19 you went to see Dr. Borden and Dr. Klara, was it your
20 understanding that a neurosurgeon, in order for a
21 person to say to the community I'm a neurosurgeon,
22 that they had to do those five things?

23 A. Not necessarily to be a neurosurgeon,
24 but to be a board certified neurosurgeon, yes. And
25 that's where our confusion kept coming in. I'm not

1 sure what the heck you were asking me that day.

2 Q. You did give a deposition in this case,
3 did you not, Ms. Washburn?

4 A. Yes, I did.

5 Q. And you gave that on November 18th,
6 1998?

7 A. Yes, I did.

8 Q. And at the beginning of that deposition
9 I said to you that if there is any difficulty that
10 you have in understanding what I'm asking you about,
11 please tell me; correct?

12 A. Uh-huh, and I think we did keep saying
13 that I didn't understand.

14 Q. And I told you if there was ever any
15 problem you have in this deposition understanding
16 what I'm asking you, to tell me; correct?

17 A. And I believe I did.

18 Q. And at the end of that deposition you
19 had the opportunity to take 30 days to read that
20 deposition and correct it if you found anything wrong
21 with it; correct?

22 A. Correct, yes.

23 Q. Now, in the course of your deposition
24 you said that you understood in 1997 that a
25 neurosurgeon or a person who was holding himself out

1 as a neurosurgeon had to have done those five things;
2 right?

3 A. Yes.

4 MS. COFIELD: Asked and answered, Your
5 Honor.

6 THE COURT: Well, she said yes. That's
7 all.

8 MR. ALLEN: I'll move on, Your Honor.

9 BY MR. ALLEN:

10 Q. Your deposition was taken 14 months
11 after the surgery in this case; correct?

12 A. Yes, it was.

13 Q. And we're here now almost four years
14 later; right?

15 A. Right.

16 Q. Now, is it your testimony to the jury
17 that Dr. Klara used the word associate when he was
18 referring to Dr. Borden?

19 A. I believe he said associate, yes.

20 Q. That's your recollection today four
21 years later; right?

22 A. It was my recollection after I left that
23 deposition when I couldn't think of the word he used
24 and said it was some verbiage, but I wasn't really
25 sure what the word was.

1 And as soon as I got in the car to leave
2 there, it hit me what the word was. I mean, I'm
3 sorry, but I was not able to think quickly enough to
4 remember.

5 Q. Would you turn with me to page --

6 A. But I know that I thought that he was
7 associated with the practice by the way he was
8 introduced to me. He didn't introduce him as a
9 fellow.

10 Q. Would you turn with me to page 91 of
11 your deposition, Ms. Washburn?

12 A. Yes.

13 Q. In November 1998 -- and I'm at line
14 four. In November 1998 did you give this testimony
15 under oath, beginning at line two?

16 Question: On that particular occasion
17 do you recall whether or not Dr. Klara was present?

18 Answer: Dr. Klara introduced me to Dr. Borden.

19 Question: Okay. Answer: He was with
20 another patient, and he asked me if Dr. Borden could
21 see me. And I said that was fine.

22 Question: And what did Dr. Klara tell
23 you about Dr. Borden, that is, who he was? Answer:
24 All I remember is him introducing him. And I don't
25 remember his verbiage, but I just remember my

1 impression. I mean, you know, I don't remember
2 exactly what he said.

3 Question: Okay. What was your
4 impression? Answer: But my impression was that he
5 was with the practice.

6 Question: A partner in equal standing
7 with Dr. Klara? Was that your understanding?

8 Answer: I didn't give it that much thought. I just
9 felt that he -- the way that I perceived him was that
10 he was in practice with him.

11 Did you give that testimony at the
12 deposition?

13 A. That's correct, because I could not
14 remember the actual word that he used.

15 MS. COFIELD: I think that's consistent,
16 Your Honor.

17 THE COURT: Well, I'm struggling with
18 that a little bit in terms of what is inconsistent.

19 MR. ALLEN: Well, it's offered for the
20 truth of the matter asserted, Your Honor. It's an
21 admission. That's her testimony in 19 --

22 THE COURT: That is her testimony,
23 then. I'll accept that.

24 BY MR. ALLEN:

25 Q. Now, Ms. Washburn, when you went to Dr.

1 Klara's office, you saw Dr. Klara's certificates on
2 the wall; correct?

3 A. Yes, I did.

4 Q. You didn't see any certificates on the
5 wall for Dr. Borden; correct?

6 A. I never looked for any for him.

7 Q. And you didn't see any?

8 A. I didn't see any there, no.

9 Q. And in fact, on November --

10 A. It was just Dr. Klara's, right. It was
11 just Dr. Klara's that I saw.

12 Q. On September 22nd when you went out in
13 the hallway with Dr. Borden and Dr. Klara, Dr. Borden
14 and Dr. Klara discussed your care; correct?

15 A. Yes, they did.

16 Q. Let me back up just a second. You heard
17 your husband testify at this proceeding, did you not,
18 Ms. Washburn?

19 A. Yes, I did.

20 MS. COFIELD: Your Honor, it's
21 inappropriate to have one witness comment on another
22 witness's testimony.

23 THE COURT: Well, let's hear what the
24 question is, and then we'll deal with it. Okay.

25 BY MR. ALLEN:

1 Q. You knew Dr. Borden was in training at
2 Dr. Klara's office, did you not?

3 A. They discussed he was there training on
4 a particular, special piece of equipment. He was
5 learning that piece of equipment.

6 He didn't say that he was there learning
7 from him to be a neurosurgeon, no. He was there
8 because Dr. Klara had invented a piece of equipment,
9 and he was there to view this piece of equipment and
10 learn it.

11 Q. And you knew that Dr. --

12 A. I know doctors that, you know, they do
13 -- regular board certified doctors will learn special
14 techniques from other ones.

15 Q. You knew that Dr. Borden had just
16 finished his residency at MCV or somewhere else;
17 correct?

18 A. I didn't know he had just finished his
19 residency, no.

20 Q. You didn't discuss that with your
21 husband?

22 A. Not that I remember, no.

23 Q. Your husband was not present with Dr.
24 Borden on any particular occasion that you weren't
25 present; isn't that right?

1 A. No, I don't believe he was.

2 Q. Now, on November or October -- rather,
3 on September 16th, 1997, you went back to Dr. Klara's
4 office or to physical therapy, rather, complaining
5 that your arm hurt you so badly that you couldn't
6 even move it; correct?

7 A. Yes. I don't know the date, but I mean
8 I guess I did.

9 Q. Well, let me direct your attention to
10 Tab 15, I believe it is, in the book setting in front
11 of you, and if you would flip down with me, Ms.
12 Washburn, eight pages.

13 MS. COFIELD: Can you tell counsel where
14 you are?

15 MR. ALLEN: Yes, eight pages down on Tab
16 15.

17 MS. COFIELD: Of your exhibit book?

18 MR. ALLEN: My exhibit book.

19 MS. COFIELD: Volume one, I guess?

20 MR. ALLEN: Volume one.

21 BY MR. ALLEN:

22 Q. Do you see that note down at the bottom
23 there dated September 16th, 1997?

24 A. Yes, I do.

25 Q. On that particular occasion, Ms.

1 Washburn, you complained to the physical therapist
2 that your arm hurt so badly that you couldn't move
3 it, and that you had constant headaches; correct?

4 A. Uh-huh.

5 Q. Is that a yes?

6 A. Yeah.

7 Q. And in fact, if you look at the next
8 page, they offered you to have a sling so that you
9 wouldn't have to move your arm; correct?

10 A. Yes.

11 Q. And then on the very next day you went
12 to see Dr. Borden and Dr. Klara. That was September
13 17th, 1997; correct?

14 A. Uh-huh.

15 Q. Is that a yes?

16 A. Yes, I guess. We've talked about that.

17 Q. And then it was on that occasion that
18 you told Dr. Borden and Dr. Klara that the pain was
19 so bad you need to have surgery done soon enough so
20 that you could get this taken care of; correct?

21 A. No, I did not tell them I needed
22 surgery. I told him I was in pain. I never -- you
23 don't tell a surgeon to do surgery. They decide to
24 do surgery.

25 Q. I'm sorry?

1 A. You don't tell a surgeon to do surgery.
2 They tell you when you need surgery. I didn't tell
3 them that I needed surgery.

4 Q. Well, you were agreeable to a surgical
5 intervention in order to alleviate that pain, weren't
6 you?

7 A. If they thought I needed it, yes.

8 Q. And you were agreeable to a surgical
9 intervention at C7-T1 if that was necessary to
10 alleviate your pain; correct?

11 A. No, I wouldn't have had that done had I
12 known. I would have continued with therapy if he had
13 told me that he had to do that with a healthy disk,
14 because they've never told me that disk was not
15 healthy.

16 Q. Ms. Washburn, is your testimony to this
17 jury that you would have allowed the surgeons to
18 operate at C6-C7 in order to alleviate that pain, but
19 you would --

20 A. Yes.

21 Q. -- would not have allowed them to
22 operate at C7-T1 in order to alleviate your pain?

23 A. No, because we knew the problem was at
24 C6-C7. They had shown it to me on the X-rays. I
25 wouldn't have had a healthy disk operated on so that

1 now I have a chance of more problems.

2 It's like if they told you your fingers
3 need to be amputated, you want them to take it to the
4 elbow, sir?

5 Q. Well, Ms. Washburn, you understood that
6 they were going to have to -- that when they decided
7 they were going to do surgery, that they were going
8 to cut on your neck; correct?

9 A. I knew that they were going to work on
10 C6 and 7.

11 Q. And you understood that they were going
12 to cut all the way down to your cervical spine;
13 correct?

14 A. I knew that they were going to 6 and 7.

15 Q. And they were going to cut all the way
16 down to C5 -- or to C6-C7 and look at that disk
17 space; correct?

18 A. Yes, sir.

19 Q. And you knew that just a few centimeters
20 lower was the other disk space; correct?

21 A. I don't know how many centimeters, but I
22 know it's below, yes.

23 Q. But it's your testimony that you would
24 not have allowed them to repair that at C7-T1 if that
25 was necessary in order to alleviate your pain?

1 A. No, not to use a healthy disk. If they
2 could have shown me that T1 was diseased, yes, but
3 not if it was healthy. And we never mentioned T1.

4 Q. On September 22nd, 1997, when you told
5 Dr. Borden and Dr. Klara you were going to have
6 surgery, there was a discussion out in the hallway
7 between Dr. Klara and Dr. Borden about backup. Is
8 that what you recall?

9 A. Yes. I heard them say you need to have
10 backup.

11 Q. You didn't ask Dr. Klara anything about
12 what backup he was referring to, did you?

13 A. No. I assumed he was talking about for
14 his office patients and his patients that might call
15 into the office. I didn't --

16 Q. And you didn't ask Dr. Borden any
17 questions about what backup he was referring to;
18 correct?

19 A. No, I didn't. Why would I mistrust the
20 man? I thought he was telling me truthful
21 statements. I never --

22 Q. Ms. Washburn, you understood that Dr.
23 Klara agreed with the surgical intervention that Dr.
24 Borden had discussed with you and had also discussed
25 with Dr. Klara; correct?

1 A. Yes, I was aware of that.

2 Q. Now, between 1995 and 1997 you had
3 headache and arm pain continually or on a frequent
4 basis; is that correct?

5 A. Yes, I did.

6 Q. And subsequent to the surgery,
7 immediately thereafter you had no headache and no arm
8 pain; correct?

9 A. I didn't have arm pain. I'm not sure
10 about headache.

11 Q. And in fact, on a number of occasions
12 you went back to Dr. Borden --

13 A. I was still in pain because my neck was
14 just done. So yeah, I think I probably had some neck
15 pain, but I didn't have the radiating pain in my arm,
16 you're right.

17 Q. That surgery fixed the pain that you had
18 on September 16th, 1997, that was so bad you needed a
19 sling; correct?

20 A. Yes, it helped. Yes, it did.

21 Q. And you didn't wear a sling after you
22 left the hospital, correct, for your left arm?

23 A. No, I did not.

24 Q. And you didn't wear a sling when you
25 went to MCV for your gastro surgery; correct?

1 A. I didn't go for my gastro surgery. I
2 went for insertion of a J-tube for eating.

3 Q. In any event, when you went to MCV, you
4 didn't wear a sling.

5 A. In any event, yes. No, I did not.

6 Q. Did you tell the physical therapist in
7 August of 1997 that the pain in your left arm was so
8 bad that on a scale of one to ten, you would give it
9 a ten?

10 A. If it's in the notes, I probably did. I
11 don't recall saying that, but I'm sure you wouldn't
12 say it if it wasn't there.

13 Q. Ms. Washburn, turn with me, if you
14 would, to --

15 MS. COFIELD: Your Honor, the objection
16 is just to why is it probative? We're not
17 complaining that she had an operation. It's not an
18 issue.

19 THE COURT: Well, again, I haven't got a
20 question yet that I can respond to. He's asked her
21 to turn to a page, and as soon as I hear it, I'll
22 respond to your objection.

23 BY MR. ALLEN:

24 Q. Ms. Washburn, would you turn with me to
25 page 76 of your deposition?

1 A. Uh-huh.

2 Q. Was this your sworn testimony in
3 November of 1998, beginning at line 15?

4 Question: For a person to hold
5 themselves out as a neurosurgeon in 1997, what
6 training did you believe they had to complete in
7 order to do that? Answer: They would have to
8 complete an internship, a residency.

9 Question: Anything else? And probably
10 a fellowship or working under another neurosurgeon.

11 Question: I'm sorry? Answer: A fellowship.

12 Question: What was your understanding
13 in 1997 that for anyone to say I'm a neurosurgeon,
14 they would have to have completed -- I'm sorry.

15 Was your understanding in 1997 that for
16 anyone to say I'm a neurosurgeon, they would have to
17 have completed medical school, an internship, a
18 residency and a fellowship working under a mentor
19 neurosurgeon; is that correct? I know they would
20 have to do the residency and pass boards.

21 Question: Well, I want to understand
22 what your belief was in 1997. Line 11: What did you
23 believe a person had to complete in order to hold
24 themselves out as a neurosurgeon in 1997?

25 Line 17: Internship, residency,

1 fellowship under another doctor, board certification,
2 and all of those are required in your understanding
3 for a person to say I'm a neurosurgeon? Answer:
4 Board certification is in my opinion the
5 understanding they need to be board certified.

6 Question: And that was true in 1997?

7 Answer: Yes. Question: So if a person said to you
8 in 1997 I'm a neurosurgeon, you believe that they
9 were representing to you that they were board
10 certified in neurosurgery; correct? Answer: I
11 believe that they were representing that.

12 Do you see that, Ms. Washburn?

13 A. Uh-huh.

14 Q. Was that your testimony in 1998?

15 A. Yes, it was.

16 Q. It was your assumption in 1998 that when
17 Dr. Borden and Dr. Klara said Dr. Borden is a
18 neurosurgeon, it was a representation that he was
19 board certified; correct?

20 A. Well, he never said he was a
21 neurosurgeon, but I was under the impression that he
22 was a neurosurgeon.

23 Q. And because you were under the
24 impression he was a neurosurgeon, you were under the
25 impression that he was also board certified; correct?

1 A. I thought he may have been board
2 certified, because most of the neurosurgeons that
3 I've been in contact with have been board certified.
4 But I wanted to clarify that, and that's why I asked
5 him.

6 And he was not operating on me at that
7 moment, so earlier in time when he was going to
8 operate on me, I clarified that.

9 Q. Ms. Washburn, when you met Dr. Borden in
10 1997 and Dr. Klara essentially represented to you
11 that here is a neurosurgeon who can also treat you,
12 you assumed that he was board certified; correct?

13 A. No, not really. I didn't give it -- I
14 really didn't think about him being board certified
15 at that moment. He wasn't going to operate on me at
16 that moment.

17 He came in to fill in for Dr. Klara on
18 an office visit, so I really didn't give it that much
19 thought. At that moment he wasn't going to be
20 cutting on me. He was going to be seeing me for one
21 office visit and related to Dr. Klara. That was it.

22 I was trying to be nice and let Dr.
23 Klara see his other patient.

24 Q. And you were disappointed, Ms. Washburn,
25 when you learned in 1998 after you went to see

1 counsel that Dr. Borden was not board certified;
2 correct?

3 A. Certainly, I was disappointed. He lied
4 to me. Wouldn't you?

5 MR. ALLEN: I have nothing further,
6 Your Honor.

7 THE COURT: All right. Any redirect,
8 Ms. Cofield?

9 REDIRECT EXAMINATION

10 BY MS. COFIELD:

11 Q. Any of those prior ailments discussed
12 with these either of these counsel keep you out of
13 work for more than a day or two between 1984 and 1997
14 when Dr. Borden operated?

15 MR. BLACKWELL: Is that a leading
16 question, Your Honor, or am I missing something?

17 THE COURT: I'll overrule the
18 objection. The question is okay.

19 A. I don't know how many days, if it was a
20 day or two or three or four. But no, I don't believe
21 that those ailments that they talked about kept me
22 out of work.

23 BY MS. COFIELD:

24 Q. Are you blaming either one of those
25 doctors for those ailments about neck pain, back

1 pain, leg pain, anything like that?

2 A. No, I am not. They didn't guarantee me
3 that my neck pain would be 100 percent gone. I never
4 expected that.

5 MS. COFIELD: I have no further
6 questions.

7 THE COURT: All right.

8 MR. BLACKWELL: I have nothing further,
9 Your Honor.

10 THE COURT: You may step down.

11 (Witness excused.)

12 * * * * *

13 (At 4:15 p.m. the trial was recessed to
14 reconvene at 9:00 a.m., Wednesday,
15 February 7, 2001.)

16

17

18

19

20

21

22

23

24


25

CERTIFICATE OF REPORTER

I, Barbara E. Ingle, RPR, do hereby
certify that I reported verbatim the proceedings in
the Circuit Court of the City of Norfolk, in the
above-entitled matter, heard by The Honorable Joseph
A. Leafe, Judge of said Court, and a jury.

I further certify that the foregoing
is a true and accurate excerpt transcript of said
proceedings.

Given under my hand this 13th day of
March, 2001, at Norfolk, Virginia.



Barbara E. Ingle, RPR

ORIGINAL

011034

1 V I R G I N I A:

2 IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

SUPREME COURT OF VIRGINIA

3

4 JANICE WASHBURN,)

5 Plaintiff,)

6 v.)

NO. L99-2229

7 PETER KLARA, M.D., et al.,)

8 Defendants.)

9

10 VOLUME III

11 EXCERPT OF PROCEEDINGS

12 Norfolk, Virginia

13 February 7, 2001

14

15 Before:

THE HONORABLE JOSEPH A. LEAFE,
and a Jury.

16

17 Appearances:

18

JUDITH M. COFIELD, P.C.

19

By: JUDITH M. COFIELD, ESQUIRE
Counsel for Plaintiff

20

KAUFMAN & CANOLES, P.C.

21

By: R. BARROW BLACKWELL, ESQUIRE
JASON R. DAVIS, ESQUIRE
Counsel for Defendant Klara

22

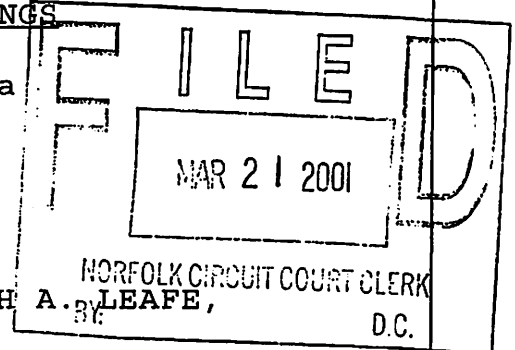
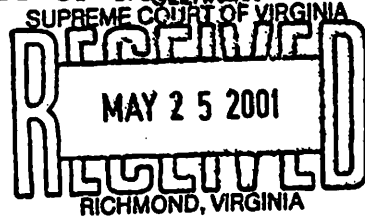
23

GOODMAN, WEST & FILETTI, P.L.L.C.

24

By: CHARLES M. ALLEN, ESQUIRE
Counsel for Defendant Borden

25



I N D E X

<u>WITNESSES</u>	<u>VOIR DIRE</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
------------------	------------------	---------------	--------------	-----------------

ON BEHALF OF THE PLAINTIFF:

JOHN KELLUM, M.D.	4, 13, 14	15		63
-------------------	-----------	----	--	----

KLARA DEPO EXCERPT		67		
--------------------	--	----	--	--

BRITT BORDEN, M.D.		69	73	74
--------------------	--	----	----	----

E X H I B I T S

NO.	DESCRIPTION	MARKED	RECEIVED
<u>ON BEHALF OF THE PLAINTIFF:</u>			
7	Bill, October MCV admission		45
8	Bill, November MCV ER		50
9	Bill, Dr. Kellum follow-up		53
10	Bill, VBGH November admission		56
15	Records, Drs. Klara/Borden	119	119
16	Prescription, speech therapy	120	120
17	Operative report, 9-25-97	121	121

EXCERPT OF PROCEEDINGS

* * * * *

JOHN KELLUM, called as a witness by
and on behalf of the Plaintiff, being first duly
sworn, testified as follows:

DIRECT VOIR DIRE

BY MS. COFIELD:

Q. Your name, sir?

A. John Kellum.

Q. And your profession?

A. I'm a general surgeon practicing at the
Medical College of Virginia.

Q. And are you an academician, or do you
also have a clinical practice?

A. I'm an academician with a clinical
practice.

Q. What does that involve, both parts of
you? Both hats you wear, that is, as a teacher and
as a doctor, would you explain them?

A. Well, I would say over half of my time
is spent in direct patient care. Also involved in
that would be instructing residents in surgery
principles and the practice of surgery as well as
some teaching of medical students.

1 But I am a professor of surgery, so I
2 have an academic rank.

3 Q. Do you have a subspecialty?

4 A. It's not one that has a boarded
5 significance, but I limit most of my practice to
6 gastrointestinal surgery. And specifically I'll
7 concentrate on the surgery of obesity or overweight.

8 Q. Can I talk about that in terms of
9 gastric bypass surgeries?

10 A. Certainly.

11 Q. And sometimes is that interest or
12 subspecialty called bariatric surgery?

13 A. Yes, it's the same thing.

14 Q. All the same?

15 A. Right.

16 Q. Okay. And you are licensed by the State
17 of Virginia as a medical doctor?

18 A. Yes, I am.

19 Q. And you have been so licensed for what
20 period of time?

21 A. Since 1983.

22 Q. Continuously without interruption?

23 A. Correct.

24 Q. Have you always been with the Medical
25 College of Virginia?

1 A. Yes, since coming to Virginia.

2 Q. And you mentioned something about board
3 certification. You obtained your board certification
4 when?

5 A. In 1975.

6 Q. Did you have to recertify, sit for them
7 again?

8 A. I've been in practice so long that I was
9 grandfathered.

10 Q. You have licenses to practice medicine,
11 or have had, issued by what states other than
12 Virginia, sir?

13 A. I was licensed to practice in
14 Massachusetts, Missouri and Maryland.

15 Q. I guess I'm jumping backwards in time.
16 However, I would like to know where you got your M.D.
17 from.

18 A. Johns Hopkins University.

19 Q. And after completing your requirements
20 for M.D., you went on to direct military service, or
21 did you go on to an internship?

22 A. I did an internship at Johns Hopkins
23 Hospital, but I did most of my surgical training at
24 Barnes Hospital, which is in St. Louis, Missouri.

25 Q. And you were on what service? Was that

1 a straight surgery?

2 A. Straight surgical residency, right.

3 Q. Took how long?

4 A. It took five years. I did a year of --
5 a research fellowship as well.

6 Q. And after you completed that program,
7 did you continue matriculating for further training,
8 or was that the end of your academic training?

9 A. That was the end of my formal training,
10 right.

11 Q. And you thereafter did what?

12 A. I went to the U.S. Army.

13 Q. You saluted for what period of time?

14 A. I was what you call an obligated
15 volunteer in the Army's parlance. That meant I was
16 obligated to serve for two years between 1975 and
17 1977.

18 Q. When you were discharged from the Army,
19 you went where?

20 A. I joined the faculty at Tufts University
21 in Boston, Massachusetts in 1977.

22 Q. Again, the service on which you were?

23 A. I was on the general surgical service,
24 which is a division in the Department of Surgery.

25 Q. Did you then at that time or at any

1 other hold any academic appointments at any
2 institution other than MCV?

3 A. I was an assistant professor at Tufts
4 University, and then I was promoted to associate
5 professor after having been there about four or five
6 years.

7 Q. There is quite a list of memberships
8 here. Are any of these -- and I can put them in
9 front of you, your CV, if you want. Any of these
10 memberships other than dues paying? I mean are some
11 honorary such that you are invited to join?

12 A. I would have to look at it. There could
13 be.

14 No, they're pretty much all dues paying.
15 I am no longer in the Sigma Xi. I just quit paying
16 dues.

17 Q. And would you please tell me what this
18 appointment is to the Governor of American College of
19 Surgeons?

20 A. I was appointed as the governor
21 representing the Society of University Surgeons as
22 their representative to the governor, so I was a
23 governor for two years.

24 Q. Governor such as to Virginia's governor?

25 A. No. The American College of Surgeons

1 has trustees, and they have governors. And governors
2 represent each of the states or societies, and in my
3 case I was representing a society.

4 Q. And that society was the American
5 College of Surgeons?

6 A. No.

7 Q. I'm sorry.

8 A. The Society of University Surgeons.

9 Q. University Surgeons?

10 A. Right.

11 Q. The Richmond Surgical Society, you are
12 also on their board? Or have been, excuse me.

13 A. I have been a member, and I've been
14 president of that society.

15 Q. And under special awards, fellowships
16 and other honors, you have several of those. Can you
17 please tell me the five-year undergraduate medical
18 program, what that encompassed?

19 A. That meant that I went from being a
20 sophomore in college to being a medical student at
21 Johns Hopkins. I basically skipped a year and got a
22 B.A. and an M.D. from Johns Hopkins University at the
23 end of seven years.

24 Q. Congratulations. And what is the NIH?
25 First tell me that.

1 A. It's the research organization of the
2 federal government in Bethesda, Maryland.

3 Q. Funded by the federal government?

4 A. Yes.

5 Q. And what was then serving as an NIH
6 consultant for peer review of obesity and nutrition
7 center grants?

8 A. Well, I was invited because I am a
9 recipient of NIH research money to evaluate various
10 grants being submitted by various universities,
11 medical schools to receive nutrition grants.

12 Q. And in addition to reviewing who gets
13 them, have you received grants yourself?

14 A. Yes.

15 Q. Headed up those programs?

16 A. I've been the principal investigator on
17 about three or four different, it's called a research
18 grant. RO-1 is the technical name for it. They're
19 three- to five-year grants doing research, usually
20 for about 100 to \$200,000 a year.

21 Q. And you're gathering data at that point
22 and analyzing it?

23 A. Right.

24 Q. You have over 90-some articles or
25 manuscripts under your bibliography. Do those

1 concern in full or in part the same issues we will
2 discuss here today, such as gastroplasties and
3 obstructions?

4 A. Some of them do. Others are purely
5 basic research articles related to my NIH research.

6 Q. And the abstracts for publications that
7 you have authored in full or in part encompass
8 another 63.

9 Same question: Do any of those
10 abstracts encompass the same topics we will discuss
11 here today about gastroplasties and/or obstructions
12 and aspiration problems?

13 A. Yes, they do. Yes, ma'am.

14 Q. Same question as to under books and
15 chapters. You have authored in full or in part
16 another eight of those. Do those topics also
17 encompass the same ones which will be discussed
18 today?

19 A. Some of them do, yes.

20 Q. You have also served in a continuing
21 medical education course as a director of some five.
22 What does that mean, sir?

23 A. We offered a training course, and most
24 of those courses were related to minimally invasive
25 surgery or laparoscopic surgery.

1 Q. You have here 40-some times that you
2 presented a speech at either a national or
3 international meeting. Was that always by
4 invitation?

5 A. We usually submitted an abstract, and if
6 we were accepted, we were asked to present the data.

7 Q. And also, I suppose, at state and
8 regional meetings as well; correct?

9 A. Correct.

10 MS. COFIELD: At this time I would
11 tender Dr. Kellum as an expert in his field and pass
12 the witness for voir dire.

13 THE COURT: Any voir dire?

14 MR. BLACKWELL: No objection.

15 MR. ALLEN: Just very briefly, Your
16 Honor.

17 THE COURT: All right.

18 MR. BLACKWELL: I will inquire as to
19 certain credentials in my cross-examination.

20 MS. COFIELD: Well, Your Honor, once
21 he's --

22 THE COURT: Let's finish the voir dire,
23 and I'll qualify the witness.

24 MR. ALLEN: Very short, Your Honor.

25 CROSS VOIR DIRE

1 BY MR. ALLEN:

2 Q. Dr. Kellum, you are board certified in
3 general surgery?

4 A. That's right.

5 Q. And there is no subspecialty of board
6 certification for your particular area of specialty,
7 which is bariatric surgery?

8 A. There is no accreditation mechanism for
9 that.

10 Q. You've been board certified in general
11 surgery since 1975?

12 A. That's right.

13 Q. But your experience -- well, let me
14 withdraw that and ask you this.

15 It would be unreasonable for us to infer
16 from your board certification in general surgery
17 alone that you are qualified to render opinions with
18 regard to the Roux-en-Y surgery or the vertical
19 banded gastroplasty that's at issue in this case;
20 correct, sir?

21 A. Would you repeat the first part of it?

22 Q. It would be unreasonable for us to infer
23 from your board certification in general surgery
24 alone that you are qualified in the area of doing
25 bariatric surgery?

1 A. Not from the board certification alone.

2 Q. People would have to ask you more
3 questions about your experience with regard to those
4 procedures in order to be convinced that you are
5 experienced in those; correct, sir?

6 A. Yes.

7 MR. ALLEN: That's all I have, Your
8 Honor.

9 THE COURT: All right. Do you have
10 anything, Mr. Blackwell?

11 MR. BLACKWELL: I was going to cover
12 that with him in my cross-examination.

13 THE COURT: All right. Thank you. Then
14 the court finds --

15 MS. COFIELD: In light of counsel's
16 questions, I would like one or two more.

17 REDIRECT VOIR DIRE

18 BY MS. COFIELD:

19 Q. How many bariatric surgeries have you
20 performed, approximately, sir?

21 A. Approximately 1,200.

22 MS. COFIELD: I would move this witness.

23 THE COURT: All right. The court finds
24 Dr. Kellum to be qualified in the field and capable
25 of rendering opinions.

1 DIRECT EXAMINATION

2 BY MS. COFIELD:

3 Q. Sir, did there come a time in the course
4 of your practice in Richmond that you came to see and
5 treat Ms. Washburn as a patient?

6 A. Yes, I did.

7 Q. Have you been hired here as an expert or
8 been paid one dime?

9 A. No.

10 Q. Are you here now to render opinions,
11 however, and did you at that time treat her?

12 A. It's my understanding that I'm here as a
13 treating physician to give opinions about why she
14 came to me and why we did what we did.

15 Q. And why you did it?

16 A. Why we did it, right.

17 Q. And would you please tell me when you
18 first saw her, what her -- it was October, I think
19 12th, if I'm not mistaken, or October 11th, 1997.
20 Describe her condition at the time.

21 A. She was in a lot of distress in that she
22 couldn't swallow. Even water would come up or cause
23 choking.

24 And I had received a call from Dr.
25 Dalton in Virginia Beach about my accepting her as a

1 transfer, because they had not found a way to nourish
2 her. She basically couldn't eat anything or drink
3 anything.

4 And she also had sort of a high squeaky
5 voice. I remember that much.

6 Q. And when you saw her then -- well, did
7 you agree to accept her to your service?

8 A. Yes, I did.

9 Q. And when you saw her for the first time
10 on the 11th of October, would you describe her
11 physical condition to you? Was she healthy at the
12 time, and if not, in what regards?

13 A. She appeared chronically ill. She had
14 just had neurosurgery, and as I say, she could not
15 swallow and she had an abnormal voice. She was very
16 hoarse, almost -- a very weak voice, almost a
17 whisper.

18 Q. And I don't know if these charts will
19 help you. If they do, fine, and if not, I would like
20 you to -- you're welcome to use your own. And I have
21 here something for you to do that with.

22 But I would like you to explain to me
23 the difference at this time between -- and let me
24 move this over here. If you want to, sir, I'm just
25 going to leave it available for you.

1 THE COURT: You don't have to come down
2 there now unless it's deemed necessary for your
3 activities.

4 THE WITNESS: All right, Your Honor.

5 MS. COFIELD: But I will leave this
6 here.

7 THE COURT: These are props that are
8 being made available if you need them.

9 Okay. Go ahead, Ms. Cofield.

10 BY MS. COFIELD:

11 Q. I would like you to demonstrate with
12 reference either to your own drawings or with
13 reference to those charts, if they help, the
14 difference between aspiration and reflux. Where do
15 they come from anatomically in people?

16 A. Right. Well, the kind of aspiration Ms.
17 Washburn had was here in the throat. It was at the
18 neck. So in other words, liquid would go down into
19 her throat and go directly down her windpipe. It
20 would never get down to the stomach.

21 The stomach is -- a lot of people say
22 this whole thing is the stomach, but actually, the
23 stomach is up in here in this part of the abdomen.
24 And reflux is when the food goes down into the
25 stomach and then washes back up, and that can cause

1 aspiration too.

2 But that's not the kind of aspiration
3 that Ms. Washburn had. She had the kind that the
4 fluid went directly into her windpipe.

5 Q. When you say windpipe, is that the same
6 as saying trachea?

7 A. Yes.

8 Q. And if it goes into the trachea, can it
9 from that point forward go into the stomach from the
10 trachea?

11 A. Well, once it's in the trachea, it can
12 either be coughed up and cause a hacking cough,
13 choking sensation, or it can stay down in the
14 bronchial tubes down there.

15 Q. In the lungs?

16 A. Yes.

17 Q. And what was happening when you saw her
18 to the food and the water which she was attempting to
19 digest?

20 A. She was aspirating the majority of it
21 and choking and coughing some of it back up.

22 Q. Was she taking anything orally, water or
23 food, or was she on IV?

24 A. She was on IVs.

25 Q. And did you receive her in that

1 condition, or did you insert the IV?

2 A. She had had an IV at Virginia Beach
3 General. I can't remember specifically whether they
4 transferred her with the IV in. I sort of think they
5 did. But she certainly had IVs while she was there
6 and all during the time that she was with us until
7 she recovered from her surgery.

8 Q. And in addition to the IVs, you were
9 treating her -- excuse me. What specifically were
10 you treating her for when you first saw her? That
11 is, what is your assessment of her on that occasion?

12 And if you want to look at your H&P or
13 any notes, they are there in front of you --

14 A. We wanted to see --

15 Q. -- or your admitting diagnosis.

16 A. -- the situation with her swallowing.

17 Q. I'll just get you to that. The H&P
18 should be behind here.

19 A. She was admitted on the 11th of October,
20 and one of the early studies that she had was a
21 barium swallow, which confirmed the fact that liquid
22 would go directly down her windpipe.

23 Q. How does a barium swallow confirm that?
24 What is it?

25 A. Well, the patient -- like this could be

1 a glass full of barium, which is a liquid material
2 that will show up on an X-ray. So the patient
3 swallows that, and they take X-rays usually from the
4 side so they can see what's happening to the liquid.

5 And in this case it just went over into
6 the windpipe directly in the neck area. It never got
7 down to here.

8 Q. Was that, in your terms, diagnostic?
9 Was that proof that she was aspirating?

10 A. Yes.

11 Q. What then did you attempt -- or excuse
12 me. Was there any other condition which you
13 diagnosed upon her arrival?

14 A. We also wanted to evaluate her vertical
15 banded gastroplasty, which is the operation she had
16 in Virginia Beach in 1984, to see if there was a --
17 if it was contributing to any of this problem.

18 Q. This problem which, the aspiration?

19 A. The aspiration, right.

20 Q. And what did you do to figure that out?

21 A. And also whether it was contributing to
22 her malnutrition, her inability to -- and I think it
23 would be worthwhile for me to draw a vertical banded
24 gastroplasty.

25 THE COURT: You may step down and do

1 that.

2 And counsel may move where they can see
3 what the doctor is doing.

4 A. What I want to draw is the stomach. It
5 may not be the prettiest stomach you ever saw, but
6 I'll do my best.

7 Now, that's a normal stomach, and this
8 part down here is the beginning of the small
9 intestine. This is the esophagus here. This is the
10 lower esophagus. Now, one of the ways surgeons have
11 treated overweight is to compartmentalize the stomach
12 into a small upper part and a big lower part, and
13 that's a gastroplasty.

14 In this case it was a Dr. Mason at the
15 University of Iowa who invented this operation in the
16 early '80s. And what he did and what the surgeon who
17 operated on Ms. Washburn did was he created a
18 through-and-through hole linking the front wall of
19 the stomach to the back wall, and so this is like you
20 could see through that hole.

21 And these staples kept the front wall
22 stapled to the back wall so there was no leakage of
23 stomach fluid outside. All right. And then the
24 surgeon -- do I need to --

25 THE COURT: No, you're okay.

1 A. The judge at least needs to see this
2 too. They put staples up here, and so that creates
3 this pouch here. The upper pouch and this whole big
4 rest of the stomach was still there; it's the lower
5 pouch.

6 And then to make sure that this caused a
7 restriction of eating he put a mesh -- a lot of
8 people say a plastic band, but it's really made out
9 of polypropylene, which is kind of like a thermal
10 underwear stuff. And so what that does is you can't
11 eat very much at a time.

12 And so this operation was done. What
13 the X-ray showed was that there was a narrowing here
14 where this band is, so that she was having a hard
15 time eating solid food.

16 BY MS. COFIELD:

17 Q. Can you tell me the date of that test
18 that showed the narrowing?

19 A. Well, I can't say this is the only test
20 she ever had that showed that.

21 Q. No, I just mean when you did it.

22 A. But she had the upper GI and also she
23 had an upper endoscopy where they put the lighted
24 scope down your mouth, so she had two different tests
25 that showed this was narrowed.

1 Q. 10-17, and you can look at --

2 A. She had the endoscopy, that's correct.
3 I remember that date.

4 Q. The endoscopy, and then let me just ask
5 you a question from that point. You know she was
6 admitted 10-11 to Virginia Beach General, 10-10 to
7 10-11. I'm sorry.

8 A. Correct.

9 Q. And you got her 10-11?

10 A. 10-11.

11 Q. Did you get her on IVs or insert them
12 right then?

13 A. I don't remember whether she had an IV.
14 I know she had had IVs. My recollection is she did
15 have IVs.

16 Q. I don't care if she physically had them
17 in the ambulance. What I mean is while she was at
18 Virginia Beach General, was she on IVs?

19 A. Yes.

20 Q. And when you got her on that date, did
21 you also restart the IVs, even if she didn't get
22 transported with them?

23 A. Yes.

24 Q. So between 10-10 and 10-17 she is on
25 IVs?

1 A. Correct.

2 Q. What happens to a patient, any patient,
3 including Ms. Washburn, who has this procedure but
4 has absolutely no food going into --

5 THE COURT: Ms. Cofield, I don't want to
6 interrupt you, but if we're going to have general
7 questioning, I'd prefer the doctor do it from the
8 stand. If he is using his diagram, I want him to be
9 able to do that.

10 MS. COFIELD: He is using it with
11 reference to the diagram, and then we're going on to
12 that.

13 THE COURT: Well, I understand, but you
14 started into another series of questions. And so if
15 you're still going to be using the diagram, then go
16 ahead.

17 MS. COFIELD: Okay. We are.

18 THE COURT: But don't do too much,
19 because it's just an awkward position to have to have
20 for general examination.

21 MS. COFIELD: All right. I will try to
22 hold him -- it just makes sense when he says
23 something and I think of it.

24 THE COURT: All right.

25 BY MS. COFIELD:

1 Q. When you're on IVs and you have a
2 vertical banded gastroplasty and you have no food and
3 no water going in there for ten days, does that
4 contribute to or cause what you just spoke of, the
5 closing?

6 MR. BLACKWELL: Judge, I'm going to
7 object to this line of questioning. I think she's --
8 the doctor said he is here as a treating physician,
9 and now we're into hypotheticals about --

10 MS. COFIELD: He is also here as an
11 expert, Your Honor. We established that he isn't
12 being paid anything.

13 THE COURT: Wait a minute, now. Let's
14 just deal with the questions and see where we're
15 going with him. He can talk about this patient.

16 MS. COFIELD: Yes.

17 THE COURT: Okay. Well, let's --
18 BY MS. COFIELD:

19 Q. On this patient since she had had no
20 food or water and was on strictly IVs for seven days,
21 would that have caused or contributed to the closing
22 of this small opening, the vertical banded
23 gastroplasty?

24 A. No.

25 Q. Okay. So it was closed for reasons that

1 you say are what?

2 A. She had chronic inflammatory narrowing
3 of that passage. This passage down here was normal,
4 so she didn't have what you call gastric outlet
5 obstruction, since this is the real outlet of the
6 stomach. So she had narrowing or obstruction of this
7 passage here --

8 Q. Okay.

9 A. -- the gastropasty.

10 Q. So then go ahead and complete what it is
11 you found. And this part that you labeled here, this
12 is the lower esophagus?

13 A. Right. This is the upper pouch. That's
14 what I'm going to call it, anyway.

15 Q. Can you just finish drawing for me
16 between the lower esophagus and the upper esophagus?

17 A. Well, the upper esophagus would be way
18 up here somewhere. Because this is at this level, so
19 the upper esophagus is way up here at this level.

20 Q. When you talk about reflux, are you
21 talking about the lower esophagus or the upper
22 esophagus?

23 A. Well, reflux originates in the stomach,
24 and it can go any -- you know, there's a big
25 variation in where reflux ends up. It can just go up

1 to here, it can go up to here, or it can go all the
2 way up to the mouth.

3 Q. But it's where it originates?

4 A. It originates in the stomach.

5 Q. And as opposed to reflux, where does
6 aspiration originate?

7 A. Well, aspiration is a broad term. It
8 just means that stuff is going into the windpipe.

9 Q. Ms. Washburn's, excuse me. Ms.
10 Washburn's aspiration.

11 A. In Ms. Washburn's case it was directly
12 from her upper esophagus. It never got down as far
13 as the stomach. It went directly into the windpipe.

14 Q. Okay. If you're done --

15 A. I'm done, but I can come back over if
16 you need me to.

17 Q. Okay. So then, you were evaluating
18 those two conditions. Any others?

19 A. We were evaluating her nutritional
20 status. She had a chest X-ray to make certain that
21 she didn't already have pneumonia.

22 Q. And did she?

23 A. Did not have pneumonia.

24 Q. Now, when you've spoken about the -- is
25 stenosis the right word, or should I use another?

1 A. Stenosis is a medical term. I was going
2 to use narrowing just so we're all --

3 Q. On the same page?

4 A. -- on the same page.

5 Q. Does this type of narrowing that you
6 found in Ms. Washburn, did that cause her aspiration?

7 A. No.

8 Q. Why is it in your opinion, sir, when you
9 were treating her, although you found a narrowing,
10 this narrowing didn't cause the aspiration into the
11 lungs that you saw on the barium swallow test?

12 A. Well, there was no evidence on the X-ray
13 that that was the case. The barium went directly
14 into the windpipe.

15 Q. And also, if you want to, you have the
16 barium swallow test there. I think it's behind the
17 X-rays, if you want me to direct you. There you go.

18 A. This is labeled esophagram dated October
19 13th, 1997.

20 Following the modified swallow patient
21 was given a small amount of barium. The study was
22 limited because of the aspiration with each swallow.
23 The patient aspirated a moderate amount of each
24 swallow. Therefore, the study was terminated after
25 the initial viewing of the thoracic esophagus.

1 There was a small sliding hiatus hernia.
2 The esophageal contour was otherwise normal, and no
3 reflux was demonstrated.

4 Q. Telling you what in our terms, sir?

5 A. Meaning that she was aspirating directly
6 in the throat, neck area.

7 Q. And to what, then -- if not the
8 narrowing of the band, to what, then, did you
9 attribute or what was the cause in your estimation of
10 the aspiration which you found on that barium swallow
11 test?

12 A. It was a dysfunction in the upper
13 esophagus and windpipe. I'm not here as an expert on
14 vocal cord paralysis, though we know that she did
15 suffer a vocal cord paralysis.

16 Q. Okay. And can you state, then, to a
17 reasonable degree of medical certainty whether that
18 caused or contributed to the aspiration, or you
19 can't?

20 A. I'm not a neurologist. But I did have
21 an otolaryngologist examine her to determine if that
22 were the case, and he did find evidence --

23 THE COURT: Well, I'm going to stop you
24 there. That testimony has been in as far as your
25 area of expertise is concerned.

1 The doctor has already said that's not
2 his area of expertise.

3 MS. COFIELD: Well, it's already in
4 evidence, so I'm asking now just hypothetically --
5 no, not even hypothetically, knowing you had a
6 consult, and did you review the findings of that
7 consult that you asked for?

8 MR. BLACKWELL: Your Honor, he just said
9 he is not an expert in this field.

10 THE COURT: I sustain the objection.
11 Dr. Kellum has said he is not an expert in this, and
12 so we're just not going back and repeating.

13 MS. COFIELD: I'm going to a different
14 place, why he did something in reliance on the
15 consult.

16 THE COURT: Okay, Ms. Cofield.

17 MS. COFIELD: That's where I'm trying to
18 go.

19 THE COURT: The court has ruled, and I
20 will note your exception. And so I don't need any
21 more opinions on that area. Okay?

22 MS. COFIELD: I'm trying to move to a
23 different one, which is why he did it in reliance.

24 THE COURT: Well, let's do that.

25 BY MS. COFIELD:

1 Q. Did you ask for a consult?

2 A. Yes.

3 Q. And from whom?

4 A. Dr. Lawrence DiNardo.

5 Q. And what type of specialty is he?

6 A. He is an otolaryngologist, or ENT is
7 another term.

8 Q. And did you rely on his findings in
9 order to render your treatment?

10 A. Yes.

11 Q. Okay. And particularly was there
12 something you did or didn't do in reliance on his
13 findings, that is, how you treated her, what you
14 decided to do?

15 A. Well, given his opinion that the
16 aspiration --

17 MR. BLACKWELL: Judge, I'm going to
18 object to his --

19 THE COURT: Well, I'm going to overrule
20 that objection. Go ahead.

21 A. Given his opinion that the aspiration
22 was related to the vocal cord paralysis, she needed
23 some source of nutrition. There were several options
24 that we could have used.

25 One was an IV method of artificially

1 delivering nutrients through the vein. But that's a
2 very unnatural way to give nutrition, because it
3 doesn't do anything to get the patient back into a
4 normal mode of eating. You would like to the patient
5 to have a more natural lifestyle.

6 The other method was to insert some type
7 of feeding tube, and we actually got Dr. Switz, who
8 is a gastroenterologist, to pass a feeding tube at
9 the time he did an endoscopy. And he successfully
10 got a Daubov (ph) tube, which is a type of feeding
11 tube, through the narrowing of the pouch, the one I
12 drew there, the gastroplasty narrowing, all the way
13 around into the first part of the small intestines.

14 And so that too was supposed to be used
15 for nutrition. Unfortunately, Janice developed a
16 reaction to this. The whole side of her face swelled
17 up. She couldn't tolerate the tube, and it had to be
18 removed. So then we were faced with either an IV
19 form of nutrition or inserting a tube surgically.

20 BY MS. COFIELD:

21 Q. Where would you insert the tube
22 surgically?

23 A. Well, it would have to be in some part
24 of her GI tract. But of course, that would not
25 mitigate or improve the narrowing of the

1 gastroplasty, which had been a pre-existing
2 phenomena. She already knew about that.

3 But the combination of the vocal cord
4 paralysis and aspiration combined with this
5 pre-existing problem contributed to her malnutrition,
6 so that she couldn't eat or drink anything.

7 So we were trying to buy some time to
8 get her nutritional status up, hoping that the vocal
9 cord paralysis would improve or that she would find
10 ways of eating without aspirating. So it was my
11 opinion that the vertical banded should be converted
12 to what is known as a gastric bypass.

13 Q. Can you explain that with reference to a
14 picture? What do you do?

15 THE WITNESS: May I have your
16 permission?

17 THE COURT: Yes, sir.

18 BY MS. COFIELD:

19 Q. Do you want another page?

20 A. I want to start with this one. In order
21 to convert this -- and one of the reasons we got the
22 X-rays was to make sure these staples were intact,
23 and they were.

24 We had to take this band away, because
25 you don't want to -- if the band is not serving a

1 purpose, it can cause trouble. It can erode into the
2 inside of the stomach, cause bleeding, lots of
3 problems, so we had to take this band off.

4 Basically, we completely removed this
5 whole small segment. And then that leaves you with
6 an open end here, and this is just sewn off, come
7 down from -- you've got about 15 feet of small
8 intestine normally, so there's plenty.

9 If you're not going to let this drain
10 into the stomach itself, then you have to drain into
11 something else. Otherwise, you have an obstruction.

12 Q. I'm sorry. Is this the band that you
13 removed?

14 A. We've taken the band away.

15 Q. Already?

16 A. It's gone. And what we do is we come
17 down and we divide the small intestine about three
18 feet downstream, and we bring the far end of that up
19 to drain this pouch.

20 And we have to let this drain back into
21 the GI tract. The near end of the small intestine
22 has to come back into the stream, because it carries
23 a lot of digestive enzymes.

24 And so because this hookup looks like a
25 Y and it was invented by a Dr. Roux in Switzerland,

1 it's called a Roux-en-Y. And it's called a gastric
2 bypass because we're bypassing most of the stomach.
3 Gastric is just another word for stomach.

4 And my reason for wanting to use this
5 operation as opposed to trying to improve the
6 gastroplasty is that once you've got a narrowing of
7 the vertical banded gastroplasty, it's almost
8 impossible for that narrowing to be dilated
9 non-surgically.

10 In other words, you can't just get the
11 gastroenterologist or endoscopist to put a balloon
12 down and blow it up and expect it to work, because
13 it's a band. It's got a piece of polypropylene
14 around it. You can't stretch it. It won't stretch.

15 And the gastric bypass doesn't rely on a
16 band like that. You've got a loop of intestine
17 draining a small opening in the stomach, and when
18 that narrows down, it just causes a little -- it's
19 not a non-yielding obstruction. It's an obstruction
20 that will dilate with a balloon.

21 So it has a higher success rate in terms
22 of avoiding long-term obstruction, and it also has
23 better results in terms of controlling weight.

24 Q. Before you did this, though, when her
25 stomach looked like this with the vertical banded,

1 she had, as you said, a partial narrowing?

2 A. Yes.

3 Q. Did that narrowing account for food
4 intolerance and the vomiting symptoms?

5 A. Yes.

6 Q. Would that narrowing have accounted to a
7 reasonable degree of certainty for the choking,
8 though?

9 A. No.

10 Q. Why not? Explain why not, the
11 difference that it accounts for the one symptom and
12 not the other.

13 A. In her case the X-ray study clearly
14 demonstrated that the choking was coming from
15 something totally limited to the neck area.

16 There was no contribution from the -- a
17 future study done the same day as the one I quoted,
18 they did give her some barium, and it did show some
19 reflux. But this did not appear to contribute to the
20 aspiration.

21 Q. So then could you, that is with those
22 findings, that second barium study, rule out the
23 narrowing as causing the choking?

24 A. Yes.

25 Q. Please tell me, sir, again to a

1 reasonable degree of certainty always, whether in
2 your opinion at that time, then, what was
3 contributing or exacerbating these gastric problems
4 which pre-existed?

5 What other conditions that she had when
6 she was transferred to you which complicated or
7 contributed to these gastric problems or stomach
8 problems?

9 A. Well, I think she had a problem in the
10 upper tube and a problem in the lower tube. And the
11 one problem superimposed on the pre-existing problem
12 just made it impossible for her to eat or drink
13 anything, so we had a nutritional emergency.

14 Q. Did you take a, I suppose you always do,
15 when you received her a history?

16 A. Yes.

17 Q. And in that history -- what did you have
18 in front of you at the time in order to get that
19 history other than the patient herself, what records?

20 A. I had a discharge summary from Virginia
21 Beach General, and I had Dr. Berger's notes from
22 Bayside Sentara Hospital where they did the endoscopy
23 and tried to put in a -- or did put in a feeding
24 tube.

25 Q. And did you also talk to your patient

1 about her history?

2 A. Yes.

3 Q. And from the records and from your
4 patient, sir, can you tell me whether you then knew
5 in treating her if she ever had that choking
6 sensation you're talking about, the choking from the
7 upper esophagus prior to the neurosurgical operation
8 of 9-25-97?

9 A. No. According to my discussion with Ms.
10 Washburn, she had never had choking before her
11 operation in September of 1997.

12 Q. After that operation of September 25th,
13 '97, could she swallow safely?

14 A. She developed real problems with choking
15 after that.

16 Q. Then you did decide on this revision.
17 Can you tell me to a reasonable degree of medical
18 certainty if that procedure was necessary -- excuse
19 me, was elective or medically necessary?

20 A. No, it was non-elective. It was an
21 urgent, almost emergent operation.

22 Q. Why do you say emergent?

23 A. Because we had to accomplish a way that
24 she could be nourished.

25 Q. Okay. And if you had not revised that

1 surgery, that is, the 1984 vertical banded
2 gastroplasty, if you hadn't revised that, could she
3 have sustained life on what she was absorbing, or for
4 what period?

5 A. Not from oral feeding, no.

6 Q. Then in your opinion, sir, to a
7 reasonable degree of certainty, did the vocal cord
8 paralysis and choking cause the revision on the date
9 that it was done?

10 A. It made it medically necessary, yes.

11 Q. Had it been elective, how long would she
12 have been in the hospital?

13 A. The average is three to four days.

14 Q. How long was she in the hospital?

15 A. As I remember, she was there from the
16 11th until at least the 27th or 28th. I would have
17 to look.

18 Q. Okay. You can look at the discharge
19 summary again.

20 A. She was discharged on the 30th, so she
21 was there a full 20 days.

22 Q. And you received her, as we've said, on
23 the 11th. How many days was it before you could even
24 operate?

25 A. Well, we went through this evaluation

1 process and also the attempt to get a feeding tube in
2 a position where she could tolerate that. But since
3 that was impossible for her to tolerate, we operated
4 on the 20th, which was --

5 Q. Nine?

6 A. -- nine days after her admission.

7 Q. And would you tell me why it is you
8 couldn't operate on those first nine days or the
9 first eight days, that you had to wait for the ninth
10 day?

11 A. Well, as I said, she was being evaluated
12 to try to make the most logical solution of this
13 problem as we could to get an idea about the
14 aspiration and also the degree of stenosis and
15 whether a feeding tube could be used as a way of
16 improving her nutritional status to buy some time.

17 But none of that worked, so in the
18 meantime she was receiving IV fluid to prevent
19 dehydration.

20 Q. The risks of doing not this first
21 surgery of the vertical banded gastroplasty but the
22 second surgery of the Roux-en-Y gastric bypass that
23 you did on day nine, are those risks for the second
24 procedure the same as the risks for the first
25 procedure?

1 A. No. They're exponentially higher the
2 second time.

3 Q. Why exponentially higher?

4 A. Well, in her case there are two
5 reasons. One, the tissue is not normal versional
6 tissue. It's not soft and pliable. It's thickened.
7 The stomach with the band is stuck up under the
8 under-surface the liver. The liver itself is stuck
9 up to the abdominal wall.

10 There is a much higher risk of bleeding,
11 particularly from making lacerations in the liver,
12 because there is almost a fusion between the liver
13 and the front of the stomach where this band is.
14 It's a foreign body, and it causes a lot of reaction,
15 inflammatory reaction.

16 And secondly, the tissues don't handle
17 as nicely as they do the first time around, so there
18 is a higher risk of a leak once you've actually
19 accomplished the gastric bypass. So the leak rate,
20 the risk of leak -- meaning it doesn't heal.

21 It's like having a ruptured ulcer or a
22 ruptured appendix. Fluid from the inside goes and
23 causes peritonitis. That's a 1 percent risk the
24 first time around. I think I estimated to Ms.
25 Washburn and her husband a risk of at least five

1 times that the second time around.

2 Q. And did she encounter that risk as a
3 matter of fact? That is, did she develop the
4 peritonitis?

5 A. She developed that later after her
6 discharge not related to the revision, but related to
7 the feeding tube that I placed.

8 Q. Okay. Then we'll reach that in a
9 moment. I'm trying to stay chronologically, and I'm
10 sorry I skipped. You discussed the risks of the
11 revision; right?

12 A. Right.

13 Q. And did you obtain her informed consent
14 to do that procedure?

15 A. Yes, I did.

16 Q. Did she have at that point, October
17 20th, 1997, an option to not doing some form of
18 gastric bypass?

19 A. Well, if we wanted Ms. Washburn to be
20 able to eat at all over the long haul, we had to do
21 something to get around the obstruction.

22 Q. Any other reason other than the
23 obstruction?

24 A. Well, in order to provide some
25 nutrition. She wasn't eating anything.

1 Q. And can you tell me all the causes that
2 she wasn't eating anything?

3 A. Because the vocal cord paralysis
4 superimposed on the pre-existing stenosis tipped her
5 over the edge so that she just couldn't swallow
6 anything.

7 Q. After you did this revision, was she
8 able to ingest food and water orally, and could she
9 come off the IVs?

10 A. By the end of her admission, she was
11 able to eat pureed food, and we did an upper GI that
12 showed that she was aspirating less.

13 Q. However, then, or rather conversely was
14 she still on IVs throughout her stay?

15 A. Well, until the last day I think she
16 was, yes.

17 Q. And was she intermittently aspirating
18 throughout the last day of her stay?

19 MR. BLACKWELL: Judge, these are leading
20 questions to the doctor.

21 THE COURT: Well, it is, but go ahead,
22 Ms. Cofield. Just try to keep them in the right
23 form.

24 BY MS. COFIELD:

25 Q. Did you have any evidence of aspiration

1 throughout October 30th?

2 A. She would intermittently choke on food.

3 Q. When she was discharged, then, did you
4 remove the IVs?

5 A. Yes.

6 Q. And she was discharged home with what
7 instructions for food and water?

8 A. She was to eat pureed food only for the
9 first 30 days, and she was to drink water in small
10 increments and not to drink too fast. And usually
11 not to eat pureed food and liquids at the same time,
12 to take one or the other but not both at the same
13 time, and to avoid sugar.

14 Q. Now, your bills --

15 MS. COFIELD: And I believe Your Honor
16 has plaintiff's copy up here.

17 THE COURT: Well, which ones are we
18 talking about? I do have it.

19 MS. COFIELD: The whole stack, not the
20 ones already admitted.

21 THE COURT: All right. These are the
22 exhibits that the court has marked for identification
23 purposes only.

24 MS. COFIELD: Thank you. And I seem to
25 be missing -- oh, six was admitted. I'm sorry. Your

1 Honor is correct, so I go to seven.

2 BY MS. COFIELD:

3 Q. All right. These are the bills from MCV
4 between October 11th and October 30th, 1997, sir.

5 Can you tell me whether those bills were medically
6 necessary for the reasons you've already testified?

7 A. Yes, in my opinion they were necessary.

8 Q. And were they related in full or in part
9 to the aspiration problem which you were treating?

10 A. Yes, they were related.

11 Q. Thank you.

12 MS. COFIELD: At this time, Your Honor,
13 I would move those into evidence.

14 THE COURT: All right. They will be
15 received.

16 MR. BLACKWELL: Judge, I would note my
17 objection.

18 THE COURT: I will note your objection.

19 (The bill for MCV October admission
20 marked as Plaintiff's Exhibit No. 7
21 was received in evidence.)

22 MS. COFIELD: May I proceed, sir?

23 THE COURT: Yes, you may.

24 BY MS. COFIELD:

25 Q. Then when she was discharged, did there

1 come a time that she again presented to the clinic or
2 emergency room at MCV?

3 A. She had some drainage around her feeding
4 tube.

5 Q. Oh, I'm sorry. Then I should back up.
6 Was she discharged with a feeding tube?

7 A. Yes.

8 Q. How often and how did she feed herself
9 through the feeding tube? Were you a part of those
10 instructions?

11 A. Well, that was in case she continued to
12 aspirate or couldn't get the pureed food by mouth,
13 then she was given some tube feeding to take at
14 home.

15 She had been progressed in the
16 post-operative period on tube feeding and had done
17 pretty well with that, so it was sort of an insurance
18 line or a life line for her.

19 And I commonly leave these tubes in for
20 three weeks to avoid the very complication that she
21 developed despite waiting three weeks.

22 Q. Well, then we're going to get to the
23 complication. But tell me where was that tube placed
24 in her when she was discharged from MCV?

25 A. That tube was in the part of the stomach

1 beyond where the staples were, in other words, the
2 lower pouch.

3 Q. Down here, approximately?

4 A. Yes, in the lower pouch.

5 Q. And on a person would that be about
6 under the rib cage?

7 A. That's exactly where it was, right.

8 Q. And this from October 30th through when,
9 sir?

10 A. It was in three and a half weeks, so she
11 came back in November to have that removed.

12 Q. Well, before the removal did there come
13 a time where that feeding tube got infected, as you
14 said?

15 A. She was seen by the emergency room
16 physicians on November the 8th for drainage around
17 the tube.

18 Q. What was the reason for the drainage?
19 Was there a diagnosis of what caused that drainage?

20 A. Well, I didn't see her at that -- I
21 didn't see her when she was in the emergency room.

22 MR. BLACKWELL: Judge, I'm going to
23 object to the witness talking about what someone else
24 did.

25 MS. COFIELD: Well, I'll lay a

1 foundation.

2 THE COURT: I think you need to lay a
3 foundation.

4 MS. COFIELD: Understood.

5 BY MS. COFIELD:

6 Q. After she had presented, in your words,
7 or appeared at the emergency room and been treated,
8 did there come a time that you saw her for feeding
9 tube complications?

10 A. Well, I was going to see her anyway for
11 follow-up, and I saw her a week later than that.

12 Q. And when you saw her a week later, did
13 you come to learn of the earlier presentation to the
14 clinic?

15 A. Yes.

16 Q. And what is it you learned at that time
17 by way of your history and your treatment of this
18 patient?

19 A. Well, the tube had been causing some
20 drainage around the tube, some yellow, purulent --
21 purulent means pussy -- drainage. And the skin was
22 red around it, and it was causing her some pain.

23 So it was the right time to remove the
24 tube anyway. Usually, the only way to permanently
25 get rid of that kind of drainage or inflammation is

1 just to remove the tube.

2 Q. Then is the condition for which you
3 treated her a few days after that emergency room
4 visit the same condition that she presented earlier?

5 A. Yes.

6 Q. And was it necessary in your opinion,
7 sir, that she receive treatment for that drainage and
8 the pus around the feeding tube?

9 A. Yes.

10 Q. And was it then related in full or in
11 part to all of this treatment we've been talking
12 about and why she had to be discharged with a feeding
13 tube?

14 MR. BLACKWELL: Judge, she is just
15 leading continuously. Why doesn't she ask the
16 question what is the relationship?

17 THE COURT: Well, I'll overrule it. The
18 question is okay.

19 MS. COFIELD: Thank you, sir.

20 THE COURT: Go ahead.

21 BY MS. COFIELD:

22 Q. Was it then related to this same --

23 A. It was related to the operation that she
24 had had which was related to the prior difficulty.

25 Q. Thank you.

1 MS. COFIELD: I would move this into
2 evidence at this time.

3 THE COURT: All right. It will be
4 received.

5 MS. COFIELD: Is that No. 8, sir?

6 THE COURT: Yes, it is.

7 MR. BLACKWELL: Same objection, Your
8 Honor.

9 THE COURT: I will note your objection.

10 (The bill for November MCV ER marked as
11 Plaintiff's Exhibit No. 8 was received
12 in evidence.)

13 BY MS. COFIELD:

14 Q. Then as you referenced, you saw her
15 personally?

16 A. Right.

17 Q. And would you like your notes from that
18 visit?

19 A. Yes.

20 Q. Okay. I will be glad to.

21 A. So on November the 14th I saw her for
22 her first post-operative visit in my office.

23 Q. I'm trying to do this upside down. So
24 I'm sorry, it's taking a minute.

25 A. Other than the drainage around the tube,

1 she had been doing reasonably well.

2 Q. I just can't do it upside down. That's
3 right there, isn't it? I'll have to find it while
4 you -- I'm sorry. I just can't do it upside down.

5 A. Let me go back and talk about this tube
6 a little bit. Because the stomach was stiff and
7 scarred up from her previous surgery -- normally, you
8 would like to bring the wall of the stomach up to the
9 abdominal wall so there is no space between the two,
10 but hers was too stiff to accommodate that.

11 So I had to use a different technique in
12 order to bring the tube out of the stomach. I had to
13 make a tunnel within the stomach, so there was a
14 space -- in other words, there was a space between
15 the abdominal wall and the stomach because of her
16 previous surgery scarring.

17 Q. I don't understand where that is. Can
18 you show me that?

19 A. (Witness approached the chart.) Well,
20 the tube came out here, and this is the abdominal
21 wall. Because of the scarring, the stomach was just
22 not pliable enough to come up. You couldn't just
23 bring it up; it was too stiff. So I had to insert
24 this tube into the stomach for feeding. It was a
25 feeding tube.

1 And normally, if you leave this tube in
2 place and you make a tunnel out here, you just sort
3 of invaginate the tube within the folds of the
4 stomach, it's safe to take that tube out at three
5 weeks.

6 But yet when we removed the tube, she
7 seemed to do all right, but by the time, apparently,
8 she got home she developed severe abdominal pain.
9 She had actually developed a leakage from where this
10 tube went into the stomach, and it developed
11 peritonitis.

12 Q. Peritonitis is what, sir?

13 A. Peritonitis is an infection of the
14 entire abdominal cavity.

15 Q. And is your bill of 9-14 when you
16 followed her up and pulled out that feeding tube or
17 J-tube?

18 A. You're talking about the date 11-14?

19 Q. What did I say? I'm sorry.

20 A. I didn't want to give the jurors the
21 impression that I charged her \$914 for removing the
22 tube. Actually, the post-operative care is included
23 in the global fee for surgery so --

24 Q. That bill is right behind it.

25 A. And there is an X-ray.

1 Q. X-rays and lab tests, your follow-up
2 visit.

3 A. Right, but there were no charges that I
4 -- I mean that was part of her surgical fee.

5 Q. So were these charges, though, for the
6 labs and the X-rays as billed just for that part of
7 your follow-up care --

8 A. That's right.

9 Q. -- for this feeding tube?

10 A. Correct.

11 Q. Were they then medically necessary?

12 A. Yes.

13 Q. Related to the same things we've
14 discussed?

15 A. Yes.

16 THE COURT: All right. It will be
17 received over your objections.

18 (The bill for Dr. Kellum's follow-up
19 marked as Plaintiff's Exhibit No. 9
20 was received in evidence.)

21 BY MS. COFIELD:

22 Q. And then you said she developed
23 peritonitis within a matter of hours. It's the 15th
24 of November. I am showing you bills for treatment
25 for the peritonitis. Were those bills medically

1 necessary?

2 A. Yes. This was done at Virginia Beach
3 General, but she certainly had to have this done.

4 Q. Regardless of where?

5 A. Right.

6 Q. And you knew that she had developed
7 peritonitis?

8 A. I learned later. I didn't know at the
9 time that this had happened.

10 Q. And are the bills necessary to treat the
11 peritonitis that she developed from the drainage of
12 the feeding tube?

13 A. Yes.

14 Q. And are they then related?

15 MR. ALLEN: Your Honor, I object on
16 foundation. I don't know how he would know what's
17 related to this Virginia Beach Hospital bill. He's
18 not employed there. He doesn't work there. He
19 doesn't know anything about --

20 MS. COFIELD: We're not here on
21 authenticity or presumption.

22 THE COURT: All right. Let me see that.

23 MS. COFIELD: We're only here on if it's
24 medically related.

25 This, sir, was part of the package given

1 30 days in advance.

2 THE COURT: Just let me look at it here
3 for a minute.

4 You can inquire of the doctor, it looks
5 like it's fairly detailed, if he can look at that
6 bill and determine that it's related to the
7 peritonitis. The court will permit it.

8 MS. COFIELD: All right.

9 BY MS. COFIELD:

10 Q. Would you look at the charges behind
11 that summary in the front, sir, and examine them?

12 A. Well, obviously, whenever you look at a
13 hospital bill, it always looks outrageous. So all I
14 can say is that she had to have another operation,
15 because she had a hole in her stomach that hadn't
16 sealed off.

17 Normally, when you leave a tube in for
18 three weeks, it's a foreign body, and it causes
19 enough reaction around the tube that it causes a
20 little fibrous tube to form. And so you can safely
21 pull that tube out, which is a real soft, pliable
22 tube.

23 In a situation where the patient is not
24 normally nourished, which apparently is what -- in my
25 opinion is what happened here, it didn't seal off.

1 So that even after three and a half weeks she still
2 leaked gastric fluid, which contains acid, into the
3 abdominal cavity.

4 And so that's not a situation compatible
5 with long life. You've got to surgically repair that
6 hole when that happens.

7 Q. And is that what was done in this case?

8 A. Yes.

9 THE COURT: All right. The court is
10 going to receive it and note the objections of
11 defense counsel.

12 (The bill for VBGH November admission
13 marked as Plaintiff's Exhibit No. 10
14 was received in evidence.)

15 BY MS. COFIELD:

16 Q. And the only other one I would put
17 before you is the two days before she was transferred
18 to your service when you consulted with Drs. Dalton
19 and Ferguson.

20 THE COURT: Wait just a minute, now. Let
21 me see those, Ms. Cofield, before we get to that, so
22 we don't go through a -- I'm not going to permit
23 these that were done by Dalton and Ferguson for the
24 hospital. So these are --

25 MS. COFIELD: Whether they were

1 medically necessary or not?

2 THE COURT: No. This witness cannot
3 determine that. Okay? Now, you picked up something
4 that was a mistake.

5 MS. COFIELD: Didn't you want me to put
6 it over on the table?

7 THE COURT: You can put it over there
8 just so we don't get them confused, Ms. Cofield.

9 MS. COFIELD: Okay. That's all those
10 bills, then.

11 BY MS. COFIELD:

12 Q. And would you go to your operative
13 note? Let me find that for you. I'm sorry. Did I
14 get it?

15 A. Yes.

16 Q. Good. And who does it show on there as
17 the attending?

18 A. Myself.

19 Q. Were you there?

20 A. I was there the entire operation.

21 MR. BLACKWELL: What's the relevancy of
22 that?

23 THE COURT: Well, I'll sustain that
24 objection. That does not relate to this.

25 MS. COFIELD: Could I address that for a

1 minute?

2 THE COURT: You may approach the bench,
3 if you would like.

4 (Counsel approached the bench, and an
5 off-the-record discussion was held.)

6 BY MS. COFIELD:

7 Q. Did Ms. Washburn inquire about your
8 qualifications, sir?

9 A. I think that Dr. Dalton had already
10 talked to her about my qualifications before she ever
11 got to me.

12 Q. So you do recall telling somebody about
13 them?

14 A. Yes.

15 MR. BLACKWELL: Objection.

16 THE COURT: I'll sustain that objection.
17 It's a leading question. He didn't say that he
18 recalled telling someone about them.

19 MS. COFIELD: All right. I'll ask
20 that. I'm sorry.

21 BY MS. COFIELD:

22 Q. Did you recall telling somebody about
23 your qualifications, and if so, who?

24 THE COURT: Just a minute. I think the
25 jury probably heard this just fine, but he said that

1 -- as I recall the testimony, the doctor said that he
2 thought that Dr. Dalton had already told the
3 plaintiff about his qualifications. He didn't say
4 anything about him personally telling anyone about
5 his qualifications.

6 MS. COFIELD: That's why I'm asking him
7 in light of Your Honor's comment.

8 THE COURT: Well, then let's ask the
9 question in that way.

10 MS. COFIELD: I tried to.

11 THE COURT: All right.

12 BY MS. COFIELD:

13 Q. Did you then to your recollection tell
14 Dalton or somebody on the service at Virginia Beach
15 General about your qualifications?

16 A. Well, Dalton had been working as a
17 resident at MCV for five years, so he had direct
18 knowledge of my qualifications.

19 Q. I see. Was he on your service?

20 A. Yes. Well, he rotated on all of the
21 services. He had been on my service part of each
22 year.

23 Q. And after the discharge and the feeding
24 tube, did you refer her for any physical therapy of
25 any nature?

1 A. She had voice and speech therapy as part
2 of her recovery.

3 Q. And why is that, sir? Why did you refer
4 her for that?

5 A. Because of her problems with swallowing
6 and speech.

7 Q. And the problems with swallowing and
8 speech, were those the ones you were concerned with
9 relating to the lower esophageal problem or the upper
10 for the aspiration?

11 MR. BLACKWELL: Judge, objection. She's
12 leading the witness.

13 MS. COFIELD: Your Honor, that isn't
14 leading.

15 THE COURT: I'll overrule that. Go
16 ahead, but the ground has been covered, Ms. Cofield.
17 He can answer this question, but let's not go back
18 and repeat.

19 MS. COFIELD: Thank you.

20 A. I attributed them to the upper problem.

21 MS. COFIELD: I have no further
22 questions, if Your Honor would just allow me a moment
23 to be sure. Oh, excuse me, I do.

24 BY MS. COFIELD:

25 Q. I found your progress note, and this is

1 now of 12-4-98. Was that a follow-up visit that you
2 had with her, sir?

3 A. Yes. This was 14 months after the
4 surgery that I had performed.

5 Q. And is that your --

6 A. Part of our program with regard to
7 weight control has to do with doing exercise. And I
8 have always urged my patients to try to work up to
9 doing the equivalent of walking three miles a day,
10 knowing that some of them can't because they had
11 arthritis or other physical problems that limit their
12 ability to walk or even swim sometimes.

13 And what I wrote on that date was, has
14 right-sided vocal cord paralysis which limits
15 exercise tolerance.

16 Q. Why, sir, were you of that opinion on
17 that date?

18 A. Because I asked her specifically about
19 what she was doing in terms of physical activity.

20 Q. After that, was it 12-98 office visit,
21 if you would turn the page, did you have further
22 follow-up with this patient?

23 And I'm not sure if I've gone out of
24 chronology, because you have the documents in front
25 of you.

1 A. I have seen her on a regular basis, on
2 an annual basis ever since her surgery.

3 Q. And how has her weight and aspiration
4 problems for which you first treated her October of
5 '97 progressed or stabilized?

6 A. The aspiration has improved, though she
7 has to be very careful about her swallowing.
8 Sometimes she has to hold her head slightly to the
9 right, and she has to eat slowly.

10 Her voice, unfortunately, has not
11 improved to my basic lay hearing of her voice.

12 MS. COFIELD: I thank you very much and
13 pass the witness at this time.

14 * * * * *

15 THE COURT: Any redirect, Ms. Cofield?

16 MS. COFIELD: Yes, sir.

17 Following up on that same line, to put
18 in context that whole conversation, page 68: I don't
19 know if she did or not from that point. Isn't that
20 fairly unusual?

21 THE COURT: Wait a minute, now, Ms.
22 Cofield. Would you please ask the doctor a question?

23 MS. COFIELD: Well, sir, under the rules
24 I am --

25 THE COURT: Let's approach the bench.

1 (Counsel approached the bench, and an
2 off-the-record discussion was held.)

3 REDIRECT EXAMINATION

4 BY MS. COFIELD:

5 Q. Doctor, regardless of the method you
6 used, that is, Roux-en-Y or something else, was it
7 medically necessary in 1997?

8 MR. BLACKWELL: I'm going to object.
9 This is not redirect.

10 MS. COFIELD: This is exactly --

11 THE COURT: I'll overrule the objection.
12 You may answer the question, doctor.

13 BY MS. COFIELD:

14 Q. Was it medically necessary that you
15 perform this procedure in '97?

16 A. Yes.

17 Q. Do you remember any discussions with Ms.
18 Washburn, as Mr. Blackwell referenced, about earlier
19 her asking for one and finding it not medically
20 necessary?

21 MR. BLACKWELL: Objection, Your Honor.
22 First of all, it's a leading question.

23 MS. COFIELD: Did he have a history with
24 this patient.

25 THE COURT: Wait just a minute, now.

1 The doctor has already said that he did not have any
2 of that history when he talked to the patient.

3 MS. COFIELD: I'm sorry. I thought he
4 said he didn't know of --

5 THE COURT: Well, let's ask him that
6 question first, and then we'll go from there.

7 MS. COFIELD: Okay.

8 BY MS. COFIELD:

9 Q. Do you recall any conversations with Ms.
10 Washburn about her telling you of an earlier request
11 she had made?

12 A. I came to know that she had seen someone
13 else. The relationship of when I knew that with
14 regard to the pre-operative discussion I had with her
15 about risks and benefits, I don't remember the exact
16 spatial or temporal relationship.

17 Q. Not taking in iron, vegetarians don't
18 eat meat. Do they all have iron deficiencies?

19 A. No.

20 Q. Are there, then, other methods of
21 getting iron?

22 A. We have our patients take iron tablets,
23 most of our patients, if they have reason to have
24 continued iron deficiency. They can also eat liver,
25 or any kind of bean will have iron in it.

1 Q. And on this chart, not as Mr. Blackwell
2 was talking on any, but on this particular one, Ms.
3 Washburn's chart, the aspiration, was that from her
4 stomach contents, or was it from her trachea?

5 A. Well, the evidence from the X-ray
6 studies that we did prior to her surgery clearly
7 showed that it was from her neck and not from the
8 stomach.

9 Q. And on this I know you used a
10 Roux-en-Y. Regardless of the method you used to
11 revise it, is your testimony the same for the reasons
12 you revised it?

13 MR. BLACKWELL: Judge, this is not
14 redirect. I'm sorry.

15 THE COURT: And I'll sustain that. This
16 has been testified to on direct examination. I think
17 the doctor has covered it very clearly.

18 MS. COFIELD: All right.

19 BY MS. COFIELD:

20 Q. And, sir, you did allow your first-year
21 resident -- excuse me, intern to do that preliminary
22 discharge. Did you --

23 A. Could I explain the system?

24 Q. Certainly.

25 MR. BLACKWELL: Judge, I'm going to

1 object.

2 THE COURT: He can answer the question
3 as completely as he needs to answer the question.

4 A. Well, may I say that under the method
5 that we use at the Medical College of Virginia, the
6 intern does the discharge summary.

7 Before it becomes an official medical
8 document, and I don't know why he received an
9 unedited version -- obviously, a mistake -- we
10 correct that. So it is a learning exercise for the
11 intern.

12 And he gets a copy of the corrected
13 version where we have filled in the blanks that could
14 not be heard or were garbled or were inappropriate,
15 and plus we strike out things that we don't think are
16 correct and write in what we do think is correct.

17 It's a teaching hospital, and that's
18 part of the teaching exercise.

19 BY MS. COFIELD:

20 Q. And that intern made several mistakes in
21 the dictation, which you then corrected.

22 A. All in all it was an excellent discharge
23 summary, but he did make some mistakes which I
24 corrected. And I think that's part of the teaching
25 process.

1 Q. And there is a learning curve; right?

2 MR. BLACKWELL: Judge, I object to that.

3 THE COURT: I'll sustain that. All

4 right. Doctor, you may step down.

5 This witness is excused?

6 MS. COFIELD: Yes. Thank you very much,

7 sir.

8 (Witness excused.)

9 * * * * *

10 MS. COFIELD: I am just going to read

11 from Dr. Klara Borden's deposition on page 33, lines

12 10 through 29 and 1 through 4 on 34.

13 Between July and September I'm only

14 talking about. In fact, Borden didn't have

15 privileges --

16 THE COURT: Whose deposition is this?

17 MS. COFIELD: Dr. Klara's, a party's.

18 THE COURT: Okay.

19 MR. BLACKWELL: Let us get to it.

20 THE COURT: Just a second until they get

21 the page.

22 MS. COFIELD: Surely.

23 MR. BLACKWELL: Which page, counsel?

24 MS. COFIELD: Page 33: Between July and

25 September I'm only talking about. In fact, he didn't

1 have privileges until July. I'm talking about August
2 7th -- rather in July. I'm talking about August 7th
3 to the end of September. I'm talking --

4 MR. ALLEN: Your Honor, I'm going to
5 object to any evidence presented about privileges.
6 There is no issue in this case about privileges, Your
7 Honor, and that's --

8 MS. COFIELD: That's parenthetical.

9 THE COURT: Well, go ahead, and I'll
10 determine what the options are.

11 MS. COFIELD: Between July and September
12 I'm talking about. In fact, he didn't have
13 privileges in July. I'm talking about August 7th
14 through the end of September. I'm talking that
15 two-month period, sir.

16 Answer, and it's Dr. Klara: Well, I
17 average probably 20 cases a month, half of which are
18 cervical, so ten or 20 cases. Most of my cases are
19 redos. This isn't a complex spine case. Okay. This
20 is very vanilla.

21 And it's your testimony -- me, I'm sorry
22 -- that approximately ten to 20 a month or ten to 20
23 total within the months of July or rather August and
24 September? Oh, ten to 20 total. Ten to 20 total
25 cervical cases? Yeah. That he assisted you?

1 Correct. How many had he done alone, sir? Oh,
2 probably none of those.

3 I would now like to call Dr. Borden to
4 the stand.

5 THE COURT: All right. Dr. Borden, you
6 were previously sworn, I think.

7 THE WITNESS: Yes.

8 THE COURT: Respond to the questions and
9 keep your voice up.

10

11 BRITT BORDEN, M.D., called as a witness
12 by and on behalf of the Plaintiff, having been
13 previously duly sworn, testified as follows:

14

15 DIRECT EXAMINATION

16 BY MS. COFIELD:

17 Q. You were in your residency in West
18 Virginia for five years; correct?

19 A. Correct.

20 Q. You were there from 1992 to 1997;
21 correct?

22 A. Yes.

23 Q. More specifically, June 30th, 1997?

24 A. Yes.

25 Q. July 1st, your first day with Dr. Klara;

1 correct?

2 A. Yes.

3 Q. Therefore, you are starting July 1. Do
4 you have privileges at any hospital to operate at
5 that point?

6 A. Only as far as operating with Dr. Klara
7 at that point.

8 Q. Fine. You first get any temporary
9 privileges from Virginia Beach Hospital August 7th,
10 1997; correct?

11 MR. ALLEN: Same objection, Your Honor.

12 MS. COFIELD: This goes to the level of
13 experience.

14 THE COURT: Okay. Well, we'll deal with
15 experience. I'll accept that for that purpose.

16 A. Yes.

17 BY MS. COFIELD:

18 Q. That is the date on which you get your
19 privileges; correct?

20 A. Yes.

21 Q. You couldn't operate alone in this
22 window, then. True statement?

23 A. I didn't operate alone.

24 Q. You didn't have privileges to operate
25 before September -- I mean August 7th; correct?

1 A. That's when the privileges were granted,
2 yes.

3 Q. Okay. And August 22nd is when you filed
4 an application.

5 THE COURT: I'll sustain that
6 objection. That's not an experience factor. We're
7 dealing with his experience.

8 MS. COFIELD: Okay. Understood.

9 THE COURT: Okay? That has nothing to
10 do with it.

11 BY MS. COFIELD:

12 Q. Between that date and September 25th,
13 1997, when you operated on Janice Washburn, you did
14 absolutely no cervical fusions between August 7th and
15 September 25th, 1997, that were revisions, redos;
16 correct?

17 A. No.

18 Q. Not correct?

19 A. No, that is correct. I didn't do any in
20 that time period. I didn't do any revisions.

21 Q. And as a matter of fact, for the entire
22 time frame there are only two that were done, from
23 the time you came here for July, August and September
24 as you produced them in discovery. Those are the
25 two; correct?

1 THE COURT: Ms. Cofield, let's just ask
2 the questions. Let's not be so hostile.

3 BY MS. COFIELD:

4 Q. Would you like to see the formal
5 pleading that accompanied them?

6 A. No. These are both marked as redo
7 operations, and they were both within those dates,
8 yes.

9 Q. And they are both before you had
10 privileges, so they are both with assistance of an
11 attending physician; correct?

12 A. Yes.

13 MS. COFIELD: I have no further
14 questions of this witness.

15 THE COURT: All right. Dr. Borden, you
16 may step down.

17 MR. ALLEN: Your Honor, I do have some
18 questions of Dr. Borden.

19 THE COURT: You want to ask them at this
20 point in time?

21 MR. ALLEN: I do want to ask him
22 briefly, Your Honor.

23 THE COURT: All right. Please come back
24 up here, Dr. Borden. Step back up on the witness
25 stand. He has the right to cross.

CROSS-EXAMINATION

1
2 BY MR. ALLEN:

3 Q. Dr. Borden, would you tell the members
4 of the jury your training and education in medicine,
5 beginning with your undergraduate degree?

6 A. I got my undergraduate degree at the
7 University of Illinois in 1985. Then I started
8 medical school at St. George's University, and I was
9 there until 1988.

10 Q. Where is St. George's University, sir?

11 MS. COFIELD: Your Honor, this is beyond
12 the scope. I asked the number, and that's all I
13 asked. How many cervical revisions did you do
14 between two dates, and that was the only scope that
15 was inquired to.

16 MR. BLACKWELL: She covered his
17 residency training for five years.

18 MS. COFIELD: No, I gave it temporal
19 consideration only.

20 THE COURT: Counsel approach the bench,
21 please, for just a minute.

22 (Counsel approached the bench, and an
23 off-the-record discussion was held.)

24 THE COURT: Doctor, you can step down.

25 Are you recalling Dr. Neal, Ms.

1 Cofield?

2 MS. COFIELD: If you will give me a
3 minute -- can we then just approach again?

4 THE COURT: Yes, ma'am.

5 (Counsel approached the bench, and an
6 off-the-record discussion was held.)

7 MS. COFIELD: I'm just trying to think
8 in light of Your Honor's instructions. I would like
9 to recall and ask him one more question.

10 THE COURT: Who?

11 MS. COFIELD: I'm sorry, Dr. Borden.

12 REDIRECT EXAMINATION

13 BY MS. COFIELD:

14 Q. Okay. Sir, the list that we were
15 looking at of your residency, would you like it? The
16 residency list of cases that you have done, okay, is
17 what I'm going to refer to now.

18 This was a list of cases compiled during
19 that five-year period of training in West Virginia;
20 correct?

21 A. Yes, it was.

22 Q. And immediately upon leaving there, we
23 know you came here.

24 A. Uh-huh.

25 Q. From July 1st to September, now,

1 regardless of that temporary privilege gateway, just
2 from the time you came here July 1st to the time you
3 operated, July, August, September, that three-month
4 period, how many total cervical fusions did you do?

5 A. I had performed that exposure ten times.

6 Q. Total?

7 A. From the time I arrived July 1st until I
8 did Ms. Washburn's surgery.

9 Q. Are you sure it's ten and not eight,
10 sir?

11 A. The exposure was ten times. Two of
12 those were vertebrectomies, but eight of them were
13 anterior cervical diskectomies and fusions.

14 Q. So the same type of procedure was not
15 performed ten times, but was performed eight times,
16 the cervical diskectomy.

17 A. Exactly the same procedure, eight times.

18 Q. Exactly. And of those eight times of a
19 cervical procedure, that's just anything being done.
20 I'm talking about just the anterior, approach from
21 the front, cervical diskectomy within those three
22 months, sir, how many of those did you perform?

23 A. Eight.

24 Q. With or without Dr. Klara present?

25 A. With Dr. Klara.

1 Q. On each occasion?

2 A. Yes.

3 Q. And while you were in your residency for
4 those five years, did you similarly perform an
5 anterior cervical diskectomy on other patients?

6 A. Yes, 50 times.

7 Q. Always with somebody in attendance;
8 correct?

9 A. Yes.

10 Q. Because you were still in your training;
11 right?

12 A. That's correct.

13 Q. And that encompassed a five-year span?

14 A. Yes.

15 Q. You didn't perform the entire operation
16 -- how many in total was that over five years?

17 A. Fifty.

18 Q. Of those 50, how many were redos or
19 revisions to a pre-existing fusion?

20 A. Some of them were, but I didn't keep
21 those kinds of records for my residency data. It
22 wasn't required, so I don't know how many were
23 reoperations.

24 Q. So can you estimate? Half of them or a
25 quarter of them or something?

1 A. No, I really don't know.

2 Q. You weren't allowed on day one of your
3 residency to do the entire operation. You just
4 opened; correct?

5 A. No. Residency training is a system of
6 graded responsibility. You start out watching the
7 operations, then you start doing small portions, and
8 then you do more and more. And eventually, you're
9 doing the whole operation yourself.

10 Q. All right. So then of the 50, you
11 certainly weren't doing the whole operation to begin
12 with.

13 A. No.

14 Q. Can you estimate by the time you got to
15 year five, how many of the 50 you had done with
16 somebody looking over your shoulder?

17 A. It was a large number. An anterior
18 cervical disectomy and fusion, in that operation the
19 residents progress very quickly in their level of
20 responsibility.

21 So most of those would have been done
22 primarily by me. In fact, I recorded 40 of those as
23 me being the primary surgeon.

24 Q. You didn't have enough cases compiled to
25 even be eligible for your board certification until

1 May of 1999; correct?

2 MR. BLACKWELL: Judge, I'm going to
3 object to that.

4 MS. COFIELD: Why?

5 MR. BLACKWELL: What is the issue here?

6 MS. COFIELD: The qualifications, his
7 skill and experience.

8 MR. BLACKWELL: But you necessarily have
9 to accumulate cases to be board certified.

10 MS. COFIELD: And that's my point, all
11 of those type of very procedures, and I'm going to go
12 across the board with them.

13 THE COURT: Well, let's -- okay.

14 MR. BLACKWELL: Dr. Neal was not boarded
15 until --

16 THE COURT: I'll overrule the objection.
17 You may continue.

18 BY MS. COFIELD:

19 Q. You graduated from your training in '95,
20 and you first got the number and variety of cases
21 that you needed to be board eligible May of 1999;
22 correct?

23 A. It's a time period rather than a total
24 number of cases. You need to have 12 months' worth
25 of cases and then three months of follow-up after

1 that for a total of 15 months of practice, and that
2 rule is the same for all neurosurgeons.

3 MS. COFIELD: Could I ask Your Honor to
4 direct the witness to answer the question? Is it May
5 of 1999 when that occurred?

6 THE COURT: Well, it was a two-part
7 question. It had to do with number of cases and
8 1999. Certainly, he should answer the question if
9 '99 was the time, but his complete answer, I think,
10 was that it was the time and not a number of cases.

11 MS. COFIELD: I don't mind that. I
12 just want the answer.

13 THE COURT: Go ahead and answer the
14 question.

15 BY MS. COFIELD:

16 Q. Isn't it true that it was May 1999
17 before you compiled the appropriate number of cases?

18 A. That's right.

19 Q. Okay. And the appropriate number of
20 cases to even be board eligible requires that you
21 have a variety of experience, correct, not just a
22 simple -- you can't have all cervical diskectomies,
23 can you?

24 MR. ALLEN: Objection, Your Honor. It's
25 a temporal requirement, as he's already testified.

1 It's not a number of cases.

2 MS. COFIELD: I am asking him does it
3 include --

4 THE COURT: Well, ask him what are the
5 requirements.

6 MR. ALLEN: Well, it -- I'll wait until
7 the question is asked.

8 BY MS. COFIELD:

9 Q. Do the requirements include that you
10 have experience in a variety of cases?

11 A. Not that I'm aware of. I've never seen
12 anything from the board that indicates that.

13 Q. Is it just a total number? You could
14 have had whatever the number is in absolute terms,
15 100 cervical diskectomies and nothing else? Is that
16 your understanding?

17 A. As I said, it's a time period and not a
18 number.

19 Q. After September 25th, 1997, did you
20 continue to have a variety of experience?

21 A. Oh, yes, a large variety.

22 Q. And is it totally time driven?

23 A. Yes.

24 MR. ALLEN: Maybe it's my hearing, Your
25 Honor. If the witness would just pull the microphone

1 in a little bit closer.

2 THE COURT: Can the jury hear okay?

3 JURORS: Yes.

4 BY MS. COFIELD:

5 Q. You are aware, are you not, sir, that
6 this being a revision put the patient at higher risk
7 than a simple -- than a virgin operation, a virgin
8 fusion?

9 A. There are additional risks from
10 scarring.

11 Q. Yes. And that is because the nerve is
12 imbedded in the scar tissue; correct?

13 A. I don't think that's accurate.

14 Q. It's not, according to you? That's not
15 one of the risks, that the nerve is imbedded in scar
16 tissue?

17 A. No, not that I know of.

18 Q. Well, you do know that the entry on the
19 right versus the left carries different risks;
20 correct?

21 A. Yes, it does.

22 Q. But you don't know if the risk to the
23 laryngeal nerve is less or greater if you enter on
24 the left, do you?

25 A. Can you repeat that?

1 Q. Sure. You know the risk is different if
2 you enter on the right or the left to the laryngeal
3 nerve, but you don't know if the risk to that nerve
4 is greater if you enter on the left, do you?

5 A. We would have to refer to the literature
6 on that.

7 Q. My question, sir, is do you know?

8 A. I don't think that -- I'm not aware of
9 any difference.

10 Q. Is the answer you do not know if the
11 risk is greater or less?

12 A. I don't think there is a difference in
13 the risk.

14 Q. So you do know, and you don't think it's
15 greater?

16 A. I don't think it's greater.

17 Q. Okay. Page 79, line 15: Is the risk of
18 damage to the laryngeal nerve less or greater if
19 entry is on the left? Answer: I don't know.

20 You didn't know when you were under
21 oath. You're under oath today. Why is it today you
22 know, sir?

23 A. Well, I've been in practice, and I've
24 formed that opinion.

25 Q. So when you had this deposition taken

1 December 4th, 1998, you didn't know, and since then
2 you have formed the opinion?

3 A. Yes.

4 Q. You didn't have the training or
5 knowledge or experience prior to December '98 to have
6 that knowledge, then?

7 A. Oh, no, I don't think it's a matter of
8 that.

9 Q. Well, then, if you didn't know it in
10 '98, you didn't know it in '97; correct? Or did you
11 simply forget it?

12 A. Oh, no, that would be correct. No.

13 Q. So when you were operating on Ms.
14 Washburn, you didn't know if entry on the left or the
15 right caused her a greater risk to her laryngeal
16 nerve?

17 A. No, I didn't.

18 Q. And sir, did you discuss on that
19 occasion the risks with Ms. Washburn of entering on
20 the right or the left, not knowing the risks?

21 A. I described the risks of surgery to her.

22 Q. But if you didn't know the risks in that
23 regard, how could you have a discussion about
24 something you didn't know?

25 MR. BLACKWELL: Judge, there's been no

1 foundation laid.

2 THE COURT: I'll sustain that objection.

3 MR. BLACKWELL: The literature is the
4 opposite.

5 MS. COFIELD: Excuse me. Move to
6 strike.

7 THE COURT: I sustained the objection.
8 Let's deal with the question.

9 BY MS. COFIELD:

10 Q. You do admit that your operation on Ms.
11 Washburn was the first cervical fusion revision you
12 did all alone?

13 A. Yes, it was.

14 Q. You never at any time, sir, intended to
15 operate at C7-T1; correct?

16 A. I performed Ms. Washburn's surgery at
17 the C6-7 level.

18 Q. Could you answer the question, sir?

19 A. That's my answer.

20 Q. Did you, sir, in any regard at any time
21 intentionally or unintentionally operate at C7-T1?

22 A. No, I didn't.

23 Q. Did you the entirety of the time you
24 were there in the operative field, were you confined
25 by the vertebral bodies of C6-C7?

1 A. Yes. That was the level I was operating
2 on.

3 Q. You, sir, do know that the prior
4 operation by Dr. Richmond involved absolutely no
5 hardware, no plates and no screws; correct?

6 A. Oh, yes.

7 Q. The first person to put any plates and
8 any screws in Ms. Washburn's spine was you?

9 A. Yes.

10 Q. You have reviewed the post-op films that
11 you ordered; correct?

12 A. Yes, I have.

13 Q. Those include the doctors or consultants
14 that you ordered, Dr. Stitik, Frederick Stitik;
15 correct?

16 A. I believe he read the X-ray that I
17 ordered.

18 Q. And you looked at it, didn't you?

19 A. I looked at all of her X-rays.

20 Q. And you did see plates extending through
21 T1 as read by the radiologist?

22 A. No. My operation was at C6-C7.

23 Q. Can you please explain, sir, how the
24 radiologists see hardware and fusion at C7-T1 and you
25 don't?

1 MR. BLACKWELL: I'm going to object to
2 that, Your Honor.

3 THE COURT: I'll sustain that in terms
4 of -- you can ask for an explanation, but that's not
5 what's been said so far.

6 BY MS. COFIELD:

7 Q. You are aware that the MRI and the CT
8 and the plain films, other radiographs say there is
9 an anterior fusion at C7-T1; right? You're aware of
10 that?

11 A. I'm not aware of any MR that says that.

12 Q. Oh, just the CT and the radiograph or
13 just the radiograph?

14 A. I'm not aware of any CTs either. I saw
15 a radiology report that said that.

16 Q. How many?

17 A. Oh, you would have to check the record.

18 Q. More than one?

19 A. You would have to check the record.

20 Q. Okay. Do you want to check the record?
21 We'll check the record.

22 THE COURT: Just continue your
23 examination. Unless you've got additional ones that
24 are there, go ahead.

25 MS. COFIELD: I do, sir. I have three

1 of them.

2 BY MS. COFIELD:

3 Q. The readings of 9-25-97 by Dr. Stitik,
4 9-28-97 by Dr. Stitik, and 10-31 by Dr. Nguyen, if we
5 are pronouncing that correctly, and I will show you
6 those readings.

7 Here is Dr. Nguyen's reading. Would you
8 please read that out loud?

9 A. Again, note is made of fusion in the
10 lower cervical spine. By history it is C6-7. The
11 superior screws are projecting over the C6-7 disk
12 space. The inferior screw is projecting over the
13 inferior aspect of the T1 vertebral body.

14 The bony details are not well evaluated
15 due to overlying soft tissue. The alignment appears
16 normal. No paravertebral soft tissue swelling.
17 Minimal osteophytes in the C4 and 5 are again noted.
18 No significant interval change as above.

19 Q. Okay. So there is a screw projecting
20 over the inferior aspect of T1 vertebral body, but
21 you didn't intend to be at T1 at all, did you?

22 A. I didn't perform the surgery there, no.

23 Q. Who did, if you didn't?

24 A. If you're asking me to explain this
25 report, I can't do that. You will have to ask the

1 radiologist.

2 Q. What is the date of the report, sir?

3 A. 10-31.

4 Q. Whose care was she under on 10-31-97?

5 A. Mine.

6 Q. Did you order that film?

7 A. I believe I did.

8 Q. Did you read that film?

9 A. Yes, I did.

10 Q. Did you ever go to the radiologist to
11 say I don't know what screws you're seeing at T1,
12 since I didn't put any there and none were there
13 before?

14 A. No, I didn't.

15 Q. Did you ever inquire in any regard of
16 anyone?

17 A. Inquire what?

18 Q. To reconcile the inconsistency that if
19 you didn't put it there, how come the radiologist
20 sees it there?

21 A. No. I didn't question the report.

22 Q. Anybody in the operating room put the
23 screws in other than yourself?

24 A. No. I placed the screws.

25 Q. Anybody put the plate in other than

1 yourself?

2 A. No.

3 Q. Here is Dr. Stitik's immediate post-op,
4 9-25, ordered by yourself; correct, sir?

5 A. Yes, this report is from 9-25.

6 Q. And that report is immediate post-op;
7 correct?

8 A. Yes.

9 Q. And would you please read what it says
10 about the fusion at what levels?

11 A. C6-7 and C7-T1.

12 Q. So post-op Dr. Stitik sees fusion on the
13 two separate levels; correct?

14 A. That's his report.

15 Q. The consent you obtained from Ms.
16 Washburn was for one level; correct?

17 A. Correct.

18 Q. You only intended to be at one level;
19 correct?

20 A. I performed the operation at one level.

21 Q. And nobody else operated on her during
22 the 9-25 procedure but yourself; correct?

23 A. That is correct.

24 Q. And you do know that she pre-operatively
25 did not have a fusion at C7-T1. You were there to

1 revise Dr. Richmond's C6-7.

2 A. I was there to revise the C6-7
3 pseudoarthrosis.

4 Q. Did you ever tell her from any of the
5 pre-operative films you had taken, and you took a
6 bone scan and you took several cervical -- excuse me.
7 You took a CT, and you took several radiographs.

8 Any one of those films, a C-spine, MR or
9 plain cervical film or the bone scan pre-op, any one
10 of those show C7-T1 was damaged, injured, diseased,
11 and she needed repair and you told her that?

12 A. Not that I'm aware of.

13 Q. And there was, therefore, no medical
14 reason that you knew of to be operating at C7-T1?

15 A. No. I didn't perform the operation
16 there.

17 Q. Again, sir, if you didn't, who did?

18 MR. ALLEN: Objection, Your Honor. It's
19 argumentative.

20 THE COURT: Well, it is, but you can
21 answer it if there is somebody. I think I've
22 understood him to say there was no operation
23 performed there. You may have other evidence to the
24 contrary.

25 MS. COFIELD: I do, and he is an adverse

1 witness.

2 THE COURT: Well, you've treated him
3 that way.

4 And please, ladies and gentlemen of the
5 jury, that's not the court's -- that's from a legal
6 stance in terms of the cross-examination.

7 MS. COFIELD: Thank you, sir.

8 THE COURT: In any event, you may answer
9 the question.

10 BY MS. COFIELD:

11 Q. Who did that?

12 A. I'm unaware of anyone else operating on
13 Ms. Washburn except myself.

14 Q. Do you have any explanation for the jury
15 as to why two different radiologists see a fusion at
16 a different vertebral level than your site of
17 operation?

18 A. I don't have any opinion on that.

19 MR. BLACKWELL: Judge, I'm going to
20 object. First of all, I'm going to object that Dr.
21 Nguyen's report does not say a fusion at C7-T1. Dr.
22 Nguyen's report says there is a fusion at C6-7.

23 The only thing that Dr. Stitik says is
24 that there is a plate at C7-T1 and fusion, but both
25 radiologists disagree with each other on that.

1 MS. COFIELD: Your Honor, I had him read
2 a fusion -- the screws are Dr. Nguyen's, but a fusion
3 is Dr. Stitik's.

4 THE COURT: Slow down. There was a
5 question. The question had fusion in it as to both.
6 Okay?

7 MS. COFIELD: It didn't intend to.

8 THE COURT: Yes, it did. Okay. Have we
9 clarified that one report says fusion and one report
10 doesn't?

11 BY MS. COFIELD:

12 Q. And Dr. Stitik then later, and you
13 ordered it on 9-28, correct, did another reading?

14 MR. BLACKWELL: I further object that
15 she is using the word fusion and plate synonymous.

16 MS. COFIELD: I am not, Your Honor. I'm
17 asking him to look at a report.

18 THE COURT: All right. I'll overrule
19 the objection. He read the report. The words are
20 what they are.

21 A. Yes, I've seen this film.

22 BY MS. COFIELD:

23 Q. You've seen that film, and you ordered
24 that film; correct?

25 A. Yes, I did.

1 Q. And that is a second film which talks
2 about a fusion at C7-T1; correct?

3 A. That is the radiologist's read.

4 Q. Did you when you reviewed that report go
5 talk to the radiologist to say I didn't intend to
6 fuse C7-T1? Where is it that you see it?

7 A. No, I didn't.

8 Q. Did you look at the film?

9 A. Yes, I've seen the film.

10 Q. But you didn't see the fusion?

11 A. No.

12 Q. And how many years of training had you
13 had in reading films as of September of 1997?

14 A. I had been looking at my own patients'
15 films throughout my training, throughout medical
16 school, residency, and then in my fellowship. I
17 always made it a point to look at my patients' films
18 myself.

19 Q. Well, did you have a learning curve to
20 reading and interpreting them, or did you just look
21 at them and understand them immediately?

22 A. Oh, no, it takes practice.

23 Q. When you were learning, and learning
24 takes practice, you acquire skill. You get better at
25 it the more you do it, obviously; correct?

1 A. Correct.

2 Q. That's true in all aspects of medicine,
3 is it not?

4 A. Yes, it is.

5 Q. So you have more skill today and more
6 knowledge than you had yesterday?

7 A. Yes, I do.

8 Q. And you had as of the date of your
9 deposition and today, the year 2000, no facts to
10 dispute the readings that we have just discussed or
11 no knowledge that would explain or reconcile them, do
12 you?

13 A. I think that if you want to talk to the
14 radiologist about his reports, that would be more
15 appropriate. I can't tell you why he read those
16 films the way he did.

17 Q. Well, you have graduated as of 1997 from
18 your residency, and there's been four more years of
19 practice. You tell me you had five years of reading
20 films during that time, so that's nine years.

21 During the time you were in medical
22 school you must have read some films; correct?

23 A. Oh, yes.

24 Q. And you were in an internship for how
25 many years, two years before the residency?

1 A. For one year.

2 Q. One year? Okay. Four years of medical
3 school?

4 A. Yes.

5 Q. Courses in reading radiology films?

6 A. Yes.

7 Q. So four years of medical school, one
8 year of internship, five years of residency, that's
9 ten, and now we have another four years, 14 years of
10 reading radiology films.

11 You did review the radiology films
12 before you came here today, knowing as you knew
13 because you were asked in your deposition to
14 reconcile what you say you did with what the
15 radiologists say you did, didn't you?

16 MR. ALLEN: Object to form. The
17 question is so compound.

18 THE COURT: What is the question?

19 MS. COFIELD: I will be glad to rephrase
20 it.

21 BY MS. COFIELD:

22 Q. You did look at those films that we have
23 just discussed, those three films after this suit was
24 filed; correct?

25 A. Oh, yes, I did.

1 Q. And you looked at those films before
2 your deposition was taken, did you not?

3 A. I don't recall if I did or not before
4 the deposition.

5 Q. You've not looked at -- let me ask you
6 differently. Have you looked at them since then?

7 A. Yes, I have.

8 Q. And you looked at them before you came
9 to court?

10 A. I did.

11 Q. And you've had an extra, since you
12 operated, four more years of experience since you
13 couldn't reconcile them in 1997 with Dr. Stitik.

14 Did you find any ability in those
15 additional four years and your recent review to
16 reconcile what they saw and what you say you did?

17 A. What I can tell you is I did perform the
18 surgery at the C6-7 level.

19 Q. I believe you, sir. Did you also
20 perform surgery at C7-T1?

21 A. No.

22 Q. Do you have any explanation how it
23 happened?

24 MR. ALLEN: Objection, Your Honor. It's
25 been asked and answered.

1 THE COURT: I'm going to sustain that.
2 We've been over this several times. Move on, Ms.
3 Cofield.

4 BY MS. COFIELD:

5 Q. Are you boarded today?

6 A. No, I'm not boarded yet.

7 Q. And what is the requirement for being
8 boarded?

9 A. You have to graduate from a residency
10 program. You have to practice for a period of one
11 year, then have three months of follow-up on your
12 patients in addition to that one year.

13 You have to pass a written board
14 examination while you're in your residency before you
15 leave, and then you sit for an oral examination after
16 that.

17 Q. And have you sat for the oral yet?

18 A. No.

19 Q. Have you sat for the written?

20 A. Yes, I have.

21 Q. How many times?

22 A. Twice.

23 Q. Why did it take two times?

24 A. I passed it the second time.

25 Q. And while you were in your residency --

1 excuse me, your fellowship as of July 1st through
2 September 25th, under whose training or tutelage were
3 you?

4 A. Oh, when I was in my fellowship I was
5 training under Dr. Klara. He was my professor.

6 Q. Your professor?

7 A. Yes.

8 Q. Why was Dr. Klara your professor? Did
9 you ever go to EVMS with him?

10 A. Oh, yes. I was enrolled in my
11 fellowship with EVMS.

12 Q. When you reported to work on a Monday
13 through Thursday basis, did you ever go to the
14 medical school?

15 A. Oh, yes. I went to Norfolk General
16 Hospital to see patients.

17 Q. Sir, did you ever go in to sit in
18 classes at the medical school, not did you go to the
19 hospital?

20 A. No. Fellows don't sit in classes in the
21 medical school.

22 Q. You were solely affiliated with Dr.
23 Klara and Dr. Ray, correct, his then partner before
24 retirement?

25 A. I trained under both Dr. Klara and Dr.

1 Ray during my fellowship.

2 Q. Then the answer is yes?

3 MR. BLACKWELL: Objection, Your Honor.

4 MS. COFIELD: Well, I'm confused.

5 BY MS. COFIELD:

6 Q. Did you not train under both -- excuse
7 me, exclusively under Dr. Klara during your
8 fellowship and treat both Drs. Klara and Ray's
9 patients?

10 A. Yes, Dr. Klara and Dr. Ray's patients.

11 Q. Who between those two was your mentor,
12 your teacher?

13 A. They were both my mentor.

14 Q. Both?

15 A. Yes.

16 Q. Not just Dr. Klara exclusively?

17 A. No.

18 Q. And that was a true statement until
19 when, sir?

20 MR. BLACKWELL: Objection to form, Your
21 Honor.

22 BY MS. COFIELD:

23 Q. When did Dr. Ray retire? I'm sorry. I
24 should have completed the thought.

25 A. I don't know when Dr. Ray retired.

1 Q. Did he retire while you were there?

2 A. I don't know.

3 Q. Was Dr. Ray there on a Monday through
4 Friday basis?

5 A. He wasn't there every day, but he was
6 there frequently.

7 Q. Was there anybody between Dr. Ray or Dr.
8 Klara who was mainly your supervisor?

9 A. Well, I just said that I trained under
10 Dr. Klara and Dr. Ray. I didn't have other
11 supervisors.

12 Q. I asked between the two of them, was one
13 of them primarily?

14 A. Oh, I spent more time with Dr. Klara.
15 He was a much busier surgeon.

16 Q. But the entirety of the time you were
17 affiliated with Dr. Klara's practice? And when I say
18 the entirety of the time, from the time you arrived
19 on July 1 through the time you left, which was what,
20 March of '98?

21 A. Yes, March.

22 Q. The entirety of the time you were
23 affiliated with Dr. Klara's practice?

24 A. I was in my fellowship at EVMS, but I
25 worked with Dr. Klara and Dr. Ray. They were my

1 professors.

2 Q. And you solely, as far as privileges
3 went, operated on Dr. Klara and Dr. Ray's patients?

4 A. Yes.

5 Q. Okay.

6 MS. COFIELD: Excuse me. Could we
7 approach for a minute?

8 (Counsel approached the bench, and an
9 off-the-record discussion was held.)

10 MS. COFIELD: And I have some clean
11 copies somewhere around here I'm going to have to
12 find.

13 BY MS. COFIELD:

14 Q. I am showing you an office visit of
15 9-22-97 at Dr. Klara's offices; correct?

16 A. That's correct.

17 Q. That is an office visit for Janice
18 Washburn; correct?

19 A. Yes, it is.

20 Q. And who signed off on it?

21 A. Myself and Dr. Klara both signed the
22 note.

23 Q. Turn the page, please. What does that
24 reflect?

25 Well, let me just put these in front of

1 you and make your life simpler. 9-17, is that an
2 office visit at Dr. Klara's office?

3 A. Yes, it is.

4 Q. For Janice Washburn?

5 A. Yes.

6 Q. Who signs off on it?

7 A. That's my signature on it.

8 Q. Who saw her on that occasion?

9 A. I saw her.

10 Q. Who treated her on that occasion?

11 A. I did.

12 Q. Were you alone, or were you doing it
13 under the auspices of Dr. Klara and/or Ray, the
14 corporation's tutelage during your fellowship?

15 MR. ALLEN: I'm going to object to form,
16 Your Honor. The two alternatives are apples and
17 oranges. Whether he was alone or whether he was
18 doing it under some auspices or not are two
19 alternatives that --

20 MS. COFIELD: I was trying very hard to
21 stay within the court's ruling.

22 THE COURT: Okay. Well, you can answer
23 the question, just whether you did it yourself or if
24 somebody else was with you.

25 A. I don't remember if anyone else was in

1 the office that day. I did this while I was in my
2 fellowship with EVMS. That is my signature.

3 BY MS. COFIELD:

4 Q. Where were you physically on that
5 occasion?

6 A. I was in Dr. Klara's office.

7 Q. Who were you treating on that occasion?

8 A. Janice Washburn.

9 Q. Who was the attending physician for
10 Janice Washburn?

11 A. That was Dr. Klara.

12 Q. Whose patient was Janice Washburn?

13 A. Dr. Klara's patient.

14 Q. Did she ever come to you outside of Dr.
15 Klara's office?

16 A. No.

17 Q. Were you ever treated by her outside Dr.
18 Klara's supervision?

19 A. I'm sorry. Can you repeat that?

20 Q. Were you ever treated -- was she ever
21 treated by you outside of Dr. Klara's supervision?

22 A. No.

23 Q. We go to 9-22-97. Whose signatures are
24 there, sir?

25 A. Mine and Dr. Klara's.

1 Q. What were you doing on that occasion?

2 A. I was seeing her in the office.

3 Q. With whom, sir?

4 A. With Dr. Klara.

5 Q. And her is who?

6 A. I'm sorry?

7 Q. You said I was seeing her. Her is who?

8 A. Ms. Washburn.

9 Q. Were you doing so in conjunction with
10 and under the supervision of Dr. Klara?

11 A. Yes, I was.

12 Q. Next page, sir, 10-10-97 office visit,
13 what were you doing, and where were you doing it?

14 A. I was again seeing Ms. Washburn in Dr.
15 Klara's office.

16 Q. Were you doing so under his supervision
17 and guidance?

18 A. Yes.

19 Q. Were you also treating her on that
20 occasion?

21 A. Yes. Each time I see a patient I
22 consider myself to be treating them.

23 Q. This is subsequent to the operation,
24 isn't it? It's follow-up care?

25 A. Yes, it is.

1 Q. Do you have any referrals for her on
2 that occasion?

3 A. Do you mean referrals to other doctors?

4 Q. Correct, sir.

5 A. Not that I've noted here.

6 Q. On that occasion. You might not have
7 noted it there, but on 10-10-97.

8 A. I may have written it on a prescription
9 blank or something like that, but if it's not in the
10 record, then I didn't refer her.

11 Q. Do you recall on 10-10-97 you admitted
12 her to Virginia Beach General Hospital?

13 A. Can I see the record of that?

14 Q. Excuse me, no. On 10-10-97 you first
15 referred her for a feeding tube to Dr. Berger. Do
16 you recall that?

17 A. If you can show me the records, I can
18 confirm that.

19 Q. Well, I'm asking you, first of all,
20 independent recollection, sir.

21 A. No. I would have to refer to the chart.

22 Q. You don't? Okay. Do you remember
23 independently that she was referred to Dr. Berger on
24 10-10-97 or of a date close in time?

25 A. Oh, yes, I do.

1 Q. Okay. I'll represent to you it was
2 10-10-97. And you referred her for treatment to Dr.
3 Berger why, sir?

4 A. I recall it was for placement of a
5 feeding tube.

6 Q. She needed a feeding tube why, sir?

7 A. She needed it to obtain feedings while
8 she was being treated for difficulty swallowing.

9 Q. Did she need a feeding tube during the
10 time you treated her from September '97 until October
11 of '97, at any point in that interval?

12 A. When she was referred, that's when it
13 was determined that she needed that.

14 Q. You saw her August of '97, did you not?

15 A. Yes.

16 Q. Did she have a feeding tube in her?

17 A. No, she didn't.

18 Q. September until the time you operated,
19 September 24th, '97, did she have a feeding tube in
20 her?

21 A. No, she did not.

22 Q. Did she sound like you heard her sound,
23 that degree of hoarseness when you saw her first in
24 August of 1997?

25 A. No.

1 Q. How about up to September 24th, '97, did
2 she sound like this?

3 A. No.

4 Q. You referred for a feeding tube to Dr.
5 Berger. That is treatment, is it not, a referral?

6 A. Yes, it is.

7 Q. And you did so in conjunction with Dr.
8 Klara, did you not?

9 A. I did that in conjunction with Dr.
10 Klara.

11 Q. And talking about in conjunction with
12 Dr. Klara, it is true, is it not, that before you
13 operated you discussed whether or not she was a
14 candidate for surgery with Dr. Klara; correct?

15 A. Yes, I did.

16 Q. And the two of you in conjunction and
17 consultation came to the decision that she was a
18 candidate; correct?

19 A. I had told Ms. Washburn that her neck
20 and arm pain would probably respond to surgery. Then
21 I presented her case to Dr. Klara, and he said that
22 that was correct.

23 Q. And the two of you at that time, that is
24 pre-operatively, reviewed all of those films that I
25 just discussed with you, that is, the bone scan, the

1 plain film, and the MR?

2 MR. ALLEN: I'm going to object to the
3 form of the question, Your Honor. She's discussed a
4 number of films with Dr. Borden, both pre-op and
5 post-op.

6 THE COURT: Well, she mentioned three
7 specifics, I think. So if there's specifics that you
8 can identify, then you can answer the question.

9 BY MS. COFIELD:

10 Q. Sir, did you look at those same films,
11 or did you look at all of them with him?

12 A. I reviewed all of those films myself,
13 and I believe Dr. Klara saw the films also.

14 Q. And after referring her to Dr. Berger,
15 Dr. Berger called you, did he not?

16 A. I don't recall.

17 Q. Do you know if the operation or the
18 attempt to insert the feeding tube was successful?

19 A. I believe it was unsuccessful. She
20 needed to be referred to other doctors for placement
21 of that tube.

22 Q. And you knew that, correct, because you
23 were called? You weren't present when that occurred.

24 A. No, I believe I was.

25 Q. You were present, or you were called?

1 Which?

2 A. Where?

3 Q. When the feeding tube insertion was
4 unsuccessful, were you present?

5 A. No.

6 Q. So you were called subsequently, and you
7 learned of that fact?

8 A. I probably was. That's probably how I
9 was notified.

10 Q. And here, sir, is your admission of
11 10-10-97 to Virginia Beach General Hospital. That is
12 your admission note on Ms. Washburn because of the
13 failed feeding tube; correct? Page 2, if you want
14 to --

15 A. That's okay. I'm reading this.

16 Q. Okay. Is that your signature on page 2?

17 A. Yes, that's my signature.

18 Q. What was your decision on 10-10-97, that
19 is, your diagnosis as to why she needed to be
20 admitted to the hospital?

21 A. She needed to receive some method of
22 feedings because she couldn't tolerate a diet. She
23 was vomiting.

24 Q. What are your diagnoses is my question,
25 sir?

1 A. Oh, aspiration and malnutrition. Ms.
2 Washburn --

3 Q. Did you tell Dr. Klara that you had
4 decided she was suffering from malnutrition and
5 aspiration post-operatively?

6 A. Oh, yes. Dr. Klara -- I had told him
7 that there was evidence on the barium swallow of
8 aspiration, and the diagnosis of malnutrition was
9 based on her history when she arrived at the
10 hospital. She had told me that she had been
11 subsisting on a diet of popcorn and cheese.

12 Q. And you discussed whether or not she
13 should be admitted and how she should be treated in
14 consultation with Dr. Klara?

15 A. Yes.

16 Q. And whose decision was it, then, to
17 admit her to the hospital, sir?

18 A. Well, we were in agreement.

19 Q. And after you admitted her to the
20 hospital, she stayed there for two days, and you saw
21 her, did you not?

22 A. Yes, I did.

23 Q. And Dr. Klara saw her, did he not?

24 A. You would have to look at the chart
25 notes to see his notes.

1 Q. Do you know if he came?

2 A. If you can show me the record, I'll tell
3 you.

4 Q. Sure. Here are the progress notes, and
5 right behind the tab that says doctors' orders, you
6 will see those as well. And if I can take this, so I
7 don't lose track of this.

8 MS. COFIELD: While he is looking, sir,
9 I would like to move into evidence the office visits
10 that have been discussed that show both signatures.

11 MR. ALLEN: Which visits are those, Ms.
12 Cofield?

13 MS. COFIELD: I'm sorry. Does Your
14 Honor want to read and then go over -- I don't have
15 them in front of me.

16 THE COURT: Slow down, counsel.

17 MS. COFIELD: Yes, sir. They've been
18 agreed upon exhibits.

19 THE COURT: Well, just show them to
20 counsel so they know what you're putting in.

21 BY MS. COFIELD:

22 Q. Do you see that you saw her?

23 A. Yes.

24 Q. And you treated her?

25 A. I see two notes from myself.

1 Q. And you reported that at least to Dr.
2 Borden, didn't you -- excuse me, Klara, your findings
3 and conclusions?

4 A. I'm sure we discussed it at some point
5 in time.

6 Q. Do you see that he came to see her in
7 those two days?

8 A. I don't see any of his notes here.

9 Q. So if indeed his patient were being seen
10 by the corporation at that time, it was through you
11 alone?

12 A. I can only tell you that my notes are
13 there, and I did see the patient.

14 Q. And he did not, according to the
15 progress notes?

16 A. I don't know. You would have to look at
17 the complete chart and see if he had a note.

18 Q. You've been practicing for quite
19 sometime now, sir. What are progress notes?

20 A. Progress notes are daily notes that are
21 written on a patient.

22 Q. By whom?

23 A. By doctors.

24 Q. Only? Do nurses do progress notes?

25 A. They have notes in a different place in

1 most hospitals.

2 Q. Yes. They're not progress notes;
3 correct? They're nurse's notes.

4 A. Correct.

5 Q. So the only people, and for a reason,
6 allowed to enter what they did, said and saw or
7 treatment to be rendered or ordered in the progress
8 notes section are physicians; correct?

9 A. Yes.

10 Q. If you see a patient and you treat the
11 patient, you record it in the progress note; correct?

12 A. Yes.

13 Q. There are no progress notes for Dr.
14 Klara on those two days; correct?

15 A. Yes.

16 Q. There are on both days from you?

17 A. Yes.

18 Q. So if Dr. Klara's patient, and you've
19 told me he was the attending --

20 A. Uh-huh.

21 Q. -- had any knowledge of his patient's
22 health and well being on those two days, it is
23 because you relayed those facts to him; correct?

24 A. Yes, it would have been.

25 Q. Thank you. Did you then also ask for a

1 consultation on that day?

2 A. Yes, I did.

3 Q. And your consultation you requested was
4 who, sir?

5 A. Dr. Dalton.

6 Q. He is what type of doctor, sir?

7 A. He is a general surgeon.

8 Q. And after two days at Virginia Beach
9 General Hospital, did you then decide to transfer
10 her?

11 A. Yes.

12 Q. Who made that decision, sir?

13 A. Dr. Dalton recommended that we transfer
14 the patient.

15 Q. Did you just transfer Dr. Klara's
16 patient without talking to him?

17 A. I don't recall if we discussed it or
18 not.

19 Q. Do you know if Dr. Dalton did?

20 A. I don't know that.

21 Q. Did you then sign any transfer orders
22 for her?

23 A. I would have to check my notes.

24 Q. Okay. And I will give you the tab
25 between the blue and the green, and tell me if that

1 refreshes your recollection at all, sir, as to who
2 entered the order alone or in conjunction with
3 yourself and Dr. Klara that this patient, his patient
4 be transferred?

5 MR. ALLEN: I'm going to object to the
6 form of the question, Your Honor. I don't think
7 there's been a foundation laid about communication
8 with Dr. Klara.

9 MS. COFIELD: I'm asking him.

10 THE COURT: Well, he can answer the
11 question as to what the -- once he finds the notes,
12 he can answer the question.

13 BY MS. COFIELD:

14 Q. Any of that refresh your recollection,
15 sir, as to how it came to be that she was
16 transferred?

17 A. Yes. I wrote the transfer order myself.

18 Q. And I ask you again, sir, would you have
19 transferred Dr. Klara's patient without consulting
20 him? Did you have that authority?

21 A. I was expected to take care of Dr.
22 Klara's patients, so I don't know if I did discuss
23 that with him or not.

24 Q. So if Janice Washburn got transferred
25 from Virginia Beach General up to MCV without you

1 consulting, you did that on the authority of Dr.
2 Klara to have a blanket such authority to act?

3 A. If Dr. Klara was in town, then I would
4 have consulted with him. If he was out of town, then
5 I would have handled that myself.

6 Q. Do you know if he was in or out of town?

7 A. No, I don't recall.

8 Q. So if he were out of town still -- and
9 he was out of town on vacation on September 25th;
10 right?

11 A. Yes.

12 Q. You don't know when he returned?

13 A. I don't recall.

14 Q. But the whole time that he was out, you
15 were seeing his patients and treating his patients,
16 including Ms. Washburn; right?

17 A. Yes.

18 Q. And you could treat them as you saw fit
19 in that interval while he was out of town?

20 A. If there was a decision that I needed to
21 discuss with someone, I would have called Dr. Ray.

22 Q. Otherwise, you just --

23 A. Otherwise, I would have taken care of
24 any situation that I was comfortable handling.

25 Q. And you did that with the pre-existing

1 authority given to you by Dr. Klara for his patients?

2 A. Yes.

3 MS. COFIELD: May I please have those
4 documents that I gave you back? Thank you.

5 BY MS. COFIELD:

6 Q. And we also have on the letterhead of
7 Dr. Klara, M.D., P.C., a 10-8 swallowing study -- or
8 excuse me, an office note, I apologize, about a
9 swallowing study. Is that signed by both of you?

10 A. Yes, it is.

11 Q. Did you or he order it or in
12 conjunction?

13 A. I would have to check the order.

14 Q. Do you want to look at the barium
15 swallow?

16 A. Yes.

17 Q. Go ahead, sir. It's behind Tab 2,
18 X-rays. Just keep going. Is that it? I'm doing
19 this upside down.

20 A. No, that's an MRI.

21 Q. There's the barium swallow. Does it
22 refresh your recollection, sir?

23 A. I ordered the barium swallow.

24 Q. And while you were ordering the barium
25 swallow on Ms. Washburn, you were treating Dr.

1 Klara's patient?

2 A. Yes.

3 Q. And you were doing so with his
4 authority?

5 A. Yes, I was.

6 Q. And on 10-8-97 the swallowing study is
7 recorded -- or excuse me. A referral to an
8 otolaryngologist for a laryngoscopy was recommended
9 by you and Dr. Klara; correct?

10 A. Yes.

11 Q. And on 10-6-97 you specifically gave her
12 a referral for speech therapy, for swallowing
13 evaluation and dietary advice; correct?

14 A. Yes, I did.

15 Q. And again, her is Janice Washburn?

16 A. Yes.

17 Q. And her is Dr. Klara's patient?

18 A. Absolutely.

19 Q. And you're acting within the authority
20 given you?

21 A. Yes.

22 Q. 12-2-97, sir, another office visit with
23 the two of you. It says I gave her a prescription
24 for speech therapy. Is that the prescription we're
25 referencing? No, it can't be, because that's

1 October.

2 Did you, then, or did Dr. Klara, because
3 it's signed by both of you? Who is the I?

4 A. I wrote this note.

5 Q. Did you talk about it with Dr. Klara, a
6 referral to an otolaryngologist, a referral for a
7 swallowing evaluation, a referral for speech therapy?

8 A. I probably did.

9 Q. And finally, on January 16th, '98, you
10 and Dr. Klara in conjunction see her; correct? It's
11 signed by both of you; correct?

12 A. Yes, I saw her on this date.

13 Q. Signed by both of you; correct?

14 A. Yes.

15 MS. COFIELD: At this time I would like
16 to move these office records.

17 THE COURT: All right. They will be
18 received as Plaintiff's 15.

19 (The office records of Drs. Klara and
20 Borden were marked Plaintiff's Exhibit
21 No. 15 and received in evidence.)

22 MS. COFIELD: And then 16, the
23 prescription for speech. They're listed separate,
24 unless you want to put it together. I don't care.

25 THE COURT: The prescription will be

1 Plaintiff's 16.

2 (The prescription for speech therapy was
3 marked Plaintiff's Exhibit No. 16 and
4 received in evidence.)

5 BY MS. COFIELD:

6 Q. And I am showing you the operative
7 report. That was done by you on 9-25-97; correct?

8 A. Yes, this is it.

9 Q. Who does it show as the surgeons?

10 A. It shows myself and Dr. Klara.

11 Q. Why is that?

12 A. Excuse me?

13 Q. Why do you have both names listed?

14 A. Oh, because Dr. Klara was my professor,
15 and I always put the professor's name on the
16 operative report with mine.

17 Q. And it's listed opposite what
18 designation, attending?

19 A. It says surgeons.

20 Q. Surgeons? We know just you were there,
21 but you were there treating Ms. Washburn who was Dr.
22 Klara's patient?

23 A. Yes.

24 Q. He was the attending; correct?

25 A. He was the attending, yes.

1 MS. COFIELD: I would tender this.

2 THE COURT: All right. That will be
3 Plaintiff's 17.

4 (The operative report, 9-25-97, was
5 marked Plaintiff's Exhibit No. 17 and
6 received in evidence.)

7 MS. COFIELD: Your Honor, out of
8 courtesy, because it's apparent that I'm going to be
9 a while longer and obviously until 5 o'clock, can I
10 go excuse the two people waiting outside or have the
11 bailiff do so?

12 THE COURT: You certainly may. If you
13 want to excuse them, that's fine.

14 THE BAILIFF: What time should I tell
15 them to come back?

16 MS. COFIELD: Sir, 9 o'clock?

17 THE COURT: That's what time the court
18 plans to start.

19 THE BAILIFF: Your Honor, Dr. Neal
20 cannot come back tomorrow or the next day.

21 THE COURT: Well, that's --

22 MS. COFIELD: Can I talk to him for a
23 moment? I'm sorry. I didn't obviously know --

24 THE COURT: Okay. I understand. Let's
25 take just a quick break, because we would like to

1 finish this this evening. But if not, we'll get it
2 in the morning.

3 You may step down, Doctor.

4 (Short recess.)

5 THE COURT: All right. Dr. Neal, you
6 can stay right there. You're not going to go back on
7 the stand now.

8 It's taken a different twist, and
9 counsel has represented to the court that we cannot
10 get to you before the court is going to quit tonight,
11 so it's going to require that you be back here
12 tomorrow.

13 DR. NEAL: I can't do it, Judge. I told
14 her before I was free this afternoon, and tomorrow is
15 out. I'm having heart surgery Friday myself, and
16 I've had all my classes moved around and everything
17 else to take exams and makeup labs and everything
18 else.

19 So there's no way I can do it. I can do
20 it tonight, but I've been waiting out there for two
21 hours.

22 THE COURT: The court is not going to do
23 it tonight. If there is a heart surgery involved in
24 it, I can't speak to that. I can't run but so much.

25 But I'm going to recognize you, Dr.

1 Neal, which means that you're bound to the
2 Commonwealth for \$250 if you don't return tomorrow.
3 You're in for that sum to the court, and you're
4 required to be back. Thereafter, the court will have
5 to deal with it as deemed appropriate at that point
6 in time, as will your counsel. Okay?

7 And thereafter, I say we'll deal with it
8 then. Raise your right hand. You've bound yourself
9 under the Commonwealth for the sum of \$250 for your
10 return tomorrow morning, at what time, Ms. Cofield?

11 MS. COFIELD: Your Honor, if you want to
12 start earlier, it doesn't matter.

13 THE COURT: I'm starting at 9 o'clock.
14 I don't know where the other testimony is going to
15 be, so I'm perfectly happy to require Dr. Neal to be
16 here at 9 o'clock.

17 MS. COFIELD: That's fine, sir.

18 THE COURT: All right, 9 o'clock
19 tomorrow morning. You're excused.

20 All right. Let's bring the jury back,
21 and I'll talk with counsel after this is over.

22 (The jury entered the courtroom, and the
23 following proceedings were held:)

24 THE COURT: All right. Dr. Borden, you
25 may return to the stand, please.

1 BY MS. COFIELD:

2 Q. When you were operating on Ms. Washburn,
3 you made a decision to enter on the right because Dr.
4 Klara had instructed you to do so; correct?

5 A. That's correct.

6 Q. Are there any other mechanical features
7 of that operation that were done in accordance with
8 instructions given to you by Dr. Klara?

9 A. I did the operation as I had always done
10 them with Dr. Klara.

11 Q. Is the answer that was the only
12 instruction? I mean mechanically it was to enter on
13 the right. Was there any other instruction that Dr.
14 Klara gave you about this operation in his absence?

15 A. No.

16 Q. And it is true, isn't it, that you did
17 not discuss the risk of permanent hoarseness or
18 permanent aspiration pre-operatively with Ms.
19 Washburn?

20 A. That is incorrect. I did discuss the
21 risks of surgery with Ms. Washburn.

22 Q. I asked you if those risks, when you
23 made that discussion, included permanent hoarseness
24 or permanent aspiration?

25 A. I didn't say that they could be

1 permanent. I said they could occur.

2 Q. Did you say they could be temporary?

3 A. I didn't draw a distinction. I said
4 they could occur.

5 Q. Sir, it is true, is it not, that you at
6 no time told Ms. Washburn that the risks of this
7 surgery included permanent hoarseness or aspiration?

8 A. As I said, I told her that --

9 Q. I'm sorry. I couldn't hear you, sir.

10 A. As I said, I told her about the risks.
11 I didn't use the word permanent.

12 Q. Okay. Now, let's go to those films, the
13 pre-operative films, sir, first the plain cervical
14 film, and that's dated 7-8-97. Do you need that in
15 front of you, or do you have one there?

16 Oh, excuse me. I am sorry. I gave you
17 an office visit. I apologize. Go to your office
18 visit of August 1st, '97. Can you find that there,
19 or would you like some help? It talks about plain
20 cervical films.

21 THE COURT: Just wait a second and see
22 if he can find it.

23 MS. COFIELD: There you go. No, you
24 passed it.

25 MR. ALLEN: I'm just going to object to

1 the form, Your Honor, because this is not his office
2 visit. It's Dr. Klara's, but he certainly can
3 testify about it.

4 MR. BLACKWELL: Same objection.

5 MS. COFIELD: I'll be glad to --

6 THE COURT: Well, let's find out what
7 the question is, and then we'll deal with it.

8 BY MS. COFIELD:

9 Q. Sir, you did review the entire chart
10 when you first saw her; correct? You've told us
11 this.

12 A. Yes, I saw this note.

13 Q. And when you reviewed it, you saw the
14 August 1st, 1997, note; correct?

15 A. Yes, I did.

16 Q. It does talk, does it not, about plain
17 cervical films that are inadequate because they don't
18 show anything below the level of C6?

19 A. Yes, and I read that.

20 Q. Okay. But it also did show on those
21 films that there was no evidence of acute
22 dislocation; correct?

23 A. For the levels that were present on the
24 film, you could tell that.

25 Q. Right. And an acute dislocation really

1 means what? A herniation, disk out of place?

2 A. Can you show me where you see that on
3 the note?

4 Q. Sure. I can't do it upside down.

5 THE COURT: Just get the book and come
6 on around, Ms. Cofield.

7 MS. COFIELD: All right.

8 BY MS. COFIELD:

9 Q. There you go, radiographs. It does say
10 the films that she brought in don't even show
11 anything below C6, but what you can see shows no
12 evidence of acute dislocation; correct?

13 A. That's correct.

14 Q. And no acute dislocation means nothing
15 out of place; right?

16 A. It means that the vertebral bodies are
17 not disconnected. A dislocation would be a bad
18 subluxation where the vertebral bodies weren't lined
19 up and weren't connected, they had slipped away from
20 each other.

21 Q. And the MR/CT of 8-14, can you find that
22 easily, or would you like some help?

23 A. Yes.

24 Q. Okay. The MRI that you were looking at
25 before you operated showed there was a normal

1 post-operative appearance at C5 and 6; correct?

2 A. The report is incorrect. There was no
3 post-operative change at C5 and C6. The radiologist
4 misdictated this report. There was post-operative
5 change at C6-7.

6 Q. Sir, this is pre-op --

7 A. Yes.

8 Q. -- right? To your operation, I mean,
9 post-op to Dr. Richmond's.

10 A. Yes.

11 Q. Okay. Just so we're --

12 A. But Dr. Richmond had already operated,
13 so this report is misdictated. She didn't have any
14 surgery at the C5-6 level as this radiologist says.

15 Q. Okay. I see what you're saying. The
16 area that he was looking at would have had to have
17 been you're saying C6-7?

18 A. When I looked at the MRI myself, I saw
19 it, and it was at C6-7.

20 Q. And at C6-7 where Dr. Richmond had
21 operated, it looked the way it should after an
22 operation. That's what they mean by normal post-op.
23 There were changes, but changes from the procedure?

24 A. An MRI isn't helpful for evaluating
25 pseudoarthrosis, because you're looking for bone,

1 and an MRI won't show you bone. It only shows soft
2 tissue, like disks and nerves.

3 Q. Then why did you get it?

4 A. A better study is an X-ray or a CAT
5 scan --

6 Q. Excuse me, sir. Why did you get it,
7 then?

8 A. -- or a bone scan.

9 THE COURT: Let him finish his answer,
10 and then you can --

11 A. So one of the other three studies would
12 have been better, either a CAT scan, a plain X-ray
13 like I obtained, or a bone scan like I obtained.
14 Those would all show evidence of pseudoarthrosis, but
15 this wasn't helpful for that particular situation.

16 THE COURT: All right. Now your
17 follow-up, Ms. Cofield.

18 MS. COFIELD: Thank you, sir.

19 BY MS. COFIELD:

20 Q. You obtained a CAT scan
21 pre-operatively?

22 A. No, I didn't.

23 Q. And you didn't obtain any films
24 pre-operatively; right?

25 A. No, actually, I did. When I saw her for

1 the first time, I looked at all of her films that
2 were available, and that included that film that just
3 went down to C6 that was inadequate.

4 Since I was looking for the C6-7 level
5 that I couldn't see on that film, I took her down the
6 hall to the radiologist, and I got some special
7 swimmer's views with flexion and extension to check
8 for movement at that C6-7 level.

9 Q. And what did those swimmer's views show,
10 sir?

11 A. There was no movement at that level
12 but --

13 Q. Excuse me. What do you mean by no
14 movement at that level? What level?

15 A. Sometimes when someone has a
16 pseudoarthrosis, they can have so much instability
17 that you can see the C6 and the C7 vertebral bodies
18 move.

19 If they don't move at all, then there's
20 less instability. But sometimes you can see enough
21 instability so that you can see it on a plain X-ray.

22 Q. Would you please go to the swimmer's
23 view and read it? It might be behind X-rays. Do you
24 have it? Yeah, they're behind X-rays. You did it in
25 the office; right?

1 A. No. I did it down the hall at the
2 radiologist's office. There is also a radiologist in
3 the same building, but I went down there with Ms.
4 Washburn to be sure that it was done correctly.

5 Q. Well, since you can't find it and I
6 really want to move along, we do agree, don't we,
7 that it showed no movement? It wasn't something you
8 would have relied on to operate, because it didn't
9 show movement, as you just demonstrated; right?

10 A. It wasn't helpful. If it had shown
11 movement, then that would have been more evidence of
12 the pseudoarthrosis. As it turned out, then I
13 ordered the bone scan, and that showed evidence of
14 pseudoarthrosis.

15 Q. That showed evidence, really, the bone
16 scan of an uptake; right? A hot spot as they
17 sometimes call it?

18 A. That's correct. And that was
19 interpreted by the radiologist as being consistent
20 with a pseudoarthrosis, so that was good evidence
21 that it existed.

22 Q. It was also evidence that there was
23 nothing more than bone healing and scar tissue, which
24 is what causes a hot spot sometimes; isn't that
25 correct?

1 A. Not according to the radiologist that
2 read that report.

3 Q. According to you, sir, since you have
4 this experience in reading bone scans, is it also
5 consistent with natural healing?

6 A. I relied on the radiologist's
7 interpretation of that.

8 Q. Well, you didn't rely on the
9 radiologist's interpretation when it disagrees with
10 you. Why is it you relied on the interpretation when
11 it does, sir?

12 A. Some pieces of information that they
13 give me are more valuable than others, so you have to
14 give weight to different studies differently and
15 interpret them in light of their importance to the
16 patient's situation.

17 Q. Is that a reason you discarded Dr.
18 Stitik's reading of fusion at C7-T1?

19 MR. ALLEN: Objection, Your Honor,
20 argumentative.

21 THE COURT: I'll sustain that.

22 MR. BLACKWELL: I thought we just
23 acknowledged that Dr. Hecht-Leavitt was incorrect at
24 C5-6.

25 THE COURT: I've already sustained the

1 objection. Let's please move on with the
2 examination.

3 BY MS. COFIELD:

4 Q. And sir, after you looked at the films
5 which didn't show the level you were going to operate
6 on, that didn't help you decide anything; right?

7 The first one, the cervical one she came
8 in with that we looked at on the August 1st visit,
9 that didn't help you decide anything; right?

10 A. I saw it on the 17th and so --

11 Q. Just answer my question.

12 A. I am answering the question.

13 Q. Did the one that you were looking at on
14 August 1st help you decide to operate?

15 A. I didn't see the patient on August 1st.
16 She saw Dr. Klara.

17 Q. Yes, sir, but you've already told us you
18 looked at those films. So did those films that are
19 referenced in the August 1st note help you decide to
20 operate, yes or no?

21 MR. ALLEN: Your Honor --

22 A. They were only useful for information at
23 the levels that they showed, and they didn't show the
24 C6-7 level.

25 BY MS. COFIELD:

1 Q. So the answer is no?

2 A. So I didn't use them in my decision
3 making.

4 Q. Okay. And the MR wasn't helpful to you;
5 correct?

6 A. No. It didn't -- it wasn't helpful in
7 determining the diagnosis of pseudoarthrosis.

8 Q. And then there was a C-spine of 9-17,
9 and that shows a C6-C7 fusion, not pseudoarthrosis or
10 non-union or non-fusion; right?

11 A. A pseudoarthrosis wouldn't always be
12 visible on a plain X-ray.

13 Q. Please look at the 9-17 film, and tell
14 me if you accepted or disregarded the radiologist's
15 finding of 9-17.

16 A. I didn't find --

17 MR. ALLEN: I'm going to object to the
18 form of the question, Your Honor.

19 THE COURT: All right. Well, let's look
20 at it and see what he's got.

21 BY MS. COFIELD:

22 Q. Do you have it in front of you?

23 A. Yes, I have it in front of me.

24 Q. And it does show, does it not, that
25 C6-C7 was already fused? Yes or no?

1 A. This report wasn't useful for me,
2 because it's been my experience that you can't always
3 draw that conclusion by looking at the film.

4 And although it says that on this
5 report, that's not enough evidence for me to say that
6 there is not a pseudoarthrosis. That's why I ordered
7 the additional test, the bone scan. It's more
8 specific, and it did show the pseudoarthrosis.

9 Q. Sir, we do agree that the C-spine shows
10 a fusion at C6-C7 and no evidence of instability?

11 A. I disagree with that interpretation.

12 MR. BLACKWELL: Judge, can we approach a
13 minute?

14 BY MS. COFIELD:

15 Q. Sir, I'm asking if that's what you
16 reviewed at the time and then disregarded?

17 A. Absolutely, I saw the films myself.

18 MR. BLACKWELL: What relevance does this
19 have?

20 THE COURT: I'm not sure, Mr. Blackwell.
21 But I'm sure that she intends to tie it up, so I'm
22 going to overrule the objection. It's been covered.

23 BY MS. COFIELD:

24 Q. So the cervical film, it didn't show the
25 right area. The MR you say doesn't show this and

1 isn't helpful. The C-spine showed a normal fusion
2 and no instability, leaving you only with a bone scan
3 that you say you accepted.

4 Did you decide alone on the strength of
5 a bone scan, which didn't reconcile with the C-spine,
6 to do any other test in order to determine whether
7 there really was a fusion or there really wasn't a
8 fusion, since you had two opposed findings?

9 MR. BLACKWELL: I object to the form of
10 that question. She is talking about -- she is now
11 editorializing, Ms. Cofield on radiology.

12 THE COURT: Let's back up and let's ask
13 the doctor this very question in terms of -- I take
14 it you're asking him whether his decision was made
15 alone?

16 MS. COFIELD: Well, no, sir. At first I
17 was asking since he had --

18 THE COURT: Well, let's do it one
19 question at a time and see if we can't get there.

20 MS. COFIELD: Okay.

21 BY MS. COFIELD:

22 Q. You definitely had a C-spine that showed
23 a fusion already in place and no instability. Against
24 that you had a bone scan that you say you accepted
25 that showed instability.

1 Did you take any other test or order
2 anything in order to reconcile those two contrary
3 findings?

4 A. I would never operate based on a
5 radiographic picture alone. The most important data
6 is what comes from the patient themselves, the
7 history that they give me and their physical exam,
8 and that was consistent with pseudoarthrosis.

9 The bone scan complemented her history
10 and physical, and that's what the decision was based
11 on.

12 Q. The decision actually -- it is true,
13 isn't it, that Dr. Klara decided there was enough
14 evidence of pseudoarthrosis to proceed?

15 A. Yes, he agreed. I presented --

16 Q. You took those failure to reconcile
17 films to Dr. Klara for his opinion, didn't you?

18 A. Oh, I reviewed the films with Dr. Klara
19 and the history and physical, and I presented the
20 case to him. And he agreed that she would be likely
21 to benefit from surgery.

22 Q. But it certainly was Dr. Klara's
23 decision to proceed because of the failure to
24 reconcile those two.

25 A. She was Dr. Klara's patient. It is

1 always his decision to proceed.

2 Q. And he didn't know actually the number
3 of procedures like this you had performed when he
4 hired you, did he? You didn't tell him.

5 A. Can you repeat that?

6 Q. Yes. You didn't tell him how many
7 cervical diskectomies you had performed when he hired
8 you; correct?

9 A. Oh, he knew I had a good experience.

10 Q. I asked you did you tell him how many?

11 A. No, we didn't discuss that.

12 Q. Did he ask?

13 A. No, he didn't ask.

14 Q. Before you were given permission to
15 operate on Ms. Washburn, did he ask how many of these
16 overall, not between August 7th and September 25th or
17 July, but overall what is your experience in this?

18 A. No, he didn't ask that.

19 Q. And did you give him the compilation of
20 your residency cases, or did you simply file them
21 with his office manager or something?

22 A. No. He didn't ask for that, and I
23 wouldn't expect him to. That was data from my
24 residency.

25 Q. And he was wasn't physically present in

1 West Virginia, was he?

2 A. Dr. Klara?

3 Q. Correct.

4 A. Of course not.

5 Q. At any time?

6 A. No.

7 Q. So the only time he could watch you
8 himself perform any such operation of a similar
9 nature, a cervical diskectomy, was between July 1st
10 and September 25th; correct?

11 A. It was those ten cervical approaches
12 that I did with him before I did Ms. Washburn's
13 surgery.

14 Q. And the only ones that were of a similar
15 nature, as I said, sir, in my preface a cervical
16 diskectomy, he saw you operate eight times; correct?

17 A. Yes, eight. The other two were removing
18 vertebral bodies from the cervical spine.

19 Q. And in those eight times he saw you
20 operate, he assisted you, according to your own
21 testimony; correct?

22 A. I assisted him, and he assisted me.

23 Q. And so it is true that when he gave you
24 -- or gave Ms. Washburn to you, he had never seen you
25 perform one of these alone?

1 MR. BLACKWELL: Objection.

2 THE COURT: Well, that's -- rephrase the
3 question, Ms. Cofield, without the assumption.

4 MS. COFIELD: I'm not sure what --

5 MR. BLACKWELL: Well, you can't watch
6 someone operate alone. That's part of the problem.

7 MS. COFIELD: Okay. I'm there now. Oh,
8 no, no, he could. He could have been in the room.
9 That was my question. I'm sorry. I'll rephrase
10 that.

11 THE COURT: Let's ask the question
12 again.

13 MS. COFIELD: Okay.

14 BY MS. COFIELD:

15 Q. So at any point in time there did you
16 perform a revision, this operation, a revision of a
17 cervical diskectomy when Dr. Klara wasn't helping
18 you?

19 A. Yeah. Dr. Klara had watched me operate
20 and do the operation myself several times.

21 I'm not sure which of those cases before
22 Ms. Washburn were the ones, because I didn't record
23 that information. But there were several cases where
24 he wasn't doing the operation and I was, and he was
25 watching.

1 Q. So you disagree with Dr. Klara when he
2 said none of those operations were performed by you
3 alone?

4 A. Oh, no, he was scrubbed in, standing
5 there. He just wasn't doing anything. So he would
6 stand there and watch me do it so that I could gain
7 experience.

8 Q. So when I asked him, this very educated,
9 experienced neurosurgeon, how many operations of this
10 nature you performed alone and he said none --

11 MR. ALLEN: Objection, Your Honor.

12 A. Be aware it's different degrees of
13 alone. You're watching, then you're helping, then
14 you're doing.

15 THE COURT: I'm going to sustain the
16 objection. You might best ask that to Dr. Klara when
17 that time comes, since it was his deposition.

18 MS. COFIELD: Yes, sir.

19 BY MS. COFIELD:

20 Q. All right. Then let me just be very
21 clear.

22 Is it your testimony, then, that you did
23 all alone, start to finish, perform a cervical
24 diskectomy between July 1st -- a revision, excuse me,
25 of a cervical diskectomy all alone, start to finish,

1 between July 1 and September 25th, '97?

2 A. Oh, I can't be certain that one of those
3 two revisions were one of the operations I did.

4 Q. There were only two total.

5 A. I don't keep those kinds of records.

6 Q. We just showed them to you.

7 A. It doesn't indicate that on the record.

8 Q. All right. I'm not sure, then --

9 A. There is no indication on the record of
10 how many minutes Dr. Klara spent doing the operation
11 and how many minutes I did, when he scrubbed in, when
12 he scrubbed out. That's far more detail than is in
13 the record.

14 Q. And you do know, sir, that they were
15 both done when it was required that Dr. Klara be in
16 the room, both of them being in July?

17 A. Oh, he was in the room.

18 Q. Did you ever tell Ms. Washburn that you
19 considered her laryngeal nerve injury to be, in your
20 words, a complication of the surgery?

21 A. Ms. Washburn's injury is a complication
22 of the surgery. Whether it was caused by the
23 intubation or the placement of the NG tube or --

24 MS. COFIELD: Sir, if he is going to
25 open up questions about proximate cause, then I just

1 want to walk through the door. I don't have a
2 problem with it.

3 THE COURT: Ms. Cofield, don't --
4 counsel, come up here.

5 (Counsel approached the bench, and an
6 off-the-record discussion was held.)

7 BY MS. COFIELD:

8 Q. Do you have an opinion on causation?

9 A. It's unclear what actually caused Ms.
10 Washburn's hoarseness. It occurred after the
11 surgery, but whether it was due to intubation or
12 placement of an NG tube or retraction during the
13 operation is not clear.

14 Q. So you do have an opinion, but you just
15 don't know what it is. You have an opinion it's one
16 of several things, and you don't know what; correct?

17 MR. ALLEN: I'm going to object to the
18 characterization, Your Honor.

19 THE COURT: Well, I think that question,
20 as we get to it, is one of three is what he said, and
21 he doesn't know which. I think that's what he
22 answered.

23 THE WITNESS: Those are three
24 possibilities, Your Honor.

25 BY MS. COFIELD:

1 Q. And did you tell Ms. Washburn that it
2 could be from the trauma of the operation?

3 A. It seemed -- it occurred after the
4 operation, but I didn't discuss what could have
5 caused it with her.

6 Q. Did you tell her that it was caused
7 during the operation? I didn't ask cause, now. Did
8 you tell her it was caused during, time frame?

9 A. I don't recall if we had a discussion on
10 that or not.

11 Q. Do you see Drs. Coleman's, Mallenbaum's
12 or Klara's thoughts on that topic in the office
13 chart?

14 A. If you will point them out to me, I'll
15 take a look at them.

16 Q. I asked if you have an independent
17 recollection first, sir?

18 A. Oh, no, I don't recall seeing those
19 notes.

20 Q. Okay. Do you want to go to doctor
21 Mallenbaum's? I'm not sure it's in that book. We'll
22 have to take a look.

23 THE COURT: Counsel, approach the bench
24 for a minute.

25 (Counsel approached the bench, and an

1 off-the-record discussion was held.)

2 THE COURT: Ladies and gentlemen of the
3 jury, it's moved on now a little past 5:15, and I
4 told you previously that we're going to try our best
5 to adjourn between 5 and 5:30. We're going to do
6 that tonight. We're not going to make up for last
7 night this time.

8 So you're excused now and free to go.
9 I'm going to ask you again to come back at 9 o'clock
10 in the morning with the same precautions as before,
11 not to discuss the case or the evidence. And give
12 the deputy your notebooks, and he'll give them back
13 to you in the morning.

14 And we'll continue with the evidence at
15 9 o'clock.

16 (The jury left the courtroom, and the
17 following proceedings were held:)

18 THE COURT: All right. Ladies and
19 gentlemen, we will stand in recess until 9 o'clock
20 tomorrow morning, at which time we will begin the
21 evidence.

22 (At 5:15 p.m. the trial was recessed to
23 reconvene at 9:00 a.m. on Thursday,
24 February 8, 2001.)

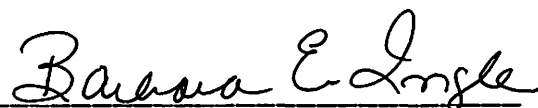
25

CERTIFICATE OF REPORTER

I, Barbara E. Ingle, RPR, do hereby
certify that I reported verbatim the proceedings in
the Circuit Court of the City of Norfolk, in the
above-entitled matter, heard by The Honorable Joseph
A. Leafe, Judge of said Court, and a jury.

I further certify that the foregoing
is a true and accurate excerpt transcript of said
proceedings.

Given under my hand this 13th day of
March, 2001, at Norfolk, Virginia.



Barbara E. Ingle, RPR

1 2000
2000
2000

270

[illegible]

AT LAW NO.
L98-1105

)
)
)
)
)
)
)
)

),

)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

15

16

21

22

23

24

25

COPY

Page 1

1 VIRGINIA:
2 IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

3 JANICE WASHBURN,)
4 Plaintiff,) AT LAW NO.
5) L98-1105
6 v.)
7 PETER KLARA, M.D., and)
8 PETER KLARA, M.D., P.C., and)
9 BRITT M. BORDEN, M.D., and)
10 VIRGINIA BEACH GENERAL HOSPITAL,)
11 Defendant.)

12 DEPOSITION UPON ORAL EXAMINATION
13 OF BRITT M. BORDEN, M.D.,
14 TAKEN ON BEHALF OF THE PLAINTIFF

15 Norfolk, Virginia

16 December 4, 1998

17 Appearances:

18 JUDITH M. COFIELD, P.C.

19 By: JUDITH M. COFIELD, ESQUIRE
20 Counsel for the Plaintiff

21 KAUFMAN & CANOLES, P.C.

22 By: R. BARROW BLACKWELL, ESQUIRE
23 Counsel for the Defendants Peter Klara, M.D.
24 and Peter Klara, M.D., P.C.
25

I N D E X

2	WITNESS	EXAMINATION BY	PAGE
3	Britt M. Borden, M.D.	Mrs. Cofield	4
4		Mr. Blackwell	130
5		Mrs. Cofield	138
6		Mr. Blackwell	141

EXHIBITS

9	NO.	DESCRIPTION	PAGE
10	1	Va. Bch. Gen. Hosp. Radiology Consultation 18-Nov-1997	70
11	2	Va. Bch. Gen. Hosp. Consent to Operation or Other Special Procedure, 9-22-97	141

Page 2

1 Appearances (Cont'd)

2 GOODMAN, WEST & FILETTI, PLLC
3 By: CHARLES M. ALLEN, ESQUIRE

4 and
5 PETER G. WALES, ESQUIRE
6 Counsel for the Defendant Britt M. Borden,
7 M.D.

8 LeCLAIR RYAN

9 By: KELVIN L. NEWSOME, ESQUIRE
10 Counsel for the Defendant Virginia Beach
11 General Hospital

12 Also Present: Rose M. Tate
13 Kathleen F. Johnson
14 Carla M. Morrisette
15
16
17
18
19
20
21
22
23
24
25

Page 4

1 Deposition upon oral examination of
2 BRITT M. BORDEN, M.D., taken on behalf of the Plaintiff,
3 before Kathleen Beard Adams, RPR, a Notary Public for the
4 Commonwealth of Virginia at large, taken pursuant to
5 notice, commencing at 10:21 a.m., on December 4, 1998, at
6 the law offices of Goodman, West & Filetti, PLLC, 215
7 Brooke Avenue, Suite A, Norfolk, Virginia; and this in
8 accordance with the Rules of the Supreme Court of
9 Virginia, 1950, as amended.

10 -----

11 BRITT M. BORDEN, M.D., was sworn and
12 deposed on behalf of the Plaintiff as follows:
13

EXAMINATION

14
15
16 BY MRS. COFIELD:

17 Q. Your name, sir?

18 A. Britt Borden.

19 Q. And you are a doctor specializing in
20 neurosurgery?

21 A. Yes.

22 Q. You have been for what period of time?

23 A. For a year and a half now.

24 MRS. COFIELD: CV available, counsel?

25 MR. ALLEN: Which was produced.

Page 5	Page 7
<p>1 MRS. COFIELD: Was produced? Okay.</p> <p>2 MR. ALLEN: Yeah.</p> <p>3 MRS. COFIELD: Let me try to short-circuit</p> <p>4 some of this then.</p> <p>5</p> <p>6 BY MRS. COFIELD:</p> <p>7 Q. All right. It doesn't have dates here, so</p> <p>8 will you help me? With reference to your medical school</p> <p>9 you graduated when?</p> <p>10 A. I graduated in 1991.</p> <p>11 Q. And thereafter did you go straight to your</p> <p>12 internship? Is that the next thing that occurred to you?</p> <p>13 A. Yes.</p> <p>14 Q. And you were there between '91 and what</p> <p>15 year?</p> <p>16 A. '92.</p> <p>17 Q. Did you leave in '92 to go straight to West</p> <p>18 Virginia University?</p> <p>19 A. Yes.</p> <p>20 Q. And you remained there from '92 through</p> <p>21 when?</p> <p>22 A. '97.</p> <p>23 Q. And that would be somewhere around June or</p> <p>24 July of '97?</p> <p>25 A. Yes.</p>	<p>1 A. All the professors.</p> <p>2 Q. All right. Were you in anybody's office?</p> <p>3 A. I'm sorry.</p> <p>4 Q. Such as Dr. Klara's office. Were you</p> <p>5 working out of or with certain professors in their</p> <p>6 clinical practice?</p> <p>7 MR. NEWSOME: Just object to the form of</p> <p>8 the question.</p> <p>9 MR. ALLEN: You can answer if you</p> <p>10 understand it.</p> <p>11 THE DEPONENT: I don't understand the</p> <p>12 question.</p> <p>13</p> <p>14 BY MRS. COFIELD:</p> <p>15 Q. All right. What is it that you did not</p> <p>16 understand? I'll try to rephrase. I'm not sure --</p> <p>17 A. Yeah. Just please rephrase it.</p> <p>18 Q. All right. While you were doing your</p> <p>19 fellowship you were also affiliated with Dr. Klara in his</p> <p>20 clinical practice, right?</p> <p>21 A. Uh-huh.</p> <p>22 MR. ALLEN: That's a yes.</p> <p>23</p> <p>24 BY MRS. COFIELD:</p> <p>25 Q. Was there a similar situation in West</p>
Page 6	Page 8
<p>1 Q. Which was it; do you recall?</p> <p>2 A. June 30th, 1997.</p> <p>3 Q. Oh, I see. All right.</p> <p>4 And your affiliation with EVMS then began</p> <p>5 July 1 and went through March of '98. During the</p> <p>6 entirety of that time when you were in your spine surgery</p> <p>7 fellowship were you in some form or fashion affiliated</p> <p>8 with Dr. Klara?</p> <p>9 A. My fellowship was with Eastern Virginia</p> <p>10 Medical School.</p> <p>11 Q. I understand. I said, while you were in</p> <p>12 your fellowship for spine surgery were you in some form</p> <p>13 or fashion also affiliated with Dr. Klara?</p> <p>14 A. I was supervised by Dr. Klara.</p> <p>15 Q. All right. The entirety of the July 1, '90</p> <p>16 through March 21st, 1997 time frame?</p> <p>17 A. Yes.</p> <p>18 Q. There was no rotating through anyone else's</p> <p>19 service or office?</p> <p>20 A. No.</p> <p>21 Q. Okay. While you were a neurosurgery</p> <p>22 resident you were under whose tutorial?</p> <p>23 A. Oh, the professors at West Virginia</p> <p>24 University.</p> <p>25 Q. No specific individual?</p>	<p>1 Virginia while you were doing your residency? Were you</p> <p>2 affiliated with a specific named doctor?</p> <p>3 A. As I said before, all the professors in the</p> <p>4 department of neurosurgery.</p> <p>5 Q. What, if any, relationship did you have</p> <p>6 with Dr. Howard Kaufman different from what you have just</p> <p>7 described?</p> <p>8 A. Dr. Kaufman is the chairman of neurosurgery</p> <p>9 at West Virginia University.</p> <p>10 Q. And there was nothing other than the fact</p> <p>11 that he was the chairman of a program in which you were</p> <p>12 enrolled?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. During your residency in West</p> <p>15 Virginia will you please describe to me what your</p> <p>16 privileges were as a resident?</p> <p>17 MR. ALLEN: Object to the form of the</p> <p>18 question. If you understand it, you can answer.</p> <p>19 THE DEPONENT: Can you be more specific?</p> <p>20</p> <p>21 BY MRS. COFIELD:</p> <p>22 Q. What type of privileges did you have</p> <p>23 extended to you during the duration of that five-year</p> <p>24 period?</p> <p>25 MR. ALLEN: Same objection. Go ahead.</p>

Page 9

1 THE DEPONENT: I took care of the patients
2 of the professors and did what the other residents did.
3
4 BY MRS. COFIELD:
5 Q. What hospital privileges did you have, sir?
6 A. I was a resident.
7 Q. Did you have any hospital privileges, such
8 as restricted in some fashion as with other residents,
9 but did you and were you -- did you apply for and were
10 you granted hospital privileges?
11 MR. ALLEN: Object to the form of the
12 question.
13 THE DEPONENT: No.
14
15 BY MRS. COFIELD:
16 Q. No. Okay.
17 MR. ALLEN: On the assumption in it.
18 MRS. COFIELD: I don't understand. What
19 assumption?
20 MR. ALLEN: You said as with all other --
21 as with other residents. I don't know what you're
22 assuming about what other residents had in terms of
23 privileges.
24 MRS. COFIELD: I just assume he had the
25 same as others; whether they were certified or not, his

Page 10

1 were not different, nor exclusive.
2
3 BY MRS. COFIELD:
4 Q. Did you then during that time frame that
5 we're talking about, which is for these purposes only
6 your West Virginia residency, have any hospital
7 privileges issued to you in your name?
8 A. I don't know.
9 Q. You know what hospital privileges are,
10 correct?
11 A. Yes, but I never applied for privileges to
12 the hospital at West Virginia University.
13 Q. Okay. Could you operate during your
14 residency?
15 A. Yes, I operated during my residency.
16 Q. All right. Then do you know if you had
17 privileges to operate on patients?
18 MR. ALLEN: Object to the form.
19 THE DEPONENT: I don't understand the
20 question.
21
22 BY MRS. COFIELD:
23 Q. Did you ever have a form application for
24 privileges to any hospital while you were residing in
25 West Virginia?

Page 11

1 A. No.
2 Q. You never went before a committee, either
3 orally or in writing or any other means of communication,
4 to apply for any form of privilege?
5 A. No.
6 Q. Okay. During the time of your residency
7 then when you were operating on patients it was always
8 with an attending there in the operating suite?
9 A. Yes.
10 Q. Did your orders have to be co-signed?
11 A. No.
12 Q. Did certain orders have to be co-signed as
13 opposed to all of them?
14 A. No.
15 Q. So no type?
16 A. None.
17 Q. Do you know why an attending was always in
18 the operating room?
19 MR. ALLEN: Just do you know.
20 THE DEPONENT: No.
21
22 BY MRS. COFIELD:
23 Q. You don't know.
24 And during your time frame while in West
25 Virginia were you ever allowed to operate alone?

Page 12

1 A. Not in the operating room.
2 Q. Then am I correct in assuming the only
3 times that you operated alone might have been on trauma
4 patients or in an emergency room setting?
5 A. In either the emergency room or the
6 intensive care unit.
7 Q. Okay. I understand the emergency room.
8 You're talking about any invasive procedure. But you
9 weren't really operating in the ICU, were you?
10 A. Placement of ventriculostomies.
11 Q. Any other types of invasive procedures?
12 MR. ALLEN: Object to the form. It's
13 vague.
14
15 BY MRS. COFIELD:
16 Q. Were you prevented in the ICU to perform
17 any other type of invasive procedures other than the
18 placement of tubes?
19 A. I don't recall any others.
20 Q. And similarly, in the ER, what types of
21 invasive procedures were you allowed to perform alone?
22 A. That's the only one I recall.
23 Q. Same type?
24 A. Same.
25 Q. Did you ever during that same time frame,

Page 13

Page 15

1 West Virginia, assist in cervical fusions?
 2 A. Yes.
 3 Q. How many?
 4 A. I assisted in ten and I performed 40 as the
 5 surgeon.
 6 Q. Were any of these redos?
 7 MR. ALLEN: Object to the form.
 8 THE DEPONENT: I don't recall.
 9
 10 BY MRS. COFIELD:
 11 Q. All right. After you left West Virginia
 12 did you then interview with Dr. Klara or was he assigned
 13 to you in some form or fashion by EVMS?
 14 A. I interviewed with him.
 15 Q. Did you submit an application?
 16 A. No.
 17 Q. Before I forget, while I'm on applications,
 18 have you submitted an application to the board of
 19 neurosurgery for board certification?
 20 A. No.
 21 Q. Are you eligible as of the time of today?
 22 A. Yes.
 23 Q. And what are the eligibility requirements?
 24 A. You have to finish a neurosurgery
 25 residency.

1 Q. And I take it you did so on your first
 2 attempt?
 3 A. No.
 4 Q. Okay. And how many tries did it take?
 5 A. I took it twice.
 6 Q. When was the first time?
 7 A. In 1995.
 8 Q. And you were allowed to sit how soon
 9 thereafter?
 10 A. The next year.
 11 Q. And you passed it the second time?
 12 A. Yes.
 13 Q. Are you then immediately eligible to sit
 14 for the oral? That is, upon passing the written.
 15 A. No.
 16 Q. No. What is the interval between those
 17 two, if any?
 18 A. You need to finish your residency and then
 19 accumulate one year's worth of cases.
 20 Q. Okay. Then I was just missing the time
 21 frames here. You first sat for those written boards
 22 while you were still in residency?
 23 A. Yes.
 24 Q. I see. Which was completed in June of '97?
 25 A. Yes.

Page 14

Page 16

1 Q. Which is always five years?
 2 A. No.
 3 Q. But yours was?
 4 A. Yes.
 5 Q. Okay. Go ahead.
 6 A. You have to pass the written board
 7 examination. You have to submit one year's worth of
 8 cases.
 9 Q. Are those cases which you alone performed
 10 or could they be cases in which you assisted?
 11 A. They are cases for which I was primarily
 12 responsible.
 13 Q. So it could have been somebody else there,
 14 but you were on the OR or op note as the primary
 15 neurosurgeon?
 16 A. Someone else could be assisting me.
 17 Q. Okay. Go ahead. Is there anything else
 18 for the criteria?
 19 A. You need to sit for the oral examination.
 20 Q. Is that the extent?
 21 A. Yes.
 22 Q. What, if any, of those criteria have you
 23 accomplished as of today?
 24 A. I have finished my residency and I've
 25 passed the written examination.

1 Q. So have you between June of '97 and it's
 2 December I guess of '98 sat for your orals?
 3 A. No.
 4 Q. Is there a reason?
 5 A. I haven't accumulated one year's worth of
 6 cases.
 7 Q. For which again you are the primarily
 8 responsible neurosurgeon?
 9 A. Yes.
 10 Q. Is that a quantitative absolute number or
 11 is it just a temporal one year's worth and it could be
 12 ten in that year or in a year's period do you need to
 13 have accomplished a hundred cases?
 14 A. I don't know.
 15 Q. You made no inquiry in that regard?
 16 A. No.
 17 Q. Can I ask then how is it you know when you
 18 will or won't be eligible? I mean, if you don't know if
 19 it's ten cases or it's a year's worth of cases regardless
 20 of the number, how can you tell when you will have
 21 satisfied that criteria?
 22 A. I will submit one year's worth of cases.
 23 Q. Regardless of the number accomplished
 24 within that one year?
 25 A. Yes.

Page 17

1 Q. All right. And that one year will have
2 elapsed -- well, you tell me. It may not be exactly from
3 March to March, so you tell me.
4 A. From May to May.
5 Q. Okay. May of '98 to May of '99?
6 A. Yes.
7 Q. And then and only then have you satisfied
8 all the condition precedents to make you eligible for the
9 orals?
10 A. Yes.
11 MR. ALLEN: After you submit them.
12 THE DEPONENT: Yes.
13
14 BY MRS. COFIELD:
15 Q. Have you been compiling a summary of the
16 operative procedures performed between May '98 and
17 December of '98?
18 A. Yes.
19 Q. And do you maintain that file?
20 A. Yes.
21 Q. Anyone else, that is any hospital,
22 institution, agency or person --
23 A. No.
24 Q. -- other than yourself?
25 And where is it maintained?

Page 18

1 A. In my office.
2 Q. Is it on hard disk?
3 A. No.
4 Q. Is it in the computer?
5 A. No.
6 Q. Is there a hard copy printout?
7 A. No.
8 Q. Just a handwritten?
9 A. Handwritten multiple notes.
10 Q. Okay. And there is no typed version then
11 of this?
12 A. No.
13 Q. Anybody have a copy of it?
14 A. No.
15 Q. Just yourself?
16 A. Yes.
17 Q. Anybody have to sign off on it, you know,
18 in the sense of, Here's my summary of this procedure
19 where I was assisted, for example, by Dr. Klara, and Dr.
20 Klara has also initialed it, or something of this
21 nature?
22 MR. NEWSOME: Object to the form of the
23 question.
24 MR. ALLEN: For the purposes of the board
25 you mean?

Page 19

1 MRS. COFIELD: Yes. Yes.
2 MR. ALLEN: All right.
3 THE DEPONENT: I don't know.
4
5 BY MRS. COFIELD:
6 Q. All right. So at this point all you're
7 doing is keeping that running summary of cases
8 accomplished?
9 A. Uh-huh.
10 Q. Okay. Do you have anything else that you
11 are in the regular course of business maintaining so that
12 your application will be in order come May of '99?
13 A. No.
14 Q. All right. That's the only running
15 commentary that you can think of, or chronology?
16 A. Yes.
17 Q. Have you received or requested, either one,
18 any recommendations, letters of recommendation?
19 MR. ALLEN: Objection to the form. It's
20 vague.
21 THE DEPONENT: Can you be more specific?
22 MR. ALLEN: For the board?
23 MRS. COFIELD: For the board, yes.
24 THE DEPONENT: No.
25

Page 20

1 BY MRS. COFIELD:
2 Q. Okay. As opposed to specifically a letter
3 of recommendation, any statements from your program
4 director that you have satisfied certain requirements,
5 anything of that nature to date accomplished by yourself?
6 A. No.
7 Q. Do you have any special emphasis on any
8 specific type of procedures during this same time frame,
9 while you're compiling your summary of cases
10 accomplished?
11 A. Can you be more specific?
12 Q. Surely. Do you have any specific types of
13 specialty, such as pediatric or spine surgery, or
14 anything of this nature?
15 MR. ALLEN: That you're presently
16 specializing in.
17 MRS. COFIELD: Uh-huh.
18 THE DEPONENT: I specialize in spine
19 surgery.
20
21 BY MRS. COFIELD:
22 Q. Thoracic, cervical, lumbar? Does it
23 matter?
24 A. No.
25 Q. And staying on the topic, if you will, of

Page 21

1 applications for the moment, you submitted, did you not,
 2 an application to the hospital for temporary -- the
 3 hospital being Virginia Beach General Hospital when you
 4 were associated with Dr. Klara -- for privileges,
 5 correct?
 6 A. Yes.
 7 Q. Okay. And what did that consist of?
 8 A. An application form.
 9 Q. They gave you a preprinted?
 10 A. Yes.
 11 Q. Again, any letters of recommendation
 12 required to be attached?
 13 A. I don't recall.
 14 Q. Academic background or certifications,
 15 degrees, any of that, required to be attached, you know,
 16 like here's my M.D., a copy of the degree?
 17 A. I don't recall.
 18 Q. All right. All you do recall -- and do you
 19 have a copy of it?
 20 A. Yes.
 21 Q. And that, too, is maintained in your office
 22 and under your custody, control or possession?
 23 A. It's -- yes, I have that.
 24 Q. All right. Do you recall if anybody signed
 25 off on it for you? Did anybody other than yourself, that

Page 22

1 is, have to sign?
 2 A. I don't recall.
 3 Q. Do you recall to whom it was submitted?
 4 A. No.
 5 Q. Did you go for an interview in addition to
 6 submitting the written application?
 7 A. No.
 8 Q. Did you submit this application while you
 9 were still in West Virginia?
 10 A. No.
 11 Q. When did you get it?
 12 MR. ALLEN: The form?
 13 MRS. COFIELD: The form.
 14 THE DEPONENT: After I arrived here.
 15
 16 BY MRS. COFIELD:
 17 Q. You arrived here July 1?
 18 A. Yes.
 19 Q. And how soon thereafter did you get it; do
 20 you recall?
 21 A. I don't recall.
 22 Q. Did you apply for temporary privileges
 23 prior to the application being approved?
 24 A. I submitted one form.
 25 Q. Do you know what that was? A different

Page 23

1 form you mean than the application we're talking about?
 2 A. No. I submitted one application for my
 3 privileges.
 4 Q. All right. Do you know when they were
 5 granted?
 6 A. I don't recall the date.
 7 Q. Do you recall the month?
 8 A. No.
 9 Q. Do you recall if you first had temporary
 10 privileges and then full or different privileges in any
 11 regard, or were your privileges always the same?
 12 A. I'm not sure.
 13 Q. But, were you notified in any regard that
 14 you could do X, Y and Z as a procedure until the granting
 15 of the full privileges and review by the credentialing
 16 committee?
 17 A. No.
 18 Q. Nothing like that?
 19 A. No.
 20 Q. So, whatever you could ultimately do at
 21 Virginia Beach General Hospital through March 21st of '98
 22 you could do in the beginning; your privileges did not
 23 change in any regard?
 24 A. I'm sorry. March of '98?
 25 Q. Well, March '98 is when you left.

Page 24

1 A. Yes.
 2 Q. So, were your privileges the same in March
 3 1998 as they were in the beginning, July or August,
 4 1997?
 5 A. I don't know.
 6 Q. Were you ever notified, to your knowledge,
 7 that they altered in any regard; expanded, modified,
 8 restricted, anything?
 9 A. I received letters regarding my privileges,
 10 but I'm not sure of the -- if they had changed in any
 11 way.
 12 MRS. COFIELD: All right. Do you want to
 13 put those same ones in front of him?
 14 MR. ALLEN: Sure.
 15 MRS. COFIELD: I don't know if I've got it
 16 in Klara's or not.
 17
 18 BY MRS. COFIELD:
 19 Q. Are you looking at the letters issued by
 20 the hospital, sir?
 21 A. Yes.
 22 MR. ALLEN: So the record correctly
 23 reflects, there's an August 7th, 1997 memo to All
 24 Departments from Medical Staff Services on letterhead
 25 appearing to be of Virginia Beach General Hospital,

Page 25

1 there's a letter August 7th, 1997 on the same kind of
2 letterhead from Brenda Omohundro to Joanne Foglia, and
3 there's a letter dated March 12th, 1998 to Auburn
4 Regional Medical Center, signed by Robert Graves,
5 administrator. Those are the three things he's looking
6 at.

7 MRS. COFIELD: Thank you.

8

9 BY MRS. COFIELD:

10 Q. And of those three things, sir, and of
11 those three pieces of correspondence, the August 7th
12 letters and the March 12th letter, do they constitute the
13 entirety of everything that you received from the
14 hospital concerning your privileges?

15 A. These letters are everything.

16 Q. You, however, did submit an application to
17 them which is not here?

18 A. Yes.

19 Q. Other than that application, is there then
20 anything else that I would add to this list? Instead of
21 being three documents there would be four if I include
22 the application. Would there be any type of fifth
23 document, be it from you to the hospital, the hospital to
24 you, or, for example, a third party on your behalf, like
25 a letter of recommendation, that would complete the

Page 26

1 application package?

2 MR. ALLEN: I object to foundation solely
3 with regard to third party may exist and he wouldn't have
4 any knowledge of it.

5 MRS. COFIELD: Well, then he can say that.

6 THE DEPONENT: I know of no other documents

7 MRS. COFIELD: Okay. This same -- and this
8 is not to you, sir, it's to counsel. This same request
9 for production went to the hospital and the hospital said
10 they didn't have anything. Would you go back and see
11 where the application is?

12 MR. NEWSOME: I'm not going provide you
13 with the application.

14 MRS. COFIELD: Okay. You said none
15 existed. You didn't even say privileged.

16 MR. NEWSOME: I didn't say none existed.
17 You asked me for the documents relating to the privileges
18 to show what privileges he had, and you have those
19 documents. That's what your request was and that's what
20 you got.

21

22 BY MRS. COFIELD:

23 Q. The application to the hospital, sir, asked
24 you what, other than name and address and where you
25 graduated from? Did it go into how many procedures you

Page 27

1 had performed? Did you have to have that same summary of
2 cases?

3 A. I don't recall.

4 MRS. COFIELD: All right. Let me just make
5 a note for a moment.

6

7 BY MRS. COFIELD:

8 Q. Do you recall if you had to as an
9 attachment submit a summary or chronology of your cases
10 as opposed to inside the application itself?

11 A. I don't recall.

12 Q. Did you in any form or fashion have to show
13 experience then as opposed to simple matriculation,
14 graduation?

15 A. I don't recall.

16 MRS. COFIELD: I want that part typed up,
17 Kathy, if you'll make a note, along with Kelvin's
18 comment.

19

20 BY MRS. COFIELD:

21 Q. Your temporary privileges apparently issued
22 August 7th, so am I correct then, sir, in assuming that
23 between July 1 when you arrived and August 7th when you
24 were granted temporary privileges you did not operate at
25 Virginia Beach General or assist in operating at Virginia

Page 28

1 Beach General Hospital?

2 A. I don't recall.

3 Q. What records would there be to refresh your
4 recollection?

5 A. Records of my cases.

6 Q. Which is where? You mean that same summary
7 you're talking about?

8 A. Another summary.

9 Q. A different one?

10 A. Yes.

11 Q. And why is it a separate one?

12 A. Because they are my fellowship cases.

13 Q. I see. And the fellowship -- all right. I
14 appreciate your candor, but I'm still not understanding
15 why in your mind it is different. You just have two
16 lists you're saying, your fellowship cases and then your
17 cases since you've completed fellowship?

18 A. Yes.

19 Q. All right. Then if I understand how your
20 mind's working better, is there a third set which you did
21 while you were in your internship?

22 A. Yes.

23 Q. Okay. Is there a fourth set for any reason
24 I can't figure out?

25 A. I don't believe so.

Page 29

1 Q. So, there are three separate lists; one
2 your internship, one your fellowship, and one your
3 private practice?
4 A. And one for my residency.
5 Q. Excuse me. Are there then four?
6 A. I don't know if I still have the one from
7 my internship.
8 Q. Okay. You might, and you don't know
9 without looking?
10 A. Yeah, I would have to look for it.
11 Q. But at a very minimum, you know you have
12 kept and do maintain three different lists?
13 A. Yes.
14 Q. Okay. And that fellowship list of cases
15 shows the date of the operation, does it not?
16 A. Yes.
17 Q. And the type of the operation?
18 A. Yes.
19 Q. Who was primary and who assisted?
20 A. No.
21 Q. No?
22 A. For my residency it does, for my fellowship
23 it doesn't.
24 Q. Is there a reason the distinction is made,
25 your fellowship that is that doesn't show it?

Page 30

1 A. No.
2 Q. Residency, because you had to have somebody
3 there, so it shows it, correct?
4 A. That's data that was required during the
5 residency.
6 Q. Would it show who was present; as opposed
7 to who was primary, who was present? And I don't mean
8 the nurses, I mean the doctors.
9 A. No. No.
10 Q. Other than the date, the type of operation,
11 I assume the place of the operation, correct?
12 A. No.
13 Q. Oh, it doesn't even show what hospital it
14 was done at or institution?
15 A. No.
16 Q. Then I guess I'm tired of guessing. Can
17 you tell me what was on it?
18 A. The patient's name.
19 Q. That's it?
20 A. It's a --
21 MR. ALLEN: Go ahead. Tell her what's on
22 it, the categories of information.
23 THE DEPONENT: It's the patient data from
24 the stickers that identify the patient in the hospital.
25

Page 31

1 BY MRS. COFIELD:
2 Q. You don't mean the addressograph, I don't
3 guess.
4 A. The stickers that are made off of the
5 plates, yes, on the floor.
6 Q. Is that all that it consists of?
7 A. That, the name, the type of procedure, and
8 the date.
9 Q. Okay. That, or those three categories, are
10 what consist on the fellowship cases' summary?
11 A. Yes.
12 Q. What categories, if they are different, are
13 entered on the internship summary?
14 A. I don't know. I haven't seen that in many
15 years.
16 Q. Oh, okay. I'm sorry. You told me that.
17 Residency. Same or different?
18 A. During the residency I would record if I
19 was the primary surgeon or the assistant.
20 Q. Other than that, it's those three plus that
21 information?
22 A. Yes.
23 Q. And while you are and have been in private
24 practice, same categories, being addressograph, type of
25 operation, date?

Page 32

1 A. Yes.
2 Q. And you don't at this point record if
3 you're primary or assisting?
4 A. I only keep data on cases for which I'm the
5 primary surgeon.
6 Q. Okay. So, that one year will be completed
7 May of '99; is that correct?
8 A. Yes.
9 Q. Then if I broaden my question to ask you
10 again is there any other summary of your cases, I don't
11 care the reason you kept them, be it internship, a
12 fellowship or some other time frame in your life, for any
13 reason at any time have you maintained in any form or
14 fashion, microfiche, hard copy, soft copy, handwritten, I
15 don't care if it's coded, a list of or summary of cases
16 or procedures which you have handled?
17 A. It's the same information on a summary
18 sheet.
19 Q. Okay. And so there's another what you call
20 summary sheet --
21 A. Uh-huh.
22 Q. -- which might include all of the above; is
23 that correct?
24 A. There's a summary sheet for the cases done
25 in residency that's submitted to the board by my program.

Page 33

1 Q. All right. So, one minute. This isn't
 2 done by you, then? You have a copy of it?
 3 A. Yes, I do.
 4 Q. All right. And this is a list of cases
 5 submitted by whom?
 6 A. The program director.
 7 Q. All right. At West Virginia?
 8 A. Yes.
 9 Q. Which would be again Dr. --
 10 MR. ALLEN: Howard Kaufman.
 11 THE DEPONENT: Howard Kaufman.
 12
 13 BY MRS. COFIELD:
 14 Q. And that would show those cases in which
 15 you were involved during your residency?
 16 A. Yes.
 17 Q. Would it show cases in which you were
 18 involved at any other time frame?
 19 A. No.
 20 Q. Would it show the type of procedure?
 21 A. Yes.
 22 Q. All right. And is it also then a true
 23 statement by definition, regardless of the type of
 24 procedure, during that time frame, because you were in
 25 your residency, someone else was always in the operating

Page 34

1 room?
 2 A. Can you rephrase that?
 3 Q. Yes. Am I correct then in assuming that
 4 list of cases compiled by the program director, Dr.
 5 Howard Kaufman, shows the cases in which you were
 6 involved during your residency, correct?
 7 A. Uh-huh.
 8 Q. And by definition, since you were in your
 9 residency, these are cases where another doctor was
 10 always in attendance?
 11 A. No.
 12 Q. No.
 13 A. It includes any procedure that I did.
 14 Q. Okay. So it could be those that you were
 15 allowed to in the ICU or the ER?
 16 A. Yes.
 17 Q. Then it's not just the operating cases,
 18 it's any procedure that's invasive that you performed?
 19 A. Yes.
 20 MR. ALLEN: Object to the characterization,
 21 but you got an answer.
 22
 23 BY MRS. COFIELD:
 24 Q. It's not your clinical practice as well,
 25 correct; in other words, who you saw? It's really just

Page 35

1 what was -- if you had performed an invasive procedure it
 2 is recorded on that list by Dr. Kaufman?
 3 A. Yes.
 4 Q. Okay. I will ask you once again because I
 5 thought I had it the first time and now I have five
 6 different lists, anything else? By anybody, any other
 7 list of any cases in which you were involved or
 8 procedures which you have a copy of or which you
 9 generated?
 10 A. No.
 11 Q. I know I asked you, but I honestly don't
 12 remember the answer, so I'd ask you to bear with me. I
 13 know you didn't get your privileges until August 7th. Do
 14 you know if you, because you weren't granted your
 15 privileges until August 7th, 1997, did not operate or
 16 assist somebody in operating between July 1, '97 and
 17 August 7th, '97?
 18 A. I don't recall.
 19 Q. All right. Again, that list, though, would
 20 show if you did, because if you did you would have
 21 recorded it, correct?
 22 A. Yes.
 23 Q. One of those lists. I don't know which
 24 one. Well --
 25 A. Which period of time are you talking about

Page 36

1 at which hospital?
 2 Q. I thought I defined that for you. Let me
 3 do it again so we're clear. July 1, '97 you're with EVMS
 4 and Dr. Klara.
 5 A. Yes.
 6 Q. Your privileges are granted a little over a
 7 month later, August 7th.
 8 A. Uh-huh.
 9 MR. ALLEN: That's yes.
 10
 11 BY MRS. COFIELD:
 12 Q. Of '97. Therefore, between July 1 of '97
 13 when you came --
 14 A. Uh-huh.
 15 Q. -- and August 7th, '97 when you were
 16 granted privileges --
 17 MR. ALLEN: Yes.
 18
 19 BY MRS. COFIELD:
 20 Q. -- did you during that interval either
 21 operate or assist in operations?
 22 MR. BLACKWELL: Are you limiting it to
 23 Beach General?
 24 MRS. COFIELD: Correct.
 25 THE DEPONENT: I would have to check the

Page 37

1 record.
 2
 3 BY MRS. COFIELD:
 4 Q. And that record would be the fellowship
 5 record, correct?
 6 A. Yes.
 7 Q. And in light of counsel's question, did you
 8 at any time during your July 1, '97 to March 21st, '98
 9 affiliation with EVMS operate or perform invasive
 10 procedures at any hospital other than Virginia Beach
 11 General?
 12 A. Yes.
 13 Q. Where?
 14 A. At Norfolk General Hospital --
 15 Q. Okay.
 16 A. -- and Leigh Memorial Hospital.
 17 Q. Also in affiliation or association with Dr.
 18 Klara?
 19 A. As part of my fellowship with EVMS.
 20 Q. Is that a yes?
 21 MR. ALLEN: I think it's an answer.
 22
 23 BY MRS. COFIELD:
 24 Q. Well, were you -- did Dr. Klara also assist
 25 you in operations at Norfolk General Hospital and Leigh?

Page 38

1 A. Yes.
 2 Q. All right. Were you ever operating in
 3 Norfolk General or Leigh absent Dr. Klara or somebody in
 4 his group?
 5 A. Yes.
 6 Q. Were you ever operating at Norfolk General
 7 or at Leigh on anybody other than Dr. Klara's private
 8 patients?
 9 A. Yes.
 10 Q. Were they clinic patients?
 11 A. They were Dr. Ray's patients. I would
 12 assist him also.
 13 Q. Any other neurosurgeon in the area whose
 14 patients you helped or serviced or treated?
 15 A. Not that I recall.
 16 Q. So your practice at Norfolk General, at
 17 Leigh, and at Virginia Beach General was done in
 18 association with Dr. Klara or Dr. Ray, correct?
 19 A. Yes.
 20 Q. All right. That was the original
 21 question.
 22 Did you have different or distinct
 23 privileges at Norfolk General Hospital and at Leigh than
 24 you did at Virginia Beach General?
 25 A. Yes.

Page 39

1 Q. In what regards?
 2 A. I submitted an application for privileges
 3 and they were granted at Virginia Beach General, and I
 4 didn't do that at Norfolk General or Leigh.
 5 Q. Why?
 6 A. I found out that I could get privileges
 7 there and so I applied for them.
 8 Q. Where? I'm sorry.
 9 A. At Virginia Beach General.
 10 Q. Were you eligible to get privileges at
 11 Norfolk General or at Leigh?
 12 A. I don't know.
 13 Q. Did you apply?
 14 A. No.
 15 Q. And that was what I thought I heard you
 16 say. Why didn't you apply if you were there assisting
 17 and operating?
 18 A. They were more closely affiliated, you
 19 know, with the fellowship program.
 20 Q. As a matter of fact, Virginia Beach General
 21 Hospital doesn't have a contract with EVMS, correct?
 22 MR. ALLEN: Objection.
 23
 24 BY MRS. COFIELD:
 25 Q. Do you know?

Page 40

1 MR. ALLEN: Objection, foundation.
 2 THE DEPONENT: I don't know.
 3
 4 BY MRS. COFIELD:
 5 Q. You don't know. Do you know why it is then
 6 that you had to apply for privileges at Virginia Beach
 7 General and you did not have to at Norfolk General or
 8 Leigh?
 9 A. I don't know.
 10 Q. You never were told?
 11 A. I wasn't told specifically, no.
 12 Q. Were you told generally?
 13 A. No.
 14 Q. Did you never inquire why you needed
 15 privileges at one hospital and not another?
 16 A. No, I didn't inquire.
 17 Q. And you don't recall anything in the
 18 general nature that you were advised as to the reason?
 19 A. No.
 20 Q. Okay. Who told you you could get
 21 privileges at Virginia Beach General?
 22 A. Dr. Klara.
 23 Q. Did he help you get them?
 24 A. I don't know.
 25 MR. ALLEN: Objection, foundation.

Page 41

1 MR. BLACKWELL: I didn't hear the answer.
 2 MR. ALLEN: He said, I don't know.
 3
 4 BY MRS. COFIELD:
 5 Q. And you did operate while at Leigh and at
 6 Norfolk General Hospital without privileges being granted
 7 to you alone without either Klara or Ray in attendance?
 8 MR. ALLEN: Object to -- I just want to
 9 make sure I understand that question. The question is
 10 did he operate without Ray and Klara present and without
 11 privileges?
 12 MRS. COFIELD: Correct.
 13 MR. ALLEN: Okay.
 14 THE DEPONENT: I'm sorry. Can you repeat
 15 that?
 16
 17 BY MRS. COFIELD:
 18 Q. Sure.
 19 MR. ALLEN: Did I make it worse?
 20 THE DEPONENT: No, no, but I --
 21
 22 BY MRS. COFIELD:
 23 Q. While you were at Leigh -- excuse me.
 24 At times when you operated at Leigh and at
 25 Norfolk General you did so sometimes without either Klara

Page 42

1 or Ray present; is that correct?
 2 A. Yes.
 3 Q. And you did so for the duration of your
 4 fellowship between July 1, '97 and March 21st, '98
 5 without privileges having been formally extended to you
 6 by either Leigh or Norfolk General Hospital, correct?
 7 A. I had privileges within the scope of my
 8 fellowship.
 9 Q. Well, I will repeat. Did you ever file an
 10 application formally as you did for Virginia Beach
 11 General Hospital?
 12 A. No.
 13 Q. Okay. Then were you, however, granted
 14 certain privileges in writing by Norfolk General and/or
 15 Leigh?
 16 A. No.
 17 Q. Then what were the nature and scope of the
 18 privileges that you understood existed during your
 19 fellowship at those two hospitals?
 20 A. To treat neurosurgical patients according
 21 to whatever their needs were.
 22 Q. They were unrestricted privileges then
 23 during your fellowship?
 24 A. I don't know.
 25 MR. ALLEN: Object to the characterization.

Page 43

1
 2 BY MRS. COFIELD:
 3 Q. You don't know?
 4 A. No.
 5 Q. Did you for each occasion on which you
 6 operated on a patient, absent Dr. Klara and/or Ray being
 7 in attendance, advise the patient that you alone would be
 8 performing the operation?
 9 A. I consented every patient that I operated
 10 on.
 11 Q. But my question to you then is the
 12 elicitation of that consent; that is, did it involve your
 13 advising the patient that you alone would be performing
 14 the procedure?
 15 A. Yes.
 16 Q. Okay. And during your telling each and
 17 every patient that you operated on alone that you alone
 18 would be doing it, did you advise them of your then
 19 existing training, education and experience in that
 20 particular type of procedure?
 21 MR. NEWSOME: Just object to the form of
 22 the question.
 23 MR. ALLEN: Object to the form of the
 24 question.
 25 THE DEPONENT: Can you restate that?

Page 44

1
 2 BY MRS. COFIELD:
 3 Q. I'll be glad to. When you were advising
 4 each and every patient that you operated on alone that
 5 you would be doing this alone --
 6 A. Uh-huh.
 7 Q. -- did you advise them of the nature and
 8 extent of your training and experience at the time?
 9 MR. ALLEN: Same objection, but you can
 10 answer it. Go ahead.
 11 THE DEPONENT: That's a lot of information,
 12 and I don't recall if I discussed that with every
 13 patient.
 14
 15 BY MRS. COFIELD:
 16 Q. As of September 25th, I think it is, 1997
 17 you had performed alone how many cervical fusions of a
 18 redo nature?
 19 MR. ALLEN: Object to the form of the
 20 question.
 21 MRS. COFIELD: What's the nature of the
 22 objection?
 23 MR. ALLEN: If you want to define for him
 24 what redo means then we'll both understand the question.
 25 MRS. COFIELD: All right.

1
2 BY MRS. COFIELD:
3 Q. Do you not understand a redo?
4 A. I'd like you to define it.
5 Q. One is failed or one is being investigated
6 as having failed and it is a subsequent procedure, a
7 prior fusion having been performed.
8 Within the confines of that definition then
9 I ask you, on September 25th, 1997 if you -- how many
10 redos of cervical fusions had you alone performed?
11 A. I don't know.
12 Q. But your list would show?
13 A. I would have to see my list.
14 Q. Do you have a general idea?
15 A. No.
16 Q. You don't know if it's 50 or if it's one?
17 A. No.
18 Q. It was the first one you had done at
19 Virginia Beach General, was it not?
20 A. I'm sorry. Can you --
21 Q. Well, your privileges weren't granted until
22 July 7th. Did you between July 7th and September 25th,
23 1997, do any other cervical fusions that were redos as I
24 have defined that term?
25 MR. NEWSOME: I just object to the form of

1 your question.
2 THE DEPONENT: I would have to consult the
3 record.
4
5 BY MRS. COFIELD:
6 Q. You don't even know that, if that was the
7 first one in Klara's office, so to speak, that you had
8 done?
9 A. No.
10 Q. Do you recall telling Mrs. Washburn how
11 many you had done as of that time alone?
12 MR. ALLEN: You mean how many cervical
13 spine redos?
14 MRS. COFIELD: Same procedure.
15
16 BY MRS. COFIELD:
17 Q. And I will so the record is clear say do
18 you recall telling Mrs. Washburn prior to the procedure
19 how many cervical spine fusion redos you had accomplished
20 alone prior to operating on her?
21 A. No.
22 Q. No, you don't recall, or no, you didn't
23 tell her?
24 A. No, I didn't tell her.
25 Q. Did you at any time tell her you were broad-

1 certified?
2 A. No.
3 Q. Did you at any time hear Brandi say that?
4 A. No.
5 Q. Did you hear any inquiry in that regard?
6 A. No.
7 Q. Never?
8 A. Never.
9 Q. Of any nature. Even if she didn't say
10 board certified, did she say board eligible or anything
11 about your boards?
12 A. No.
13 Q. Didn't inquire in any regard --
14 A. No.
15 Q. -- about your training, knowledge or
16 experience?
17 A. No.
18 Q. Never?
19 A. No.
20 Q. And nobody absent an inquiry volunteered
21 any information about your training or your knowledge or
22 your experience in your presence, correct?
23 A. Can you rephrase that?
24 Q. Absent her making the affirmative inquiry,
25 did you overhear anybody, you know, bragging about you,

1 you know, telling the patient about your knowledge, your
2 training or your experience?
3 A. No.
4 Q. Can I ask you why it is as you sit here
5 today that in the years 1992 through '97 you recall you
6 performed 40 cervical fusions and assisted in ten, but in
7 the year immediately following, which is certainly closer
8 in time, you don't have any idea, not by estimation or
9 otherwise, as to how many again cervical fusions you
10 performed either assisting or as the primary?
11 MR. ALLEN: I object to the
12 characterization of the question. The question's been
13 asked and answered given you qualified your second
14 category by saying they were redos. If you want to ask
15 him how many cervical fusions he's done I'm sure he'd
16 give you an answer.
17 MRS. COFIELD: That was the question.
18 MR. ALLEN: No, it wasn't, but you can ask
19 him a new question.
20
21 BY MRS. COFIELD:
22 Q. Then if that's the confusion at moment, let
23 me try to clear it up. Do you between July 1, 1997 and
24 September 25th, 1997 recall how many cervical fusions you
25 performed or assisted in?

Page 49

Page 51

1 A. Yes.
 2 Q. How many?
 3 A. Eight.
 4 Q. Well, we are going to reduce that time a
 5 little or constrict it even a little more, aren't we,
 6 because you didn't do any between July 1 and August 7th,
 7 did you?
 8 MR. ALLEN: Object to the characterization
 9 and the form of the question.
 10
 11 BY MRS. COFIELD:
 12 Q. All right. You didn't do any between July
 13 1 and August 7th?
 14 MR. BLACKWELL: Are you referring to Beach
 15 General again?
 16 MRS. COFIELD: At Beach General.
 17 THE DEPONENT: Oh, at Beach General?
 18
 19 BY MRS. COFIELD:
 20 Q. Yes.
 21 A. I don't know.
 22 Q. So if you did any of those eight it was at
 23 the other hospitals, Leigh or Norfolk General?
 24 A. I would have to consult my record to see
 25 where those were done.

1 privileges at Virginia Beach General?
 2 A. I don't know. I would have to look at my
 3 record.
 4 Q. Okay. But you do know between July 1 and
 5 September 25th you performed eight cervical fusions,
 6 right?
 7 A. Yes.
 8 Q. Do you also know, sir, if those were -- any
 9 of those were where you were the primary?
 10 A. I don't know.
 11 Q. Do you know if you did any of those alone?
 12 A. I don't know.
 13 Q. The list would show because it's the
 14 fellowship list, right?
 15 A. Uh-huh.
 16 Q. I'm sorry. You have to say yes for the
 17 record.
 18 A. Yes.
 19 Q. And you also don't know if they were redos,
 20 correct, or you know they were not?
 21 A. I don't know.
 22 Q. Do you recall the very first redo you ever
 23 did?
 24 A. No.
 25 Q. Do you know what year it was in?

Page 50

Page 52

1 Q. They were in this Tidewater area?
 2 A. To see whether they were at Norfolk, Leigh
 3 or Virginia Beach.
 4 Q. Okay. That's what I said. That if they
 5 weren't -- strike.
 6 Since your privileges weren't granted at
 7 Virginia Beach General until August 7th, by definition if
 8 some of them predate August 7th they were performed at
 9 either Leigh or Norfolk General.
 10 MR. ALLEN: I object --
 11 MR. NEWSOME: Just object to the form of
 12 the question.
 13 MR. ALLEN: -- to the form of the
 14 question. You're making an assumption and a
 15 characterization about a response that he didn't give.
 16 MRS. COFIELD: I'm just certainly hopeful
 17 he didn't do it at Virginia Beach General without
 18 privileges since it's not part of EVMS, and I'm giving
 19 him the benefit of that doubt.
 20 MR. ALLEN: Those are all assumptions you
 21 made.
 22
 23 BY MRS. COFIELD:
 24 Q. Do you know, sir, if you actually performed
 25 some of those eight before you were granted temporary

1 A. No.
 2 Q. Do you know what state it was in?
 3 A. No.
 4 Q. Can you say definitively, however, that it
 5 was during your internship or your residency as opposed
 6 to during your fellowship?
 7 A. No.
 8 Q. Only the lists would show that?
 9 A. Yes.
 10 Q. Is it then possible that this was the very
 11 first redo you ever did alone?
 12 A. I don't know.
 13 MR. NEWSOME: Object to the --
 14 MR. ALLEN: Yeah. That's all right.
 15
 16 BY MRS. COFIELD:
 17 Q. You were during your fellowship employed by
 18 whom?
 19 A. By EVMS.
 20 Q. Did you receive a W-2?
 21 A. Yes.
 22 Q. And you were paid what, on any basis you
 23 want? I don't know if you were paid weekly, monthly,
 24 bimonthly.
 25 A. Every two weeks.

Page 53

Page 55

1 Q. So then on a monthly basis you received
2 what? Or you could say on a biweekly basis, if that's
3 easier.

4 A. It was roughly \$40,000 divided into
5 two-week segments.

6 Q. Year, per annum?

7 A. Yeah. If it was a whole year it would have
8 been \$40,000, and then that was divided.

9 Q. Okay. Did you receive any other gratuity,
10 stipend, remuneration of any nature, from Dr. Klara's
11 office save and except a gas card for your car?

12 A. Yes. -

13 Q. What else?

14 A. Dr. Klara subsidized my rent.

15 Q. To what tune?

16 A. \$660 a month. And I received a \$1,000
17 bonus for interviewing expenses.

18 Q. Anything else of that nature?

19 A. No.

20 Q. In other words, something the IRS wants to
21 know about as income.

22 A. No.

23 Q. And did that 660 rent continue each and
24 every month and the 1,000 was a one-time?

25 A. Yes.

1 Q. Let's say you had a hundred patients you
2 attended in a given month. Did you in any form or
3 fashion, direct or indirect, receive any form of
4 compensation from Dr. Klara's office dependent upon or
5 contingent upon the number of patients you saw?

6 A. No.

7 Q. Was, again, any compensation or
8 remuneration given to you dependent upon any type of
9 procedure you performed?

10 A. No.

11 Q. So the extent, be it direct or indirect, of
12 any compensation was, as you have just described it, 660
13 a month and a thousand for the interview from Klara, and
14 from EVMS your annual salary of 40,000?

15 A. Yes.

16 Q. Is the fellowship ordinarily a year?

17 A. Yes.

18 Q. Can you tell me why yours was a little less
19 than that?

20 A. I had an opportunity to start my practice
21 in Seattle, so I left early.

22 Q. So there's no mandatory one-year program?

23 A. No.

24 Q. In any form or fashion did you continue
25 your fellowship in Seattle?

Page 54

Page 56

1 Q. I am correct in both regards.
2 The 660 stipend or subsidy was a monthly
3 basis?

4 A. It was monthly.

5 Q. And it continued -- or commenced, rather,
6 when and continued through when?

7 A. It started on July 1st, and I believe it
8 continued through March.

9 Q. Was that by contract?

10 A. No.

11 Q. Oral?

12 A. Yes.

13 Q. You'd just get a check from them?

14 A. I'm sorry?

15 Q. You'd get a check from their office?

16 A. Yes.

17 Q. At no point in time did you ever get any
18 part of a doctor's fee for assisting Dr. Klara?

19 A. No.

20 Q. Or Ray?

21 A. No.

22 Q. Did you ever get any remuneration or
23 compensation of any nature, direct or indirect, for the
24 number of patients that you attended?

25 A. Can you say that again?

1 A. No.

2 Q. It did just stop in its entirety and you
3 became a private practitioner --

4 A. Yes.

5 Q. -- where you presently are?

6 A. Yes.

7 Q. In affiliation with whom?

8 MR. ALLEN: Object to the form, but if you
9 can answer it, go ahead.

10 THE DEPONENT: I'm a sole proprietor.

11

12 BY MRS. COFIELD:

13 Q. Okay. Oh.

14 A. And I share office space with another
15 neurosurgeon.

16 Q. Who?

17 A. Michael Schlitt, S-c-h-l-i-t-t.

18 Q. S-c-h --

19 A. L-i-t-t.

20 Q. And that's the individual who was present
21 when you performed the operation on Ms. Washburn,
22 correct?

23 A. Yes.

24 Q. Did he assist you in any regard?

25 A. No.

Page 57

1 Q. He was in the observation area?
 2 A. There is no observation area.
 3 Q. Well, I -- he was back from the operating
 4 table if there's no observation area?
 5 A. Yes.
 6 Q. And he was not in any way scrubbed to
 7 assist you?
 8 A. No.
 9 Q. Okay. That's purely an office-sharing
 10 situation?
 11 A. Yes.
 12 Q. He presently resides because you do in
 13 Seattle and did at the time of September 25th, '97?
 14 A. Yes.
 15 Q. How come he was in the operating room then?
 16 A. He was visiting.
 17 Q. Is he an old friend of yours you mean?
 18 A. No. No. He was -- he was visiting because
 19 we were discussing me moving to Seattle.
 20 Q. You had never known him before? This was a
 21 purely professional relationship?
 22 A. Yes. It was professional.
 23 Q. To your knowledge, did you ever advise
 24 anybody that Ms. Washburn was your first cervical fusion
 25 redo that you had performed alone?

Page 58

1 A. No.
 2 Q. Can you tell me a little more why Dr.
 3 Schlitt, who was not assisting and did reside in Seattle
 4 and I guess wasn't licensed in Virginia, was there?
 5 A. Because he was visiting.
 6 Q. I understand that, but I still would wonder
 7 why he's in the operating room.
 8 A. Because that's what I was doing that day
 9 and he was spending the day with me.
 10 Q. Was he evaluating your skills in any
 11 regard?
 12 A. No.
 13 Q. Did you have in that room at that time,
 14 September 25th, '97, any prior radiographs or diagnostic
 15 tests of MR, prior films, CT, fluoroscopy, anything of
 16 this nature?
 17 A. Yes.
 18 Q. What did you have in the operating room at
 19 that time?
 20 A. Fluoroscopy.
 21 Q. Anything else?
 22 A. Whatever previous films Ms. Washburn had.
 23 Q. Are you sure they were there?
 24 A. They always are.
 25 Q. Did you look at them?

Page 59

1 A. I don't -- I don't recall if I looked at
 2 them.
 3 Q. Do you recall what they were?
 4 A. Whatever was in her jacket.
 5 Q. Do you recall if it was taken out and put
 6 up?
 7 A. Yes.
 8 Q. By whom?
 9 A. By me.
 10 Q. Then you do recall looking at them?
 11 A. Yes.
 12 Q. What were they? What type of film?
 13 A. I don't recall. Whatever films she had I
 14 looked at.
 15 Q. Okay. And can you explain to me why in
 16 addition to having those preoperative films you needed
 17 also to do a fluoroscopy?
 18 A. Yes.
 19 Q. Tell me.
 20 A. Can you restate the question?
 21 Q. Surely. You just told me you had prior or
 22 preoperative films.
 23 A. Yes.
 24 Q. And that they were taken out of the jacket
 25 and put up and viewed in the view box, right?

Page 60

1 A. (Nodded affirmatively.)
 2 MR. ALLEN: Yes.
 3
 4 BY MRS. COFIELD:
 5 Q. We're waiting because you have to say yes
 6 or no on the record.
 7 A. Yes.
 8 Q. And you're telling me you're the one who
 9 did that, correct?
 10 A. Yes.
 11 Q. Then my question becomes, why is it in
 12 addition to seeing the preoperative films, be they CT or
 13 MRs, you needed the fluoroscopy also intraoperatively?
 14 A. The fluoroscopy is used to confirm the
 15 position of the patient's neck and to identify the site
 16 at which the operation will be performed.
 17 Q. You didn't use the CT or MR for any of
 18 that?
 19 A. I used all the films that she had.
 20 Q. How then did you specifically use the --
 21 MRS. COFIELD: And which was it, counsel?
 22 I don't remember. Was it a CT or MR? Anybody? I'll
 23 look it up.
 24 MR. ALLEN: There are both pre-op, but I
 25 don't know what your question's directed to.

Page 61

Page 63

1

2 BY MRS. COFIELD:

3 Q. Well, did you have both? Did you have both
4 CT and MRs in there?

5 A. I'm unaware of any CT.

6 Q. Okay. Just the MR pre-op. There's only
7 one or the other.

8 MR. ALLEN: And plain film.

9

10 BY MRS. COFIELD:

11 Q. Did you have any plain films in there you
12 viewed?13 A. I don't recall the specific films, but
14 whatever films she had I had there.15 Q. All right. What is it about the
16 fluoroscopy that told you the site of incision?17 MR. ALLEN: Object to the form. You mean
18 his incision or --

19 MRS. COFIELD: Correct. Correct.

20 MR. ALLEN: All right.

21 THE DEPONENT: Can you be more specific?

22

23 BY MRS. COFIELD:

24 Q. You said you used the fluoroscopy in order
25 to confirm the position of the patient's neck and the

1 operative field?

2 A. The fluoroscopy was helpful in where I was
3 going to make my skin incision.

4 Q. Full circle.

5 MR. ALLEN: Just tell her what you did with
6 the fluoroscopy.7 THE DEPONENT: All right. We brought the
8 fluoroscopy in, I took a metal clamp and I put it on the
9 previous incision, and I took a fluoro and I could see
10 that the previous incision was higher than where the
11 surgery needed to be performed.

12

13 BY MRS. COFIELD:

14 Q. Why and how?

15 A. I'm sorry?

16 MR. NEWSOME: Object to the form of the
17 question.

18

19 BY MRS. COFIELD:

20 Q. What were the criteria that you used to
21 make that determination?22 A. The previous surgery was at C6-7 and that
23 area could not be seen with the fluoroscopy, but I could
24 see the position of the clamp above that site.

25 Q. C6-7 couldn't be viewed?

Page 62

Page 64

1 site of the incision, right?

2 A. The site of the operation.

3 Q. Am I saying something different?

4 A. You said the site of the incision.

5 Q. All right. What is it I'm saying distinct
6 from you? Distinguish what I'm saying from what you're
7 saying.8 MR. NEWSOME: Just object to the form of
9 the question.10 THE DEPONENT: Can you rephrase your
11 question?

12

13 BY MRS. COFIELD:

14 Q. I understand you could cut the skin one
15 way. All right. So I'll -- can I say this then so we
16 communicate and it's a quicker rather than a longer
17 deposition: Site of the incision is where you're going
18 to operate, the operative field. All right? Can we
19 agree on that artificial definition for the purposes of
20 this deposition?21 A. The incision is part of the operation, the
22 skin incision.23 Q. I really do understand that much. So, why
24 is it then or how is it that you use the fluoroscopy to
25 determine, I'll put it this way then, the site of the

1 A. No.

2 Q. No? No, it couldn't be viewed?

3 A. It couldn't be viewed, no.

4 Q. Okay. Why?

5 A. Mrs. Washburn had a short neck and heavy
6 shoulders, and so the fluoroscopy couldn't be used to
7 visualize the spine that low.

8 Q. That low being at the C6-C7 level?

9 A. Yes.

10 Q. You could, however, view her spine at the
11 C7-T1 level?

12 A. No.

13 Q. Where could you?

14 A. I could see the top of C6.

15 Q. All right. Then explain to me from an
16 anatomical standpoint why it is you entered at C7-T1.17 MR. ALLEN: Object to the form of the
18 question and the assumption therein.

19

20 BY MRS. COFIELD:

21 Q. Why you operated. Why you operated or
22 fused at C7-T1.

23 MR. ALLEN: Same objection.

24

25

1 BY MRS. COFIELD:
 2 Q. I'll stand on it.
 3 A. I performed my operation at C6-7.
 4 Q. You did. Can you explain to me why some of
 5 the documents show a fusion at C6-T1?
 6 MR. ALLEN: Object to the form of the
 7 question.
 8 MR. NEWSOME: Object to the form.
 9 THE DEPONENT: No.
 10
 11 BY MRS. COFIELD:
 12 Q. Did you in any regard at any time
 13 intentional or unintentionally operate at C7-T1?
 14 A. Not that I'm aware of.
 15 Q. The entirety of the operative field was
 16 confined by the vertebral bodies at C6-7?
 17 A. As far as I know.
 18 Q. Oh, while I'm looking for some documents
 19 would you mind telling me if there was a fusion or a
 20 nonfusion --
 21 A. Excuse me.
 22 Q. -- or a union, either one, at C6-7 when you
 23 opened her up?
 24 A. I identified a fibrous union and I removed
 25 it and fused it.

1 any studies?
 2 A. Yes.
 3 Q. What?
 4 A. Cervical spine x-rays.
 5 Q. All right. Anything else?
 6 A. Not that I recall.
 7 Q. Did you at any time, intentionally or
 8 unintentionally, anteriorly fuse C6 through T1?
 9 A. I'm sorry?
 10 Q. Did you at any time, intentionally or
 11 unintentionally, from an anterior position fuse C6
 12 through T1?
 13 A. Not that I'm aware of.
 14 Q. I am showing you a cervical spine -- I'm
 15 not sure if it's an MR or CT because it doesn't say, or
 16 plain radiograph -- saying that there was anterior fusion
 17 of C6 through T1 using a metallic plate and disc screws
 18 into the C6, C7 and T1 vertebral bodies. Would you take
 19 a moment to --
 20 MR. BLACKWELL: Counsel, will you tell us
 21 what it is?
 22 MR. ALLEN: A Virginia Beach General
 23 Hospital radiology consultation form which appears to be
 24 dated November 19, 1997.
 25

1 Q. Do you categorize the fibrous union as a
 2 nonunion?
 3 A. Yes.
 4 Q. Did you take any -- or order any, rather,
 5 preoperative films?
 6 A. Yes.
 7 Q. What?
 8 A. I ordered flexion/extension cervical spine
 9 x-rays and a bone scan.
 10 Q. Am I correct in understanding the bone scan
 11 was to see where the uptake was?
 12 A. It was to see if there was a
 13 pseudoarthrosis.
 14 Q. All right. Then I am confused. So,
 15 explain to me. Postoperatively you wanted to see if
 16 there was a pseudoarthrosis?
 17 MR. ALLEN: Objection.
 18 MRS. COFIELD: Excuse me. I said
 19 postoperative.
 20 MR. ALLEN: No. You said preoperatively.
 21 THE DEPONENT: No. You asked me for
 22 preoperative studies.
 23
 24 BY MRS. COFIELD:
 25 Q. I'm sorry. Postoperatively did you order

1 BY MRS. COFIELD:
 2 Q. Okay. Have you had a moment to review
 3 that?
 4 A. Yes.
 5 Q. All right. Did you at any time,
 6 intentionally or unintentionally, in fact -- and you'd
 7 have to read it again. I can't do it from memory --
 8 place the screws from C6 through T1 with a plate?
 9 A. Not that I'm aware of.
 10 Q. Okay. When you opened her up, and it was
 11 the first operation that Dr. Isabella Richmond performed,
 12 was there hardware at the C6-T1 level?
 13 MR. ALLEN: Object to the form. I think
 14 what I -- go ahead and answer it. I'll object to the
 15 form.
 16 THE DEPONENT: What do you mean by
 17 hardware?
 18
 19 BY MRS. COFIELD:
 20 Q. Plates, screws.
 21 A. There were not any plates or screws.
 22 Q. None at any -- okay. So the first hardware
 23 in that sense inserted in Mrs. Washburn was inserted by
 24 yourself?
 25 A. Yes.

Page 69

1 Q. Okay. I just want to be sure. There was
2 nothing there that you had to explant, right?
3 A. No.
4 Q. You told me you postoperatively ordered a
5 C-spine series. Is that the C-spine series you ordered?
6 A. No.
7 Q. All right. Did you see that; that is, not
8 just the impression or finding, but the film itself?
9 A. I don't know if I saw this specific film.
10 Q. Did it ever come to your attention that the
11 hardware was positioned as shown in that impression or as
12 alleged to exist in that reading?
13 A. No.
14 Q. Did you ever intend for it to be in that
15 location, if that is a correct reading?
16 A. I -- can you rephrase that question?
17 Q. Surely. Did you intend for the hardware
18 which you inserted in Mrs. Washburn to reside in her body
19 in the vertebral bodies and with that placement shown on
20 that reading?
21 A. No.
22 Q. Can I have that back then, please?
23 MR. NEWSOME: May I see that, please?
24 MR. BLACKWELL: Again, for the record, what
25 is that?

Page 70

1 MRS. COFIELD: It's the 11/18 cervical
2 spine from Virginia Beach Hospital.
3 MR. BLACKWELL: Okay.
4 MRS. COFIELD: Joseph Dalton listed there.
5 And if you could just get your own for a
6 moment, counsel, because I've got to put it back to find
7 another one and I can't close my book until I do that.
8 MR. NEWSOME: Okay. Whatever.
9 MRS. COFIELD: Oh, darn. I can't close it
10 anyway. You're just going to have to wait for a minute.
11 MR. BLACKWELL: Is that being marked as an
12 exhibit?
13 MRS. COFIELD: No, I didn't, but I don't
14 mind if you want it done.
15 MR. BLACKWELL: I'd like it marked.
16 MRS. COFIELD: Okay. We're just going to
17 have to tab it for the moment because I can't work with
18 my book.
19
20 (Whereupon, an off-the-record
21 discussion took place.)
22
23 (Britt Deposition Exhibit No. 1 was
24 marked for identification.)
25

Page 71

1 MRS. COFIELD: Now, here I'm showing you a
2 9/25 film reading dated 7:40 p.m., saying no -- got it?
3 Thank you. Saves me having to take apart this book each
4 time -- showing no comparison films. Do you see that one
5 in front of you, counsel?
6 MR. ALLEN: Yeah, it's a document dated
7 September 25th, 1997, 9:47 p.m.
8 MRS. COFIELD: 7:40. Oh, at the top;
9 you're correct, 9:47. At the bottom in the body of it
10 7:40.
11 MR. ALLEN: Yes.
12 MRS. COFIELD: Okay. We're at the same
13 document.
14
15 BY MRS. COFIELD:
16 Q. Can you tell me, sir, did you order that
17 film?
18 A. I would have to check the record.
19 Q. What record would you have to check?
20 A. The patient's chart.
21 Q. Well, the chart's in front of you, sir.
22 What part of it would you need?
23 A. The order sheets.
24 Q. On 9/25/97 there was no other doctor in
25 attendance, correct or incorrect?

Page 72

1 A. On the day of the surgery I was the doctor.
2 Q. Okay. So did anybody else, to your
3 knowledge, order any films?
4 A. Not that I'm aware of.
5 Q. Do you have any reason to doubt that you
6 ordered this?
7 A. I did order this.
8 Q. Okay. And you're now looking at the
9 physician's orders?
10 A. Yes.
11 Q. And that refreshes your recollection?
12 A. Yes.
13 Q. Was it done preoperative, intraoperative or
14 postoperatively?
15 A. Postoperatively.
16 Q. Okay. Is the time about correct then, it
17 was postoperatively, assuming the operation ended at
18 about 6:20?
19 MR. ALLEN: Which time; the 7:40?
20 MRS. COFIELD: That's what I'm curious
21 about, the 7:40.
22 THE DEPONENT: The post-op orders are
23 written at 6:25 and the x-rays performed at 7:40.
24
25

Page 73

Page 75

1 BY MRS. COFIELD:
 2 Q. Okay. It shows under Impression that there
 3 was an anterior fusion at the C6-7 and -- C7-T1 levels,
 4 correct? It states that, in other words.
 5 A. The radiologist states that.
 6 Q. Correct. Was there prior to your operation
 7 a fusion at the C7-T1 levels?
 8 A. Not that I'm aware of.
 9 Q. Was there subsequent to your operation a
 10 fusion at C7-T1?
 11 A. Not that I'm aware of.
 12 Q. Do you believe that the two cervical spine
 13 readings that I have provided you are erroneous, or are
 14 they consistent with what you did?
 15 A. I don't know.
 16 Q. Is there any explanation for you having
 17 operated at C6-7 and a metallic plate and disc screws
 18 being seen by the radiologist on C7-T1?
 19 A. I don't know.
 20 Q. But if there are screws at the T1 level you
 21 placed them, correct?
 22 MR. ALLEN: Object to the form of that
 23 question.
 24 MR. NEWSOME: Object to the form.
 25 MRS. COFIELD: I'll stand on the question.

Page 74

Page 76

1 THE DEPONENT: Can you rephrase that?
 2
 3 BY MRS. COFIELD:
 4 Q. No. I'll stand on it.
 5 A. Can you repeat?
 6 Q. Did anyone other than yourself insert any
 7 screws in Mrs. Washburn on September 25th, 1997?
 8 A. I inserted the screws.
 9 Q. You alone?
 10 A. Yes.
 11 Q. Okay. And there was no hardware we have
 12 established, screws or plates, prior to that operation?
 13 A. Yes.
 14 Q. Okay. And I would now show you if you'd be
 15 so kind, counsel, the September 28th, 1997 cervical spine
 16 series. And before we go to it, that prior film, sir,
 17 was that a plain radiograph?
 18 A. What prior film?
 19 Q. The 9/2 one performed at 7:40.
 20 A. This appears to be a plain radiograph.
 21 Q. Okay. Now, the September 28th, '97
 22 cervical spine also showing evidence of an anterior
 23 fusion at the C6-T1 level. Is that ordered by you? Is
 24 that the postoperative, that is, film ordered by
 25 yourself?

1 A. I would have to check the orders.
 2 Q. Okay.
 3 A. This appears to be the x-ray I ordered.
 4 Q. All right. Did you intentionally fuse the
 5 C6-T1 vertebral bodies?
 6 MR. ALLEN: Objection. This is about the
 7 fifth time's he's answered this question.
 8 MRS. COFIELD: There's three different
 9 readings.
 10 MR. ALLEN: Well, the question is still the
 11 question. I don't care how many readings you have. You
 12 could have a hundred readings, the question is still the
 13 question.
 14 MRS. COFIELD: I'll go ahead and ask a
 15 different question.
 16
 17 BY MRS. COFIELD:
 18 Q. Do you have any reason to suspect Fred
 19 Stitik incorrectly read the radiograph of September 28th,
 20 '97?
 21 MR. NEWSOME: I just object to the form of
 22 the question.
 23 MR. BLACKWELL: Well --
 24 THE DEPONENT: I can't speculate as to what
 25 the radiologist saw.

1
 2 BY MRS. COFIELD:
 3 Q. But I didn't ask you to speculate. I mean,
 4 you could have a reason to say, I never was down at T1 so
 5 I don't care what he read; I wasn't in that operative
 6 field, in other words.
 7 MR. ALLEN: Objection.
 8 MR. NEWSOME: Objection.
 9 MRS. COFIELD: It's an example, not a
 10 question. You said you don't want speculation and I
 11 don't either.
 12
 13 BY MRS. COFIELD:
 14 Q. I want to know if you have any facts which
 15 would say this reading is wrong because I wasn't at, for
 16 example, the T1 level?
 17 MR. ALLEN: He's already said he wasn't at
 18 the T1 level, so that's clear, but if you want to know if
 19 there's any facts that he has --
 20 MRS. COFIELD: I do. That's all I want.
 21 MR. ALLEN: Okay.
 22
 23 BY MRS. COFIELD:
 24 Q. Do you have any facts at your disposal to
 25 say that indeed there is no fusion at the T1 level?

Page 77

1 MR. ALLEN: That's not -- that was not your
2 question the first time.
3 MRS. COFIELD: Well, I certainly intend it
4 to be, so I'll just stand on that one.
5
6 BY MRS. COFIELD:
7 Q. Do you have any facts to say that there is
8 no anterior fusion at the C6-T1 level?
9 A. I performed the surgery.
10 MR. ALLEN: Object to the -- to your
11 question based on your description of the anatomy being
12 incorrect.
13
14 BY MRS. COFIELD:
15 Q. Okay. Go ahead. Oh.
16 A. I performed the surgery at the C6-7 level.
17 Q. Okay. Do you have any facts to support any
18 reading there's an anterior fusion at C7-T1?
19 A. I'm sorry. Can you repeat that?
20 MRS. COFIELD: Counsel correctly pointed
21 out that I said -- well, strike. Strike.
22 MR. ALLEN: Don't admit I said anything
23 correct.
24 MRS. COFIELD: Yeah.
25

Page 78

1 BY MRS. COFIELD:
2 Q. Did you at any time operate on three
3 vertebral bodies being C6, C7 and T1?
4 A. I performed the operation at C6 and C7.
5 Q. Only? And never went down to T1?
6 A. As far as I know, yes.
7 Q. All right. Did you enter from an anterior
8 position?
9 A. An anterior approach for the operation?
10 Q. An anterior approach I should say.
11 A. Yes.
12 Q. Did you give any consideration to entering
13 on the right or the left at the time?
14 A. Oh, I entered on the right, as I was told
15 to do.
16 Q. By whom?
17 A. By Dr. Klara.
18 Q. Always on the right you mean?
19 A. Yes. Dr. Klara said always do an anterior
20 fusion from the right side.
21 Q. What are the risks associated with an entry
22 on the right?
23 A. The risks of surgery are infection,
24 bleeding, damage to the trachea, esophagus, or carotid
25 artery, recurrent damage to the laryngeal nerve resulting

Page 79

1 in hoarseness or difficult swallowing, spinal cord injury
2 resulting in weakness, numbness, tingling, loss of bowel,
3 bladder or sexual function, nonunion of the graft, or
4 breakage of the plate and screws.
5 Q. Did you advise Mrs. Washburn of each and
6 every one of those?
7 A. Yes.
8 Q. Are those risks which you have just
9 enumerated the same on the right as they are for the
10 left?
11 A. No.
12 Q. What are the ones for entry on the left?
13 A. Entering on the left involves one
14 additional risk, damage to the thoracic duct.
15 Q. Is the risk of damage to the laryngeal
16 nerve less or greater if entry is on the left?
17 A. I don't know.
18 Q. I take it then you did not tell Mrs.
19 Washburn that the risks -- strike.
20 Did you ever talk with Ms. Washburn about
21 where you would enter; that is, on the right or the
22 left?
23 A. No.
24 Q. Did you ever discuss the variant risks
25 associated with entry on the right or the left?

Page 80

1 A. No.
2 Q. And is it your testimony that you always
3 and at that time were instructed to enter on the right if
4 you have an anterior approach?
5 A. Yes.
6 Q. Does that vary in any regards if it's a
7 redo?
8 A. Dr. Klara also said always do the operation
9 on the side of the previous surgery, which was also the
10 right.
11 Q. Before we leave these films, can you give
12 me any explanation at all of a factual and/or
13 anatomically factual foundation why three different
14 radiologists read a fusion at T1?
15 A. I can't speculate as to why they read their
16 film the way they did.
17 MR. ALLEN: Objection to the form.
18 MRS. COFIELD: Well, I'm asking something
19 different.
20 MR. ALLEN: Let me go back to object to the
21 assumption and characterization of the first question.
22 MR. BLACKWELL: I object to the form of the
23 question as describing in your own terms what these
24 radiologists interpreted these films to be. I see
25 different things in these reports; they can't visualize

Page 81

Page 83

1 certain things, they want corroboration.
 2 MRS. COFIELD: And that's why I'm asking
 3 the exact question since he had a look-see and sometimes
 4 films aren't clear.
 5
 6 BY MRS. COFIELD:
 7 Q. Can you tell after you opened her up why a
 8 radiologist who doesn't have her open might read a film
 9 as having a fusion at C7-T1?
 10 MR. NEWSOME: I just object to the form of
 11 the question.
 12 MR. ALLEN: Join the objection.
 13 MR. NEWSOME: Calls for speculation.
 14 MR. ALLEN: Same objection.
 15 THE DEPONENT: I can't speculate as to why
 16 they read their films the way they do.
 17
 18 BY MRS. COFIELD:
 19 Q. Did you see any fibrous tissue between C7
 20 and T1?
 21 MR. ALLEN: When?
 22 MRS. COFIELD: When he opened her up.
 23 THE DEPONENT: Not that I know of.
 24
 25

Page 82

1 BY MRS. COFIELD:
 2 Q. Was it in your operative field when she was
 3 open?
 4 A. I'm sorry?
 5 Q. Was C7-T1 in your operative field when she
 6 was opened?
 7 A. I don't know.
 8 Q. Can you tell me the -- where the incision
 9 extended; that is, what you could visualize?
 10 A. I could see C6 and C7.
 11 Q. Only?
 12 A. As far as I know.
 13 MRS. COFIELD: Can we get -- can I just take
 14 a break for coffee?
 15 MR. ALLEN: Sure. Absolutely.
 16
 17 (Recess.)
 18
 19 BY MRS. COFIELD:
 20 Q. Were you or did you ever have issued to you
 21 while you were with Dr. Klara's office, which just
 22 defines the time frames, a provider number for Cigna
 23 Health Care?
 24 A. No.
 25 Q. Did you have a provider number for any

1 other insurance policy?
 2 A. No.
 3 Q. Did you apply for one and were denied?
 4 A. No.
 5 Q. Did all the operations which you performed
 6 get billed under Dr. Klara or Dr. Borden or the group's
 7 prior number?
 8 MR. ALLEN: Objection, foundation.
 9 THE DEPONENT: I'm unaware of Dr. Klara's
 10 billing practices.
 11
 12 BY MRS. COFIELD:
 13 Q. You have no idea?
 14 A. No.
 15 Q. You do know, however, during that time
 16 frame you did perform operations on Klara's and/or Ray's
 17 patients without their presence, correct?
 18 A. Yes.
 19 Q. You also do know on those operations we
 20 have just defined you did not receive any pay, correct?
 21 A. Correct.
 22 Q. Are you aware that 11,000, give or take,
 23 was charged for Ms. Washburn's operation?
 24 A. No.
 25 Q. You received, however, no part of the

Page 84

1 remuneration for Mrs. Washburn's operation, did you?
 2 A. None.
 3 Q. Did you at any time tell Ms. Washburn why
 4 you were with Dr. Klara, any explanation of any nature?
 5 A. I told Ms. Washburn that I was in my
 6 fellowship.
 7 Q. Did you explain what that meant?
 8 A. No.
 9 Q. Was there any further discussion about that
 10 term?
 11 A. No.
 12 Q. Was anyone in attendance when you made the
 13 statement?
 14 A. I don't know.
 15 Q. You don't recall if her husband was
 16 present?
 17 A. I don't recall.
 18 Q. Do you recall going into the hallway and
 19 looking at people's -- the doctors's qualifications that
 20 are framed on the wall?
 21 MR. ALLEN: With Mrs. Washburn
 22 specifically?
 23 MRS. COFIELD: Correct, with Mrs. Washburn.
 24 THE DEPONENT: Well, I'm sorry. Going into
 25 the hallway where?

Page 85

1
2 BY MRS. COFIELD:
3 Q. At Klara's office where qualifications are
4 framed.
5 A. Yes.
6 Q. And looking or talking about them at any
7 time with Mrs. Washburn?
8 A. No.
9 Q. Did you overhear Mrs. Washburn at any time
10 talk to another office personnel about them?
11 A. No.
12 Q. Okay. Do you recall being in the
13 examination room with Mr. and Mrs. Washburn, yourself and
14 Dr. Klara, and I'm not sure if Brandi was also there,
15 when it was decided that the operation would be performed
16 on or about September -- one minute -- 22nd?
17 MR. ALLEN: Object to form and foundation.
18 THE DEPONENT: No. We were never all in
19 the same room as you described.
20
21 BY MRS. COFIELD:
22 Q. Okay. Do you then recall the office visit
23 of September 22nd?
24 A. Yes.
25 Q. What is it you recall about that?

Page 86

1 A. I'd like to see my note from that day.
2 Q. Surely.
3 A. Okay. I'm sorry. What was the question?
4 Q. What do you recall about that conversation?
5 MR. ALLEN: Object to the form of the
6 question.
7
8 BY MRS. COFIELD:
9 Q. Go ahead. I assume you talked to her, you
10 examined her and you signed off. So, what do you recall
11 about that office visit?
12 A. I obtained a history, I examined her, I
13 discussed the test results with her, and she decided to
14 undergo the surgery.
15 Q. Is that the first occasion on which a
16 decision was made that surgery was to be the appropriate
17 treatment?
18 MR. NEWSOME: Just object to the form of
19 the question.
20 MR. ALLEN: Same objection.
21
22 BY MRS. COFIELD:
23 Q. Go ahead.
24 A. Yes.
25 Q. Was it on that occasion or at a later time

Page 87

1 that it was discussed -- that it was decided, rather, you
2 as opposed to Dr. Klara would perform the surgery?
3 A. It was at the time of that visit.
4 Q. What was the nature, sum and substance that
5 is, of the conversation concerning that topic?
6 A. I brought Ms. Washburn from the exam room
7 into the hallway where Dr. Klara was, and he said that he
8 would be unavailable for the day that Mrs. Washburn
9 wanted to have her surgery, but I would be available to
10 do the operation.
11 Q. Any other conversation about delaying it or
12 having him present at another time, anything else, or was
13 that the sum and substance, best you can recall?
14 A. There was no discussion about delaying it.
15 Mrs. Washburn wanted it right away.
16 Q. Why do you say that?
17 A. She said she didn't want to wait.
18 Q. Was the duration of the wait explained to
19 her? In other words, if you waited and I didn't do it
20 it's six weeks, it's six months, it's two years,
21 anything?
22 A. The duration of the wait wasn't discussed.
23 Q. Do you know where Dr. Klara was on
24 September 22nd, '97?
25 A. On September 22nd he was in the office.

Page 88

1 Q. Excuse me. September 25th. That is, why
2 he wouldn't be available?
3 A. I believe he was hunting.
4 Q. He was on vacation at the time?
5 A. I believe so.
6 Q. What, if anything else, do you recall about
7 the September 22nd, '97 office visit? That is, other
8 than is recorded.
9 A. At that time I consented Ms. Washburn.
10 Q. Okay. Do you recall if at this time her
11 husband was present?
12 A. I don't recall.
13 Q. Do you recall if Brandi was present or
14 anyone other than yourself and she?
15 A. Brandi was present part of the time.
16 Q. Was it at the beginning, middle or end of
17 that consult?
18 A. Of the office visit?
19 Q. Uh-huh.
20 A. I don't know.
21 Q. Do you recall if Brandi was there when you
22 consented her?
23 A. Brandi signed the consent form with her.
24 Q. Does that mean she was present because
25 that's a requirement of the practice?

Page 89

Page 91

1 A. I don't know if she was there when I
2 discussed the risks and benefits with Ms. Washburn.
3 Q. She just witnessed the signature of Mrs.
4 Washburn?
5 A. She witnessed the signature on the consent
6 form.
7 Q. Okay. On September 22nd, '97 was Dr. Klara
8 in the room also examining Ms. Washburn or did he just
9 co-sign?
10 A. I don't recall.
11 Q. Do you recall doing the exam?
12 A. Yes.
13 Q. You just don't recall if Dr. Klara was
14 present at all?
15 A. No, I don't recall if he was present at any
16 time during the visit --
17 Q. You do?
18 A. -- in the exam room.
19 Q. You do recall leaving the exam room with
20 Mrs. Washburn and finding Dr. Klara in the hallway to
21 talk about the scheduling procedure, correct?
22 A. Yes.
23 Q. All right. So, he clearly wasn't in the
24 exam room at that time?
25 A. No.

1 Q. Any other conversations or examinations
2 which are not documented on the face sheet of this
3 memorandum or this charted entry (indicating)?
4 MR. ALLEN: And which he hasn't already
5 told you about?
6 MRS. COFIELD: Obviously.
7
8 BY MRS. COFIELD:
9 Q. Anything else is the question.
10 A. No. Just what we had previously discussed
11 with regard to the exam.
12 Q. If I go backwards in time then, you can
13 take a review if you need, but answer the following
14 question: The first office visit is 8/1/97 and the one
15 immediately preceding is September 17th, '97. In order
16 to expedite this proceeding, can I ask as to all of those
17 prior office visits, is it true that at no time had you
18 decided in conjunction with Mrs. Washburn that surgery
19 would be performed, it was just being entertained?
20 A. Mrs. Washburn was seen by Dr. Klara on
21 those other visits.
22 Q. Exclusively?
23 A. Yes.
24 Q. All right. So you have no knowledge one
25 way or --

Page 90

Page 92

1 Q. Did he then come in the exam room
2 afterwards or did you have that discussion in the
3 hallway?
4 A. We had that discussion in the hallway.
5 Q. Who else was present? Was Brandi present
6 in the hallway? Can you recall that?
7 A. I don't know.
8 Q. Was it Brandi at the time who would do the
9 scheduling of operations?
10 A. Yes.
11 Q. What, if any, instructions did you give
12 her?
13 A. The type of procedure that Mrs. Washburn
14 was going to have.
15 Q. And you simply said what; fusion?
16 A. A C6-7 repair of pseudoarthrosis.
17 Q. And why is it you told Brandi that?
18 A. She requests the necessary instruments for
19 the hospital.
20 Q. Give instructions to anyone else in the
21 office to be carried out?
22 A. Not that I recall.
23 Q. All right. Do you then recall anything
24 else concerning that office visit?
25 A. Can you be more specific?

1 A. That was on the 1st.
2 Q. Oh.
3 A. Now, she did have a visit with me on the
4 17th.
5 Q. Correct.
6 A. So, she was seen by Dr. Klara on the 1st --
7 I'm sorry -- yeah, on the 1st, and then again on the
8 29th, and the first time I saw her was 9/17.
9 Q. Okay. Do you know by way of communications
10 with Dr. Klara or otherwise if surgery had previously
11 been contemplated, that is, prior to September 22nd, '97?
12 A. I don't know what he discussed with her.
13 Q. And you didn't ask him?
14 A. I read his notes.
15 Q. And that was the nature and extent of the
16 communication; i.e., a written one?
17 A. Yes.
18 Q. Do you know what conservative treatments
19 were rendered other than what is in the chart, or is that
20 the extent of your knowledge?
21 A. What's in the chart.
22 Q. As opposed to communications with the
23 doctor, did you have any communications with the patient
24 concerning conservative treatments?
25 A. I'm sorry. Can you repeat that?

Page 93

Page 95

1 Q. You said the nature and extent of the prior
2 treatment with Dr. Klara is contained in the chart.
3 A. Uh-huh.
4 Q. Did you have any communications with the
5 patient about prior treatment which is not contained in
6 the chart?
7 A. No, just what's in the chart.
8 Q. Okay. Then what are the criteria which you
9 brought to bear on September 22nd, 1997 to decide that
10 surgery or surgical intervention was the appropriate
11 procedure at that time to treat her condition?
12 A. Her history and the bone scan results.
13 Q. What is it in the bone scan results that
14 was clinically significant to you in reaching that
15 determination?
16 A. The radiologist determined the bone scan as
17 being consistent with a pseudoarthrosis.
18 Q. Meaning nonunion?
19 A. Yes.
20 Q. Did you have the results of the bone scan
21 at that time?
22 MR. ALLEN: At that time being 9/22/97?
23 MRS. COFIELD: Correct.
24 THE DEPONENT: Yes.
25

Page 94

1 BY MRS. COFIELD:
2 Q. Were there any discussions with Dr. Klara
3 concerning that, the bone scan, the decision for the
4 treatment, as opposed to who would operate, just the
5 decision that surgery was going to be performed?
6 A. Yes.
7 Q. What were the nature and extent of those
8 communications?
9 A. I discussed the results of the bone scan,
10 and the patient's worsening pain, and whether a CT scan
11 would be needed, and Dr. Klara decided that there was
12 enough evidence of pseudoarthrosis to proceed with the
13 surgery.
14 Q. Did that conversation take place in front
15 of Mrs. Washburn?
16 A. I don't recall.
17 Q. Did it take place in the exam room or the
18 hallway?
19 A. In the hallway.
20 Q. So you decide to operate three days later.
21 Anybody other than yourself as a physician perform any
22 part of that procedure? I understand you had nurses
23 helping you.
24 A. Yes. Nancy Tsai, the medical student, was
25 scrubbed also.

1 Q. What year was she in; fourth?
2 A. Fourth year.
3 Q. What did she do mechanically?
4 A. She made the skin incision for harvesting
5 the bone graft, and then --
6 Q. Was that in the hip?
7 A. In the hip. I removed the graft and then
8 she closed the incision.
9 Q. Anything else?
10 A. No, other than assisting with the exposure
11 of the spine.
12 Q. Holding it open?
13 A. Yes.
14 Q. She's a fourth-year student at EVMS, right?
15 A. She was.
16 Q. Was.
17 Do you have any idea how many operations,
18 if any, she had assisted in of a cervical nature?
19 A. You would have to ask her.
20 Q. You don't know?
21 A. No.
22 Q. You earlier told me on September 22nd, '97
23 you discussed the test results with Mrs. Washburn. I
24 take it that was the bone scan test results you
25 referenced, right?

Page 96

1 A. The bone scan, yes.
2 Q. Okay. Not a plural?
3 A. I'm sorry?
4 Q. That was the only test result completed as
5 of that date, right?
6 A. I'll have to look at the record.
7 Q. Well, I take that back. An MRI was done on
8 8/14. Did you discuss that with her?
9 A. I don't recall if I discussed that with her
10 or not.
11 Q. All right. There's --
12 A. I may have discussed her cervical spine
13 x-rays with her.
14 Q. Of 9/17?
15 A. Yes.
16 Q. And the 9/17 cervical spine, that's just a
17 plain radiograph also?
18 A. With flexion and extension.
19 Q. That being the position, but it's a plain
20 radiograph?
21 A. Yes, it is.
22 Q. Did you ever discuss with Dr. Davis, Dr.
23 Klara, or any other physician, the impression there of no
24 evidence of instability?
25 A. I'm sorry. Is Dr. Davis the radiologist?

Page 97

Page 99

1 Q. Yes. Yes. I thought you had it in front
2 of you. I'm sorry.
3 A. I believe I discussed that with Dr. Klara.
4 Q. Okay. Nature and extent of that
5 communication, if you will.
6 A. I would have -- I informed him that the
7 cervical spine x-rays showed no subluxation.
8 Q. He respond at all?
9 A. To that specific --
10 Q. Yes.
11 A. -- information?
12 I don't recall.
13 Q. Were you expressing concern as to whether
14 an operation would be necessary absent subluxation?
15 A. No. I was summarizing the data.
16 Q. When you opened her up and did a look-see
17 and did see the fibrous tissue, was it so dense that in
18 your opinion at that time there -- that accounted for the
19 fact of no subluxation; that is, the density of the
20 fibrous mass?
21 A. I can't speculate.
22 Q. I'm not asking you to, sir. Did you have
23 an opinion at that time if the fibrous tissue which you
24 viewed was such a dense and extensive mass that it would
25 account for a finding on a radiograph of no subluxation?

1 She was admitted the same day of your consult in the
2 office, correct?
3 A. I'm sorry?
4 Q. She was admitted to the hospital September
5 22nd --
6 A. Let me take a look at this.
7 Q. -- or not? No. She wasn't. I don't know
8 why it's a wrong date. September 25th through the 28th,
9 correct?
10 A. Yes.
11 Q. Okay. Did you see her in the hospital
12 post-op?
13 A. Yes.
14 Q. You and Dr. Klara or you alone, sir?
15 A. Me alone.
16 Q. Was Dr. Klara still hunting, still on
17 vacation?
18 MR. ALLEN: Object, foundation. You can
19 answer.
20 THE DEPONENT: I don't recall.
21
22 BY MRS. COFIELD:
23 Q. Do you recall if he was back in the office?
24 A. No.
25 Q. No, you don't recall, or no, he wasn't?

Page 98

Page 100

1 MR. NEWSOME: Just object to the form of
2 the question.
3 THE DEPONENT: I don't have an opinion on
4 that.
5
6 BY MRS. COFIELD:
7 Q. Okay. Did you have an opinion at that time
8 as to whether or not the extension and density of that
9 mass of fibrous tissue could support the vertebral bodies
10 between C6 and 7?
11 A. Can you say that again?
12 Q. Yes. If it's inartfully phrased, tell me.
13 Did you have an opinion when you looked at
14 her on September 25th in the operating room whether the
15 mass of fibrous tissue was so dense and/or extensive that
16 it provided a framework of support between C6 and C7?
17 MR. ALLEN: Did you have an opinion at that
18 time?
19 THE DEPONENT: There's no way. I have no
20 opinion on that.
21
22 BY MRS. COFIELD:
23 Q. You then saw her postoperatively -- excuse
24 me.
25 She was in the hospital six days, I guess.

1 A. I don't recall.
2 Q. Can you explain to me why the OR report
3 states that the surgeons were Britt Borden and Peter
4 Klara?
5 A. Yes.
6 Q. Why?
7 A. I always put the professor's name on the op
8 report. That's the way I was taught to do it in my
9 residency.
10 Q. And then all of your operative reports
11 through residency would show that?
12 A. Yes.
13 Q. I see. Doesn't mean that person was there?
14 A. It means they were the professor.
15 Q. And Dr. Klara was at that time your
16 professor?
17 A. Yes.
18 Q. Because you were under his aegis in some
19 fashion during your fellowship?
20 MR. ALLEN: Object to form.
21 THE DEPONENT: Because I was doing the
22 fellowship.
23
24 BY MRS. COFIELD:
25 Q. Okay. You also saw her postoperatively in

Page 101

Page 103

1 the office, correct?
 2 A. Yes.
 3 Q. Postoperative visits with you commence
 4 October 1, '97; is that correct?
 5 A. I'll have to check the records.
 6 Q. Sure.
 7 A. I believe that was the first visit.
 8 Q. All right. Before we go to that first
 9 visit, let me see if I can get the 9/25 questions out of
 10 my head.
 11 Did you position the fluoroscopy or C arm?
 12 A. Yes.
 13 Q. Who was assisting you in doing that? Who
 14 was the radiology tech, in other words?
 15 A. I don't know.
 16 Q. If you look at the operative report will
 17 that refresh your recollection?
 18 A. Do you have the op report?
 19 Q. Yeah.
 20 MR. ALLEN: What one are you looking at?
 21 MRS. COFIELD: Kennedy 1.
 22 MR. ALLEN: Surgical services
 23 intraoperative record, correct?
 24 MRS. COFIELD: Correct. Thank you.
 25

1 one or two post-op? Describe it like that for me in
 2 stages of the operation.
 3 MR. ALLEN: To the best of your ability to
 4 and if you can.
 5 THE DEPONENT: I don't recall.
 6
 7 BY MRS. COFIELD:
 8 Q. Do you know that you did one at least
 9 pre-op?
 10 A. Yes.
 11 Q. One at least intraoperatively?
 12 A. I don't recall.
 13 Q. Do you know if one at least postoperatively
 14 was performed?
 15 A. I don't recall.
 16 Q. So the only thing you're positive of is at
 17 least one pre-op?
 18 A. Well, I know I did -- I know I performed
 19 several. I don't know at what time they were.
 20 Q. All right. And of the several do you know
 21 at least one was preoperatively or not?
 22 A. Prior to the skin incision?
 23 Q. Yes.
 24 A. Yes. One.
 25 Q. Why?

Page 102

Page 104

1 BY MRS. COFIELD:
 2 Q. See the M. Allen, x-ray tech?
 3 A. Let's see.
 4 Q. Under the line designated Other?
 5 A. Yes.
 6 Q. Okay. Does that refresh your
 7 recollection? Do you know him?
 8 A. I don't recall who that is.
 9 Q. Did anybody -- and I'll use the term M.
 10 Allen because that's what the record shows. Did M. Allen
 11 or any other radiology tech assist you in positioning the
 12 C arm?
 13 A. Yes.
 14 Q. Who that you recall then?
 15 A. I don't recall specifically who did it.
 16 Q. All right. How many views did you take?
 17 A. I don't recall.
 18 Q. They were all, and tell me, what; prior to
 19 incision?
 20 A. No.
 21 Q. During the operation as well?
 22 A. Yes.
 23 Q. Okay. Then tell me every time you took one
 24 and maybe we can get to the number. I mean, did you take
 25 one or two pre-op and then one or two intra-op and then

1 A. Because I had checked the position of the
 2 incision.
 3 Q. Did you after positioning the C arm then
 4 read -- I don't know. Should I say film, the view, the
 5 picture? I'm not sure the appropriate term really.
 6 A. Yeah. After --
 7 MR. ALLEN: And I'm not sure what you mean
 8 to ask him.
 9 MRS. COFIELD: You're not.
 10
 11 BY MRS. COFIELD:
 12 Q. If you're looking at a fluoroscopy and
 13 you're not doing a printout of the film what is it that
 14 you're looking at?
 15 A. The television screen.
 16 Q. Thank you.
 17 Then did you yourself interpret the
 18 television screen?
 19 A. Yes.
 20 Q. Were any -- and that's what I term in real
 21 time. I mean, you're looking at it then and there as to
 22 what the machine is viewing, correct?
 23 A. Yes.
 24 Q. Can you press a button, have a print made
 25 of it, or switch a lever? Is there some mechanism?

Page 105

1 A. I don't know that much about the
2 equipment. I know I can request that copies be made.
3 Q. Okay. Did you?
4 A. No.
5 Q. Then none should exist of the fluoroscopy
6 findings, correct?
7 A. Not that I know of.
8 Q. And no written impression or report such as
9 a radiologist would render, correct?
10 A. Not that I know of.
11 Q. And I believe you told me that the
12 fluoroscopy findings confirm the position of her neck,
13 correct?
14 A. Yes.
15 Q. What do you mean by that? We all know
16 where to a lay person the neck is.
17 A. I looked at the lordosis of the neck.
18 Q. Was it marked?
19 A. It was correct.
20 Q. Okay. And you also said you used the
21 findings or your interpretation of the fluoroscopy views
22 to determine the site. Is that for the site of incision
23 or the site of the fusion or another site?
24 A. For the site of the incision. And I tried
25 to visualize the site of the pseudoarthrosis, but due to

Page 106

1 her heavy shoulders and short neck that wasn't possible.
2 Q. So, all you could determine was that the
3 spine was not bent or was within normal limits by virtue
4 of the fluoroscopy, correct?
5 MR. NEWSOME: I just object to the form of
6 the question.
7 MR. ALLEN: Object to the form of the
8 question.
9 MR. NEWSOME: Also mischaracterizes
10 previous testimony.
11
12 BY MRS. COFIELD:
13 Q. Does it, sir?
14 A. Yes.
15 Q. In what regard?
16 A. I said that I checked the lordosis of her
17 neck and the position to make the skin incision.
18 Q. I understand that, but as to the lordosis
19 didn't you say it was normal?
20 A. It was correct.
21 Q. Same as saying within normal limits?
22 A. The position of her neck was correct.
23 Q. Okay. Okay. Correct for how you had
24 placed it you mean?
25 A. Yes.

Page 107

1 Q. Okay. I'm sorry. I misunderstood that.
2 So, who then did the positioning?
3 A. I did.
4 Q. And it took you from when to when to do?
5 A. I don't know.
6 Q. Well, sir, the -- let's go back.
7 11:45, I believe, shows anesthesia was
8 first induced. Did you begin positioning her neck prior
9 to the first induction of anesthesia?
10 A. No. The patient is induced first.
11 Q. Okay. So sometime then between 11:45 and
12 12:55, according to the record, which is the point of the
13 incision, is the time that you're positioning her,
14 correct?
15 MR. ALLEN: Object to the form of the
16 question. I mean, you're making an assumption and making
17 representations to him without telling him anything about
18 where those representations come from or even identifying
19 where you're getting all the numbers from. The record
20 that I'm looking at says inductions start at 11:43. I
21 realize that's a rather small difference, but it still is
22 a difference.
23 MRS. COFIELD: And at another place and
24 time it says something else. If you want to back it up
25 to 11:43 I don't care.

Page 108

1
2 BY MRS. COFIELD:
3 Q. Sometime between 11:43 and 11:45 when the
4 patient was first induced with anesthesia to, as a
5 closing of the window, time of incision is when you're
6 positioning her, correct?
7 A. No.
8 Q. Okay. Then when? It certainly means
9 according to what you've told us she's first induced.
10 When did you start positioning her?
11 A. 11:43 is the time the anesthesiologist
12 starts his part of the procedure.
13 Q. Okay.
14 A. That requires time also.
15 Q. So maybe that's why two minutes later she
16 is under?
17 A. No. 11:42 is the time the patient was
18 brought in the room, and the time the anesthesiologist
19 started working on the patient was 11:43.
20 Q. And she was effectively under anesthesia
21 when?
22 A. I don't know.
23 Q. All right. When did you start positioning
24 her?
25 A. I don't know.

Page 109

Page 111

1 Q. What other than positioning her were you or
2 your staff, the operating room staff, doing between 11:43
3 and 12:55, which was the time of the incision?

4 MR. NEWSOME: Just object to the form of
5 the question.

6 THE DEPONENT: Yeah. The anesthesiologist
7 has to give medications and give the antibiotics. He has
8 to place the endotracheal tube, and the nasogastric tube,
9 and whatever other procedures he sees fit as far as IVs
10 and other things.

11
12 BY MRS. COFIELD:

13 Q. Can you tell by looking at that document in
14 front of you and/or the anesthesiology records at what
15 point his job was accomplished?

16 A. I can't.

17 Q. I'm sorry, sir. I couldn't hear you.

18 A. No.

19 Q. You can't?

20 A. No. After he performs his procedures then
21 the table has to be changed to accommodate the Asculap
22 head holder, the patient has to be moved to the table,
23 then her neck has to be positioned, a Foley catheter has
24 to be placed, she has Ted stockings placed.

25 Q. I'm sorry?

Page 110

1 A. Teds.

2 Q. Uh-huh.

3 A. Then she would have sequential compression
4 devices placed on her legs. All of her pressure points
5 would have to be carefully padded to make sure that she
6 didn't get any injury to the nerves or pressure sores.
7 Metal sleds have to be located to hold the patient's arms
8 at the sides, and those frequently aren't in the room.
9 They have to be found. Wrist restraints have to be
10 placed on the patient's wrists in order to pull the arms
11 to facilitate the fluoroscopy. I have to --

12 Q. Are you describing other -- all those other
13 things you were doing also?

14 A. Yes, these are the things I'm doing.

15 Q. I just want to be sure.

16 A. I have to put drapes around the two
17 incision sites, then I put on my Loups and my headlight,
18 and then I scrub. Then I come in and sterilely drape
19 both of the incision sites. Then we get the fluoroscopy
20 and we sterilely drape that and position that. Then we
21 have to take the fluoro film to identify the position of
22 the skin incision. Of course, in between those, some of
23 the OR staff has to prep the sites sterilely with
24 Betadine and alcohol.

25 Q. Are you done? I'm sorry. I don't want to

1 interrupt you.

2 A. That's all I can think of right now.

3 Q. Okay. And you have just, as I said,
4 described the things you did, right?

5 MR. ALLEN: Objection,
6 mischaracterization. Go ahead.

7 THE DEPONENT: No. I'm describing things
8 that I did, that the nurses did, that the
9 anesthesiologist did.

10
11 BY MRS. COFIELD:

12 Q. Okay. And it took one -- one hour, is it?
13 Yeah, a little over one hour to accomplish all that?

14 A. According to this record.

15 Q. Did you have any complicating factors,
16 something wasn't available that you wanted in the OR or
17 had to wait for?

18 A. Sometimes you have to locate the sleds or
19 the C arm, they're not in the room. I don't know if that
20 was the case that day. Or the Asculap head holder.

21 Q. You don't recall if anything was delayed in
22 arriving?

23 A. I don't recall.

24 Q. And again, sir, it's your testimony that by
25 looking at the anesthesia record you can't tell when she

Page 112

1 was under, correct?

2 MR. ALLEN: Objection, mischaracterization.

3 MRS. COFIELD: Well, I'm asking, that if I
4 did misunderstand that's why I have revisited it.

5 MR. ALLEN: No. You said by his testimony.

6 MRS. COFIELD: That's what I understood it
7 to be.

8
9 BY MRS. COFIELD:

10 Q. If that's wrong, please tell me.

11 A. If you're asking when the anesthesiologist
12 finished his work --

13 Q. Correct.

14 A. -- I don't know when that was.

15 Q. Do you know when she was under by virtue of
16 looking at the anesthesia record?

17 MR. ALLEN: Objection to form.

18 THE DEPONENT: These sheets are filled out
19 by the anesthesiologist. I'm not as familiar with them
20 as the anesthesiologist would be. I don't know where
21 that information would be.

22
23 BY MRS. COFIELD:

24 Q. Okay. Did you have any trouble or, again,
25 complicating factors in performing those tasks which were

Page 113

Page 115

1 assigned to you --
 2 A. No.
 3 Q. -- prior to incision?
 4 A. No.
 5 Q. And then it was and remains
 6 approximately -- give or take, but approximately a
 7 one-hour pre-incision procedure to be accomplished or
 8 procedures to be accomplished in this type of operation?
 9 MR. NEWSOME: Just object to the form of
 10 the question.
 11 MR. ALLEN: Yeah, I object to the form.
 12 THE DEPONENT: On this day these are the
 13 times that are recorded.
 14
 15 BY MRS. COFIELD:
 16 Q. I'm asking if those are ordinary and
 17 customary for this type of operation, about an hour for
 18 things to be done.
 19 MR. ALLEN: Object to the form. Go ahead.
 20 THE DEPONENT: The time of positioning
 21 varies.
 22
 23 BY MRS. COFIELD:
 24 Q. Does this fall in a normal range or a
 25 little over that?

1 MR. ALLEN: Object to the form of the
 2 question.
 3 THE DEPONENT: No.
 4
 5 BY MRS. COFIELD:
 6 Q. Your incision extended only between C6 and
 7 ??
 8 A. It's impossible to tell from the
 9 fluoroscopy exactly where the incision was because the
 10 C6-7 level couldn't be visualized. I made my incision
 11 below the previous incision because the operative site
 12 was lower than the previous incision.
 13 Q. Why was that?
 14 A. I don't know.
 15 Q. I'm sorry. I don't understand.
 16 A. I didn't make the previous incision.
 17 Q. No. My question is not why is the prior
 18 one there, but why was yours lower than the prior one.
 19 A. I placed a clamp on the previous incision,
 20 got a fluoroscopic image, and saw that that was above the
 21 C6-7 level where the operation needed to be performed;
 22 therefore, I made the incision lower.
 23 Q. Let me ask two questions about that. You
 24 made the incision below the C6-7 level intentionally?
 25 MR. ALLEN: Objection,

Page 114

Page 116

1 A. Yes.
 2 Q. Which? Within normal range?
 3 A. Yes, this is in the normal range.
 4 Q. When Dr. Klara was performing the operation
 5 and you were assisting it would usually take about an
 6 hour to get the person prepped for surgery?
 7 MR. ALLEN: Objection to the form.
 8 THE DEPONENT: I don't know.
 9
 10 BY MRS. COFIELD:
 11 Q. Did you have any difficulty with the
 12 bisection?
 13 A. I'm sorry?
 14 Q. Did you have any difficulty with the
 15 bisection?
 16 A. What's a bisection?
 17 Q. Opening her up, to bisect. I'm making it
 18 into an adverb, I guess, but...
 19 A. I don't know what that is. I'm sorry.
 20 Q. Any difficulty in removing all of the
 21 tissue that you had to in order to expose the spine?
 22 A. No. There was no difficulty.
 23 Q. Did you in any regard intentionally make
 24 the incision lower than C7 to allow room for screws or
 25 hardware of any nature?

1 mischaracterization. Go ahead.
 2
 3 BY MRS. COFIELD:
 4 Q. I'm sorry. I'm just not getting it,
 5 because you said you put the clamp on the C6-7.
 6 MR. ALLEN: He didn't say that.
 7 THE DEPONENT: No. I put the clamp on the
 8 previous incision.
 9
 10 BY MRS. COFIELD:
 11 Q. Where was the previous incision?
 12 A. Above the C6-7 level.
 13 Q. Where anatomically?
 14 A. I don't recall.
 15 Q. You don't?
 16 A. But I know it was above the C6-7 level.
 17 Q. Okay. But you do know that C6-7 was fused
 18 previously?
 19 A. Yes.
 20 Q. It wasn't a higher fusion?
 21 A. No.
 22 Q. Okay. Have you ever -- strike.
 23 When I say spinal procedures performed
 24 between July and August and September that you told me
 25 about earlier, and you responded you'd have to look at

Page 117

1 the list, are we saying the same thing if I say a spinal
2 procedure and you're doing a head procedure, or are those
3 clearly distinct procedures?

4 MR. ALLEN: Objection to form.

5 THE DEPONENT: Yeah, a head procedure is
6 much different than a spine procedure.

7

8 BY MRS. COFIELD:

9 Q. I just want to be sure that I'm properly
10 eliciting a response to my question and not inadvertently
11 getting a different one. So, when we talk about spinal
12 procedures you're definitely talking about from the
13 cervical C1 down to T or lumbar what? How many lumbar
14 vertebrae are there?

15 A. No. I'm talking only anterior cervical
16 operations.

17 Q. Somehow I thought there was some
18 qualification.

19 MR. ALLEN: Somehow I thought your question
20 was specifically to cervical operations earlier.

21 MRS. COFIELD: And that's why I'm
22 revisiting, to be sure.

23

24 BY MRS. COFIELD:

25 Q. And now again, because of my conversation

Page 118

1 with counsel, tell me what you just said again so I can
2 have it in my head what you were answering.

3 MR. ALLEN: I object to that because I
4 don't know that what he was answering to what question is
5 going to be clear on the record.

6 THE DEPONENT: Please ask the question
7 again.

8 MRS. COFIELD: I'll just have Kathy read it
9 back to you.

10

11 (Whereupon, the record was read by the
12 reporter.)

13

14 BY MRS. COFIELD:

15 Q. So the numbers you gave me earlier on about
16 how many cervical spine operations you performed were
17 only of the anterior cervical nature?

18 A. Yes.

19 Q. Does that number change if we expand it by
20 virtue of expanding the vertebral bodies involved?

21 A. Yes.

22 Q. Do you have those numbers at your
23 fingertips as well, that is between the July and
24 September 1997 time frame?

25 A. Not at my fingertips.

Page 119

1 Q. Give or take.

2 A. I have them on the same record.

3 Q. All right. Well, I think you knew eight
4 cervical --

5 A. Eight anterior cervical.

6 Q. -- anterior cervical operations had been
7 performed.

8 Do you have an approximation of how many
9 spinal surgeries have been performed?

10 A. I would have to look at the record.

11 Q. All right. And that being the same list
12 you earlier spoke of?

13 A. Yes.

14 Q. Is there a particular reason you qualified
15 eight as anterior cervical operations; that is, have you
16 ever done a posterior?

17 A. Yes.

18 Q. Then have you ever performed -- between
19 July and September 1997 had you ever performed any
20 posterior cervical spine operations?

21 A. I would have to look at the record.

22 Q. All right. Would that record that you're
23 talking about these would be on show if you did them
24 alone or not?

25 A. No.

Page 120

1 Q. Because they would always list Dr. Klara's
2 name as the professor?

3 A. Yes.

4 Q. How is it I would determine on that list
5 that you compiled during your fellowship if you were
6 there alone?

7 A. I don't know.

8 Q. You have no way of determining that?

9 A. No.

10 Q. Is it then true the only way to determine
11 if you were alone or not is to look at billing records?

12 A. I don't know anything about the billing
13 records.

14 Q. Okay. Or the -- you know something about
15 the operating room schedule?

16 A. I don't know if that would be an indication
17 or not.

18 Q. Because that might also list Klara, as this
19 operating room report does, and yet he wasn't there,
20 right?

21 A. I didn't schedule the cases.

22 Q. How is it you will be able to -- strike.

23 Do you need to submit to the board of
24 neurosurgery proof that you performed a certain number of
25 operations by yourself?

Page 121

1 A. Not that I know of.
 2 Q. So to the best of your knowledge at least,
 3 you could never have performed one single operation alone
 4 and still submit this list of procedures in which you
 5 assisted for a one-year period of time and that would
 6 satisfy the criteria?
 7 MR. ALLEN: Object to mischaracterization.
 8 MR. NEWSOME: Objection.
 9 THE DEPONENT: The cases that I submit are
 10 unrelated to my fellowship cases.
 11
 12 BY MRS. COFIELD:
 13 Q. Okay. Do they all then have to be
 14 subsequent to completion of fellowship?
 15 A. As far as I know.
 16 Q. All right. You ever treat Mrs. Washburn
 17 after her discharge from MCV? And if you need that time
 18 I'll be glad to give it to you.
 19 A. I need to look at the record.
 20 MR. ALLEN: You saw me put those away,
 21 didn't you?
 22 MRS. COFIELD: Yeah.
 23
 24 BY MRS. COFIELD:
 25 Q. Somewhere around October 10th to 11th, then

Page 122

1 a transfer, if you will, up to MCV, and that went from
 2 October 11th through the 30th.
 3 A. I have an office note from 10/31.
 4 Q. Do you recall the nature and extent of any
 5 communication you had with her concerning her lost
 6 weight -- her weight loss?
 7 A. No.
 8 Q. You ever advise her what in your opinion
 9 was the cause of the laryngeal nerve palsy?
 10 A. No.
 11 Q. Did you ever, if you will, speculate with
 12 her, or I think in your words give her differentials, for
 13 the etiology of that condition?
 14 A. I can't speculate.
 15 Q. I don't ask you to here. Did you ever with
 16 her?
 17 A. No.
 18 Q. Did you ever give her a differential of
 19 possible etiologies?
 20 A. No.
 21 Q. Did you on any occasion, directly or
 22 indirectly, concede that there was an intraoperative
 23 injury to the laryngeal nerve?
 24 A. No.
 25 Q. Did you ever speculate with her that there

Page 123

1 was an intraoperative laryngeal nerve injury?
 2 A. No.
 3 Q. Did you ever comment as to why she was
 4 hoarse?
 5 A. I did notice that she was hoarse after
 6 surgery, as she did, and she was aware that that was a
 7 possible complication of the surgery.
 8 Q. Was it in your mind a complication of the
 9 surgery?
 10 MR. ALLEN: Objection.
 11 THE DEPONENT: I don't know.
 12
 13 BY MRS. COFIELD:
 14 Q. Did you ever give it any thought?
 15 A. Yes.
 16 Q. Did you ever think it was?
 17 MR. ALLEN: Objection.
 18 THE DEPONENT: I don't know if it is.
 19
 20 BY MRS. COFIELD:
 21 Q. I didn't ask that. Did you ever think it
 22 was at the time in question?
 23 MR. ALLEN: Same objection, as to form.
 24 THE DEPONENT: I don't recall.
 25

Page 124

1 BY MRS. COFIELD:
 2 Q. You ever record anyplace that it was an
 3 intraoperative complication anticipated, associated or
 4 otherwise?
 5 A. Not that I'm aware of.
 6 Q. Ever discuss that with Dr. Klara?
 7 A. I don't know.
 8 Q. You don't recall or what? I'm not sure I
 9 followed that.
 10 A. It may have been discussed during her
 11 follow-up visits when she was receiving treatment for
 12 that, but I can't recall anything specific being
 13 discussed.
 14 Q. You ever received back the consultations
 15 which were performed by other physicians such as the
 16 speech pathologist or Dr. Coleman?
 17 A. Yes.
 18 Q. Did you take issue or disagree with any of
 19 the findings contained therein concerning the etiology of
 20 her condition?
 21 MR. ALLEN: Objection. I mean, he answered
 22 the generic question about all the consults he might have
 23 gotten back.
 24 Read back the question. Did you ever
 25 receive any?

Page 125

1 MRS. COFIELD: Yes, of speech pathologist
 2 consults that you reviewed -- I'll be glad to narrow it.
 3 I'll be glad to cure counsel's objections.
 4 MR. ALLEN: Good.
 5
 6 BY MRS. COFIELD:
 7 Q. Of those speech pathologist consults which
 8 you reviewed, and of Dr. Coleman's records which you
 9 reviewed, did you take issue with any of their findings
 10 concerning the etiology of her hoarseness?
 11 MR. ALLEN: Objection to form and
 12 foundation. Go ahead.
 13 THE DEPONENT: I can't offer an opinion on
 14 that because I'm neither an otolaryngologist nor a speech
 15 pathologist.
 16
 17 BY MRS. COFIELD:
 18 Q. Well, Dr. Coleman is not an
 19 otolaryngologist.
 20 A. Oh. Well, what is his specialty?
 21 Q. I'll have to look that up exactly, but he's
 22 not an otolaryngologist. But be that as it may, whatever
 23 his specialty, you did review Dr. Coleman's reports,
 24 didn't you?
 25 A. I did.

Page 126

1 Q. Okay. Did you ever take issue with his
 2 findings, and, if so, in what regard?
 3 MR. ALLEN: Okay. Same objection. If you
 4 want to show him a specific document or a specific --
 5 MRS. COFIELD: I'm trying to find it.
 6 MR. ALLEN: -- representation made by
 7 Coleman and ask him if he disagrees with it, but I think
 8 to ask him if there's any paper out there that he has
 9 previously seen that he disagrees with I think is
 10 incredibly unfair to this witness.
 11 MRS. COFIELD: I certainly don't want to be
 12 unfair to him.
 13
 14 BY MRS. COFIELD:
 15 Q. If you'd put in front of him the January
 16 29, 1998 straboscopy report and video. January 29th,
 17 1998.
 18 MR. ALLEN: Of which?
 19 THE DEPONENT: Coleman, at EVMS, the video
 20 straboscopy.
 21
 22 BY MRS. COFIELD:
 23 A. Did you review his findings, sir, and
 24 report --
 25 MR. ALLEN: Two-page document?

Page 127

1 MRS. COFIELD: Exactly correct.
 2 MR. ALLEN: Good.
 3 MRS. COFIELD: Let the record reflect, as
 4 appropriate, the deponent is taking a moment to read the
 5 document so you are familiar with it before you answer
 6 the question.
 7 And while he's looking, off the record,
 8 Kath.
 9
 10 (Whereupon, an off-the-record
 11 discussion took place.)
 12
 13 THE DEPONENT: And your question was?
 14
 15 BY MRS. COFIELD:
 16 Q. Surely. Are there any findings contained
 17 therein, that is of Dr. Coleman's report which was just
 18 identified on the record by counsel, with which you
 19 disagree?
 20 A. I'm not in a position to disagree with his
 21 findings because I'm not a Ph.D. of speech pathology.
 22 Q. So you have no opinion as to the
 23 etiologies --
 24 A. I have no opinion.
 25 Q. -- attributed to her problem as contained

Page 128

1 in that report, just no opinion whatsoever?
 2 A. No.
 3 MR. ALLEN: Objection to the
 4 characterization, but you got an answer.
 5
 6 BY MRS. COFIELD:
 7 Q. Did you ever review Dr. Sidney Mallenbaum's
 8 neurological findings?
 9 A. Not that I recall.
 10 Q. Okay. Are there any office visits which
 11 you attended of Mrs. Washburn other than the ones we have
 12 spoken about; that is, you didn't sign off, but you were
 13 in attendance?
 14 MR. ALLEN: There are ones you haven't
 15 asked him about where he signed off.
 16 MRS. COFIELD: I understand that.
 17
 18 BY MRS. COFIELD:
 19 Q. I said, are there any you attended but you
 20 didn't sign off on?
 21 A. I don't understand. What does sign off
 22 mean?
 23 MR. ALLEN: Your signature.
 24
 25

Page 129

Page 131

1 BY MRS. COFIELD:

2 Q. Your name. Your name does not appear on
3 the first one. Does that by definition mean you weren't
4 there or you were not present?

5 A. No. I wasn't there.

6 Q. Okay. The second one?

7 A. I would have to look at the notes.

8 MR. ALLEN: The first one being August 1st,
9 '97.

10

11 BY MRS. COFIELD:

12 Q. If you didn't sign them you weren't there;
13 is that what it means?

14 A. Yes.

15 Q. Okay. Were you ever present when Dr. Klara
16 discussed the causes of her hoarseness?

17 A. Not that I recall.

18 Q. Did you and Dr. Klara ever discuss the
19 causes for her hoarseness absent the presence of Mrs.
20 Washburn?

21 A. Not that I recall.

22 Q. Is the January 16th, 1998 office visit the
23 last time you saw her?

24 A. As far as I know, that was the last time.

25 MRS. COFIELD: I have no further

Page 130

1 questions. Pass the witness. Thank you.

2 MR. ALLEN: Gentlemen, Seattle is a long
3 ways away.

4 MR. BLACKWELL: I have just a few
5 questions.

6

7 BY MR. BLACKWELL:

8 Q. Dr. Borden, I represent Dr. Klara.

9 Doctor, with regard to your board

10 certification, you described the requirements as you
11 understand them and you indicated that you have passed
12 the written part of your examination?

13 A. Yes.

14 Q. Did you pass the written part before you
15 began your fellowship with Dr. Klara?

16 A. Yes.

17 Q. That would have been passed sometime in
18 1996 when you took it?

19 A. Yes.

20 Q. So at the time you joined Dr. Klara it was
21 a question of developing a sufficient resume of cases and
22 sitting for your oral exams in order to be board
23 certified?

24 A. Yes, that's...

25 Q. Doctor, with regard to some interrogatory

1 answers that have been provided to us by Mrs. Washburn --

2 MR. BLACKWELL: I'm referring counsel to
3 those answers in response to Dr. Klara's interrogatories
4 propounded to the plaintiff which were certified as
5 mailed to counsel on August 11, 1998 by plaintiff's
6 counsel, and specifically referring to interrogatory
7 number 15 and the answer thereto.

8

9 BY MR. BLACKWELL:

10 Q. Doctor --

11 MRS. COFIELD: I'm sorry. Can I just look
12 at the question so I don't have to go find all of that?

13 MR. ALLEN: Sure. It's the alleged
14 representations.

15 MRS. COFIELD: Where are we?

16 MR. ALLEN: Right here. This is the
17 answer. And there's your objection and then this is the
18 answer.

19 MRS. COFIELD: Thank you.

20

21 BY MR. BLACKWELL:

22 Q. Doctor, at any time when it was decided
23 that Mrs. Washburn would have the surgery that you
24 performed at Virginia Beach General Hospital on September
25 25, 1997, did Mrs. Washburn ask you whether you were a

Page 132

1 board-certified neurosurgeon?

2 A. No.

3 Q. Did she ask you any questions about board
4 eligibility?

5 A. No.

6 Q. Did you ever say to her, quote, Yes, I am a
7 board-certified neurosurgeon, close quote?

8 A. No.

9 Q. Did you ever hear Brandi indicate that all
10 doctors in Dr. Klara's office were board certified?

11 A. No.

12 Q. Did you ever hear Mrs. Washburn indicate
13 that she was a nurse and that she appreciated the
14 difference between board eligibility and board
15 certification?

16 A. I believe you're asking two questions.

17 MRS. COFIELD: Object to form there, not
18 because it's compound, because I don't recall that she
19 ever said she made that representation. She said it was
20 true, but not that she represented it.

21 MR. BLACKWELL: I'm asking the question.

22 THE DEPONENT: I believe you're asking two
23 questions; one, did I hear her say that she was a nurse
24 and, two, did she know the difference between board
25 eligibility and board certification.

Page 133

1 She did tell me that she was a nurse.
 2
 3 BY MR. BLACKWELL:
 4 Q. She did not?
 5 A. She did.
 6 Q. She did.
 7 A. She did not tell me that she knew the
 8 difference between board eligibility and board
 9 certification.
 10 Q. So I take it from your testimony that at no
 11 time during your interaction with Mrs. Washburn was there
 12 a discussion about your board certification or board
 13 eligibility?
 14 A. No.
 15 MRS. COFIELD: Object to form.
 16
 17 BY MR. BLACKWELL:
 18 Q. Now, Doctor, with regard to surgeries
 19 you've performed at Virginia Beach General Hospital, did
 20 your privileges there allow you to see other patients not
 21 in Dr. Klara's office?
 22 A. No. All the patients were all Dr. Klara's
 23 patients.
 24 Q. Okay. Did you perform other surgeries at
 25 Virginia Beach General Hospital during your fellowship

Page 134

1 with Dr. Klara where he was not present during the
 2 surgery?
 3 A. Yes.
 4 Q. Did you believe, Dr. Borden, that based on
 5 your education, training and experience as of September
 6 1997 that you were capable of performing the surgery done
 7 on Mrs. Washburn?
 8 MRS. COFIELD: Object, and move to strike.
 9 THE DEPONENT: Yes.
 10 MRS. COFIELD: Somebody's belief that
 11 they're an expert doesn't make them one pursuant to the
 12 Supreme Court's specific ruling, and unless he's
 13 proffered as an expert he certainly can't be speaking in
 14 that regard.
 15 MR. BLACKWELL: I think this goes to the
 16 issue of whether he felt he was sufficiently trained. I
 17 think that's a proper question.
 18 MRS. COFIELD: And I just stand on my
 19 objection.
 20 MR. BLACKWELL: You've opened the door on
 21 that, Mrs. Cofield.
 22 MRS. COFIELD: I stand on the question. I
 23 mean, the objection.
 24 MR. BLACKWELL: Okay. Question, objection,
 25 you're standing.

Page 135

1 MRS. COFIELD: Either way. Just standing
 2 on it.
 3
 4 BY MR. BLACKWELL:
 5 Q. With regard to the consent issue, let me
 6 show you if I may have marked as an exhibit for
 7 identification at this point a document from Beach
 8 General that I ask that you take a look at.
 9 Dr. Borden, do you recognize that document?
 10 A. Yes.
 11 Q. And can you tell us on the record what that
 12 is?
 13 A. This is the consent that was signed on the
 14 22nd.
 15 Q. All right. And is that your signature on
 16 the consent form?
 17 A. Yes, it is.
 18 Q. Did you witness Mrs. Washburn sign it?
 19 A. I was there that date when she signed it.
 20 Q. All right. And is that Brandi's signature?
 21 A. Yes.
 22 Q. Now, was that form signed after you
 23 explained the risks and benefits of the procedure to Mrs.
 24 Washburn?
 25 A. Yes.

Page 136

1 Q. And, Doctor, you went over in previous
 2 testimony the risks and benefits I believe of this
 3 procedure to include bleeding, infection, injuries to the
 4 trachea, esophagus and carotid artery, recurrent injury
 5 to the laryngeal nerve resulting in hoarseness or
 6 difficulty swallowing, spinal cord injuries, nonunion of
 7 graft, and breakage of the plate and screws. Were those
 8 risks explained to Mrs. Washburn on September 22nd, 1997,
 9 prior to her signing that form?
 10 A. Yes.
 11 Q. Did she have any questions of you regarding
 12 any of the risks that you described for her that day?
 13 A. No.
 14 Q. Were there any other risks besides those
 15 I've enumerated for you based on your prior testimony
 16 that you would have explained to her that day?
 17 A. No.
 18 Q. Did she raise any concern with you
 19 regarding any risks that she might be exposed to in
 20 undergoing this surgery?
 21 A. I'm sorry. Can you repeat that?
 22 Q. Did she raise any concerns with you
 23 regarding any of the risks that she would be exposed to
 24 in undergoing this surgery?
 25 A. No.

1 Q. Did she at any time tell you she didn't
2 understand the risks?
3 A. No.
4 Q. You've indicated that the surgery proceeded
5 on September 25 because the plaintiff wanted it to go
6 forward at that time?
7 A. Yes.
8 Q. Had her symptomatology worsened since her
9 previous office visit as of September 22nd?
10 A. Yes.
11 Q. Dr. Borden, did you at any time advise any
12 of the operating room personnel described in the
13 operative records that you had not performed this
14 particular procedure before alone?
15 A. No.
16 Q. Subsequent to the surgery has Mrs. Washburn
17 made any inquiry to you as to your status as board
18 eligible or board certified?
19 A. No.
20 Q. Dr. Klara ever say anything to you about
21 any inquiry made by Mrs. Washburn?
22 A. No.
23 MR. BLACKWELL: That's all I have. Thank
24 you.
25 I'd like to go ahead and have that marked

1 correct?
2 A. Yes.
3 Q. And in paragraph 2 is that your handwriting
4 as well?
5 A. Yes.
6 Q. The physician's signature, is that yours?
7 A. Yes.
8 Q. Whether or not you represented to any
9 operating personnel that it was the first time you had
10 performed such an operation, was it a true statement?
11 A. I'm sorry?
12 MR. ALLEN: Objection.
13
14 BY MRS. COFIELD:
15 Q. Counsel asked you if you ever represented
16 to hospital personnel that this was the first time you
17 performed such a procedure to which you answered no.
18 Regardless of whether you made that representation, was
19 it a true statement it was the first time you performed
20 this type of operation?
21 MR. ALLEN: Objection to the form.
22 Mischaracterizes the question and the response.
23 MRS. COFIELD: I stand on it. I think it's
24 accurate.
25 THE DEPONENT: I think you're asking me two

1 as an exhibit to the deposition.
2 MR. ALLEN: The consent form.
3 MRS. COFIELD: The consent form.
4 MR. ALLEN: Do you need a copy made?
5 MR. BLACKWELL: Yes.
6 MR. ALLEN: You just hand it to Heather and
7 she'll do that for us.
8
9 BY MRS. COFIELD:
10 Q. One or two follow-ups. On that consent
11 form, whose handwriting is that at the top, sir?
12 A. On which line?
13 Q. Starting with paragraph one.
14 A. That's my writing.
15 Q. Why is it knowing that Dr. Klara would not
16 be present, you entered the name Klara?
17 A. Because Dr. Klara is the professor.
18 Q. No other reason?
19 A. No.
20 Q. What does that have to do with obtaining a
21 patient's consent?
22 A. Ms. Washburn was Dr. Klara's patient and
23 his name appeared on the documents.
24 Q. But you did know when you entered his name
25 at the time of 9/22/97 he would not be in attendance,

1 questions.
2
3 BY MRS. COFIELD:
4 Q. No. I don't care if you represented it or
5 not. If you think that's one of them put that aside.
6 A. Will you repeat the question?
7 Q. Surely. Whether or not you stated that to
8 anyone else I don't care. My question to you, distinct
9 from that, is whether it is a true statement, this is the
10 first time you performed a redo of a cervical fusion
11 alone?
12 A. I would have to check my records.
13 Q. Okay. It is then possible, is it not, sir?
14 MR. ALLEN: Objection.
15 THE DEPONENT: I don't know.
16
17 BY MRS. COFIELD:
18 Q. Did you ever during the time you consented
19 Ms. Washburn explain that a laryngeal nerve injury could
20 result in permanent hoarseness?
21 A. Exactly what I told Ms. Washburn was that
22 it could result in hoarseness or difficulty swallowing.
23 Q. Permanent was part of my question.
24 A. I don't recall if I said it was permanent
25 or not.

Page 141

1 Q. Do you recall if you told her there could
2 be permanent shortness of breath?
3 A. I don't recall.
4 Q. And I take it you don't recall if you told
5 her she could possibly lose her job as a result?
6 MR. ALLEN: Objection.
7 THE DEPONENT: (No response.)
8 MRS. COFIELD: No further questions.
9 MR. BLACKWELL: Just one follow-up,
10 Doctor.
11
12 BY MR. BLACKWELL:
13 Q. Even though you've listed Dr. Klara, did
14 the patient understand Dr. Klara would not be performing
15 the surgery?
16 A. Yes. She signed this on the day that Dr.
17 Klara was standing there in the hallway saying, I will
18 not be available for this operation.
19 MR. BLACKWELL: Thank you.
20 MR. ALLEN: He'd like to read and sign.
21 Thanks very much.
22
23 (Signature not waived.)
24
25 (Borden Deposition Exhibit No. 2 was

Page 142

1 marked for identification.)
2
3 (Whereupon, the deposition was
4 concluded at 1:40 p.m.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 14

1 ERRATA SHEET
2 PAGE LINE CORRECTION
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 14

1
2
3 -----
4 BRITT M. BORDEN, M.D.
5
6
7
8 Commonwealth of Virginia, to wit:
9
10
11
12
13
14 Subscribed and sworn to before me at
15 this day of , 1998.
16
17
18
19 -----
20 NOTARY PUBLIC
21
22
23 -----
24 MY COMMISSION EXPIRES
25

Page 145

1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:
2 I, Kathleen Beard Adams, RPR, a Notary
3 Public for the Commonwealth of Virginia at large, of
4 qualification in the Circuit Court of the City of
5 Norfolk, Virginia, and whose commission expires August
6 31, 2002, do hereby certify that the within named
7 witness, BRITT M. BORDEN, M.D., appeared before me at
8 Norfolk, Virginia, as hereinbefore set forth, and after
9 being first duly sworn by me, was thereupon examined upon
10 his oath by counsel for the respective parties; that his
11 examination was recorded in Stenotype by me and reduced
12 to computer printout under my direction; and that the
13 foregoing constitutes a true, accurate, and complete
14 transcript of such examination.

15 I further certify that I am not related to
16 nor otherwise associated with any counsel or party to
17 this proceeding, nor otherwise interested in the event
18 thereof.

19 Given under my hand and notarial seal this
20 14th day of December, 1998, at Virginia Beach, Virginia.

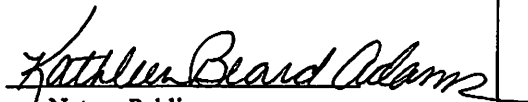
21

22

23

24

25


Notary Public

1 V I R G I N I A:

2 IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK CLERK

SUPREME COURT OF VIRGINIA

3

4 JANICE WASHBURN,)

5 Plaintiff,)

6 v.)

7 PETER KLARA, M.D., et al.,)

8 Defendants.)

9

10 VOLUME IV

11 EXCERPT OF PROCEEDINGS

12 Norfolk, Virginia

13 February 8, 2001

14

15 Before:

THE HONORABLE JOSEPH A. LEAFE, CLERK
and a Jury.

16

17 Appearances:

18

JUDITH M. COFIELD, P.C.

By: JUDITH M. COFIELD, ESQUIRE
Counsel for Plaintiff

19

20

KAUFMAN & CANOLES, P.C.

By: R. BARROW BLACKWELL, ESQUIRE
JASON R. DAVIS, ESQUIRE
Counsel for Defendant Klara

21

22

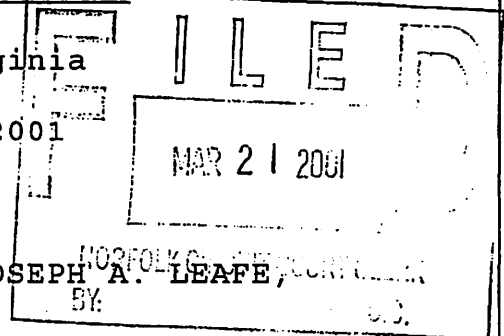
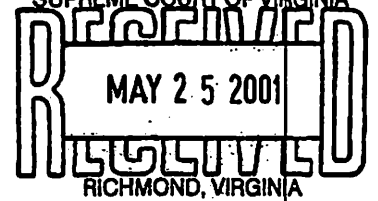
GOODMAN, WEST & FILETTI, P.L.L.C.

By: CHARLES M. ALLEN, ESQUIRE
Counsel for Defendant Borden

23

24

25



I N D E X

WITNESSESREDIRECTRECROSSON BEHALF OF THE PLAINTIFF:

BRITT BORDEN, M.D.

5, 85, 100

19, 97

KLARA DEPO EXCERPT

104

E X H I B I T S

NO.	DESCRIPTION	MARKED	RECEIVED
<u>ON BEHALF OF THE PLAINTIFF:</u>			
12	VBGH bill		15
18	Notes of two revisions	11	11
19	VBGH admission, 10-10-97	12	12
<u>ON BEHALF OF THE DEFENDANT:</u>			
2	Fellowship cases	24	
3	Internship cases	25	
4	Residency cases	26	
5	More residency cases	27	
6	VBGH Progress notes	71	71
7	X-ray report, 9-25-97	74	
8	X-ray report, 9-28-97	77	

EXCERPT OF PROCEEDINGS

THE COURT: Good morning.

MS. COFIELD: I apologize for being late, Your Honor. I was printing out some cases, and the computer was very slow. But I think it will save us maybe a whole day of testimony, though.

THE COURT: We'll see. We'll see. What do we have folks? Where are we?

MS. COFIELD: I think it was Dr. Borden on the stand.

THE COURT: All right. Are we ready to go? Mr. Blackwell, have you got those all --

MR. BLACKWELL: Well, we have not had a chance to chat this morning, Your Honor, but it sounds like she is now changing her day, perhaps.

THE COURT: Well, let's see how we go. Then let's bring the jury in.

(The jury entered the courtroom, and the following proceedings were held:)

THE COURT: All right. Ms. Cofield, you may continue your examination.

MS. COFIELD: Thank you, sir.

BRITT BORDEN, M.D., called as a witness

1 by and on behalf of the Plaintiff, having been
2 previously duly sworn, further testified as follows:

3

4 REDIRECT EXAMINATION (cont.)

5 BY MS. COFIELD:

6 Q. Dr. Borden, just a few more questions.
7 The plates you put in Ms. Washburn, were those the
8 ones that Drs. Ray and Klara patented and invented?

9 A. Dr. Klara designed that plate.

10 Q. He did?

11 A. Yes.

12 Q. All right. And was that the plate you
13 earlier talked about coming from, I think West
14 Virginia to Virginia to learn more about?

15 A. I came to Virginia to learn additional
16 techniques in complex spine surgery.

17 Q. Didn't that include plating?

18 A. Oh, yes. It included different types of
19 instrumentation. I had used other plates in West
20 Virginia, but not this particular brand.

21 Q. So part of that fellowship you earlier
22 spoke of was for the purpose of learning the plates
23 that you had not used, and that included the ones
24 that you did use this time developed by Dr. Klara?

25 A. Well, plates are very similar in design,

1 so the experience that I had in plating was pretty
2 extensive in West Virginia. But the plate that Dr.
3 Klara designed, it was the plate that was used in his
4 practice. He preferred to use that one.

5 Q. Sir, is that a yes? It was part of the
6 reason for your coming here to Dr. Klara's office, to
7 learn how to use the plates he developed?

8 A. Yes, I did learn how to use his plate.

9 MS. COFIELD: And excuse me, sir. Did
10 I move into evidence the two redos? He identified
11 them yesterday, Your Honor, and I just want to
12 quickly look over here.

13 THE COURT: All right. I don't know
14 what you have, Ms. Cofield.

15 MS. COFIELD: Yes, I see that's correct.

16 BY MS. COFIELD:

17 Q. Earlier I showed you two redo procedures
18 you had done in July, redo revision of an anterior
19 cervical diskectomy; correct?

20 A. Yes.

21 Q. And you had done those two in July;
22 correct?

23 A. I believe those were the dates on the
24 stickers.

25 Q. And on the face of them, if my memory

1 serves me, and we'll look at them in a moment, it
2 says something like Harms or something. Is that a
3 type of plate?

4 A. That's a different type of device. It's
5 a metal cage that's used to replace a vertebral
6 body. When you remove an entire vertebral body
7 rather than just a small disk or repair a
8 pseudoarthrosis, you need a larger piece of hardware,
9 and you use what's called a Harms cage.

10 Q. Okay. Again, now I have them for you.
11 Tell me, do either one of those involve removing a
12 whole vertebral disk as opposed to just the disk
13 space? And here is your other one.

14 A. Neither one of these mention a Harms
15 cage.

16 Q. Okay. Then are both of those just the
17 removal of the disk material between the vertebral
18 bodies, or are either of them?

19 A. This notation indicates that this was a
20 repair of a pseudoarthrosis at one level, and this
21 one indicates it was a pseudoarthrosis at two levels.

22 Q. Sir, could you answer my question?

23 MR. BLACKWELL: Your Honor, I believe he
24 did.

25 A. That's the best answer to the question.

1 BY MS. COFIELD:

2 Q. It wasn't what levels. It was did
3 either one of those involve the removal of the disk
4 versus --

5 THE COURT: Excuse me. The court just
6 understood him to answer what they involved.

7 MS. COFIELD: Then I'm sorry, I'm
8 confused.

9 THE COURT: Well, then ask the question
10 again. I don't know how you can answer it other than
11 say it involved what he did.

12 MS. COFIELD: Then I'll try to clear it
13 up, because I'm certainly confused.

14 MR. ALLEN: May I also see what he is
15 looking at, Ms. Cofield?

16 MS. COFIELD: Sure. It was from your
17 exhibit book.

18 MR. ALLEN: What page?

19 MS. COFIELD: It's the two redos.

20 BY MS. COFIELD:

21 Q. Okay. Let's just take the first one
22 that is marked July 22nd. Okay?

23 To clear up my confusion, on July 22nd
24 did you remove the disk space, the spongy material
25 between the bodies, or did you remove a whole body?

1 A. This indicates that another surgeon had
2 removed the disk previously and tried to fuse it, and
3 it didn't heal. So this operation was removing the
4 pseudoarthrosis where it didn't heal and then
5 re-fusing.

6 Q. Okay. And did you use a plate on that
7 occasion?

8 A. Yes.

9 Q. Did you use Dr. Klara's plate?

10 A. Yes.

11 Q. And July 3rd, I believe -- it's hard to
12 read -- is that the same thing but on two spaces?

13 A. That's correct.

14 Q. And did you use a plate on that one?

15 A. Yes.

16 Q. And Dr. Klara's plate; right?

17 A. Yes.

18 Q. And we've already established these are
19 the only two revisions you did between the time you
20 arrived here, a revision to an anterior cervical
21 diskectomy?

22 A. That's correct.

23 Q. So you had on two occasions for the
24 first time with Dr. Klara used a plate, correct,
25 before Ms. Washburn?

1 A. No. There may have been other
2 operations in the record before these. I would have
3 to look at the record to see which was actually the
4 first operation I did.

5 Q. Sir, would you like to again look or
6 should -- I thought we had established these are the
7 only two revisions of anterior cervical diskectomies.

8 A. But plates were used on the primary
9 surgery also.

10 Q. But I'm talking about revisions, sir.
11 These are the only two revisions?

12 A. Revisions with plates.

13 Q. Okay.

14 MS. COFIELD: I would like to move these
15 into evidence, Your Honor.

16 THE COURT: All right. They will be
17 received as, I believe it's 17.

18 MR. ALLEN: I think it should be 18,
19 Your Honor.

20 THE COURT: What was 17?

21 MR. ALLEN: The OR report dated 9-25-97,
22 I believe, Your Honor.

23 THE COURT: All right. Then it will be
24 Plaintiff's 18.

25 (The notes on two revisions were marked

1 Plaintiff's Exhibit No. 18 and received
2 in evidence.)

3 MS. COFIELD: Thank you, sir.

4 BY MS. COFIELD:

5 Q. And I had asked you yesterday to
6 identify a document, I believe. I also don't believe
7 I moved it into evidence, and I was remiss so it's
8 time.

9 You have identified previously that you
10 did the H&P on the second admission, aspiration and
11 malnutrition being your two diagnoses; correct?

12 A. Can I see the document?

13 Q. Surely. And if you want to go into this
14 one, it will be your signed version. Here you go.

15 A. Yes, this is mine.

16 Q. Okay. And so even though this one isn't
17 signed, is this one a copy of the one that is signed
18 and it's a clean copy?

19 A. It appears to be the same document.

20 MS. COFIELD: Thank you, sir.

21 THE COURT: All right. Plaintiff's 19.

22 MS. COFIELD: Can I just wait a moment
23 so I have the document, sir? It would help.

24 THE COURT: Sure.

25 (The VBGH admission, 10-10-97 was marked

1 Plaintiff's Exhibit No. 19 and received
2 in evidence.)

3 MS. COFIELD: Thank you.

4 BY MS. COFIELD:

5 Q. You do agree with me that when you made
6 the diagnosis of aspiration and malnutrition, it was
7 necessary to admit her at this time to Virginia Beach
8 General Hospital. It wasn't an elective move on your
9 part.

10 A. No, she required admission.

11 Q. Okay. And the treatment that you gave
12 at that time or participated in giving to Dr. Klara's
13 patient was because of aspiration and malnutrition
14 and related to those events?

15 A. Yes.

16 Q. And you asked during that admission for
17 Drs. Dalton and Ferguson to be consulted; correct?

18 A. Yes.

19 Q. And then there came a time there was a
20 third admission. Are you aware that she came back to
21 Virginia Beach General Hospital because of an
22 infection, peritonitis, a stomach lining infection?

23 A. I heard that.

24 Q. But you didn't participate in that?

25 A. No.

1 Q. Was Dr. Klara back by that time, and he
2 did?

3 A. I believe he was.

4 Q. Is that how you heard of it, because Dr.
5 Klara was back on the case?

6 A. No. I heard of it because of the
7 records.

8 Q. When you reviewed them after the fact,
9 you mean?

10 A. Yes.

11 Q. But you were still in Dr. Klara's office
12 during her third admission; correct?

13 A. I believe I was.

14 Q. November of 1997?

15 A. Yes.

16 Q. And did you discuss it with Dr. Klara at
17 all?

18 A. I didn't have the documents at that
19 time. I didn't know that she had been admitted.

20 Q. Okay. So you didn't have any
21 discussions about why she was admitted or how the
22 treatment was going or anything of this nature?

23 A. Not for that admission.

24 Q. Okay.

25 MS. COFIELD: I will redact and remove

1 from here -- and I'm not very good at billings, so if
2 Your Honor will just let me ask which of these three
3 pages gets removed, I can submit now one of the
4 bills. But I don't want the wrong one.

5 THE COURT: Fine. Go ahead.

6 MS. COFIELD: Okay. At this time then
7 I would like to tender, Your Honor, which had
8 previously been marked for identification, the
9 hospital bill that the doctor has identified as
10 medically necessary and related to malnutrition and
11 aspiration.

12 I have deleted anything from the third
13 admission since he wasn't a part of that.

14 THE COURT: All right. Any objection,
15 gentlemen?

16 MR. ALLEN: No, Your Honor.

17 THE COURT: Okay. It is a different --
18 for the record, there has been that deletion, so it
19 really isn't the same exhibit that's been ID'd with
20 the deletion.

21 But in any event, we will consider it
22 that, and I will just show it received on this date,
23 the 8th, as opposed to what was offered for
24 identification on the 6th.

25 MS. COFIELD: Would Your Honor like for

1 housekeeping me to submit that one page I pulled off
2 and leave that for ID?

3 THE COURT: No, ma'am, this is just
4 fine. I think it's clear. I'm just clarifying it
5 for the record and the court reporter, Plaintiff 12.

6 (The VBGH bill marked as Plaintiff's
7 Exhibit No. 12 was received in
8 evidence.)

9 MS. COFIELD: Thank you, sir.

10 BY MS. COFIELD:

11 Q. And then between yesterday and today the
12 services that we have talked about were medical
13 services that you rendered while you were affiliated
14 with Dr. Klara for his patient, Ms. Washburn?

15 A. When I was in my fellowship at EVMS.

16 Q. Exactly correct. And that was, as we
17 have said, between July 1 and the course of her
18 treatment through January of 1998; correct?

19 A. Yes.

20 Q. Did you get back involved in her
21 treatment anytime after the second admission, which
22 ended October 11th?

23 A. That would be reflected in the office
24 notes. You would see in the office notes from visits
25 where I saw her.

1 Q. I think we do have that. Okay. Now,
2 tell me, then, when you consented her, that was --
3 and when I use that term as a verb, when you sat down
4 and you told her we're going to operate, we recommend
5 it, on September 22nd, 1997. Okay?

6 A. Yes.

7 Q. So when you consented her to do the
8 operation, that is something that all surgeons do;
9 correct?

10 A. Yes.

11 Q. You need to obtain the patient's consent
12 to go in and operate; right?

13 A. Yes.

14 Q. And you did so in the ordinary course of
15 business in order to advise her of certain risks and
16 have her agree to them to give you permission; right?

17 A. Yes.

18 Q. And that was a service that you rendered
19 in the ordinary course of being a physician
20 practicing medicine?

21 A. That's part of every patient's
22 treatment.

23 Q. And you did that in the course of your
24 duties as they were described for you by Dr. Klara?

25 A. Yes.

1 Q. And you did so on Dr. Klara's patient;
2 correct?

3 A. Yes.

4 MS. COFIELD: I have no further
5 questions of this witness and pass him.

6 THE COURT: All right. Mr. Allen?

7 MR. ALLEN: Yes, sir. Your Honor, I put
8 together a Plaintiff's Exhibit 2 and Plaintiff's
9 Exhibit 15 in eight folders for the jury, and I'm
10 asking the court's permission that they be allowed to
11 look at these exhibits during the course of his
12 examination.

13 THE COURT: All right. They can look at
14 it.

15 MS. COFIELD: I'm sorry. What is this,
16 all of those that are admitted?

17 MR. ALLEN: No, not all of them.

18 THE COURT: It's just for reference
19 during the course of his examination.

20 MS. COFIELD: Well, Your Honor, excuse
21 me. Could we be heard on that? These aren't in
22 evidence yet and --

23 THE COURT: Yes, ma'am.

24 MR. ALLEN: They're all in evidence.

25 MS. COFIELD: That's what I asked, are

1 they all in evidence?

2 MR. ALLEN: They are.

3 THE COURT: No. 2 and 15 were the two
4 exhibits that you've already introduced.

5 MS. COFIELD: That's what I didn't get.
6 So can I then go get 2 and 15 again to see what we're
7 talking about?

8 THE COURT: Yes, ma'am. It's the
9 consent form and the office notes that you previously
10 referred to and introduced.

11 MS. COFIELD: Okay. Thank you.

12 THE COURT: Check those with yours, Ms.
13 Cofield, and if you have them, I would prefer that
14 you not take the actual exhibits away from the
15 collection of exhibits. Okay?

16 MS. COFIELD: Sure. I know I have the
17 consent.

18 THE COURT: They are things that you
19 have, because you've already --

20 MS. COFIELD: I can probably just go to
21 my medical records. That's fine.

22 THE COURT: Now that you know what they
23 are.

24 Just one second, Mr. Allen, please.

25 MR. ALLEN: Sure.

1 THE COURT: All right. You may
2 continue.

3 MR. ALLEN: Thank you, Your Honor.

4 RECROSS-EXAMINATION

5 BY MR. ALLEN:

6 Q. Dr. Borden, where do you presently
7 practice, sir?

8 A. In Bellevue, Washington.

9 Q. And what is the nature of your practice?

10 A. I'm a neurosurgeon specializing in
11 spinal instrumentation surgery.

12 Q. Would you give the members of the jury
13 the benefit of your educational background, beginning
14 with your undergraduate training?

15 A. Yes. I graduated from the University of
16 Illinois in 1985.

17 Q. What was your field of study there, sir?

18 A. Biological sciences.

19 Q. And what year did you graduate, sir?

20 A. 1985.

21 Q. Next where did you go?

22 A. I went to St. George's University, and I
23 started medical school there. I went there from '85
24 until '88.

25 Q. Where is that located, sir?

1 A. That's in Grenada in the West Indies.

2 Q. And you were there for a year, and then
3 where did you go?

4 A. Well, I was there for several years, and
5 then I transferred to Robert Wood Johnson Medical
6 School in New Jersey.

7 Q. Is Robert Wood Johnson Medical School
8 affiliated with any major universities?

9 A. Yes. It used to be called Rutgers
10 Medical School.

11 Q. And it's located in New Jersey. And
12 what did you do? Did you receive a degree there,
13 sir?

14 A. Yes. I received my M.D. degree there.

15 Q. And upon completion of your M.D. degree,
16 did you make application for further education?

17 A. Yes. I then went to Northwestern
18 University in Chicago for my year of general surgery.

19 Q. And after that, sir?

20 A. Then I went to West Virginia University
21 for five years of neurosurgery training.

22 Q. Is there an application process in order
23 for you to get into a neurosurgery residency program?

24 A. Yes, there is.

25 Q. Tell the members of the jury what you

1 have to do to get into that program.

2 A. Well, first you have to apply to as many
3 schools as you want to interview at, and then you
4 have to go to a lot of interviews. Then the medical
5 residency programs, they rank the residents in the
6 order that they would want them in their program.

7 And then the applicants make a similar
8 list, both lists are submitted to a computer in San
9 Francisco, and then it makes matches. And you get a
10 letter telling you where you're going to go.

11 Q. And as a result of that process, you
12 ended up at West Virginia University; is that
13 correct?

14 A. That's correct.

15 Q. Who was the principal director of that
16 program while you were there?

17 A. The chairman was Howard Kaufman.

18 Q. And under Dr. Kaufman's direction, did
19 you receive education in neurosurgery?

20 A. Yes, I did.

21 Q. Would you tell the members of the jury
22 what the general process is? How do you learn
23 neurosurgery in a residency program?

24 A. Well, neurosurgery training is a -- it's
25 a graded responsibility. When you first start you're

1 watching operations, then you start to do small parts
2 of the operation, then you start doing more and more,
3 and eventually, you're doing the whole operation
4 yourself.

5 Q. And does that continue over the whole
6 five-year period?

7 A. Yes.

8 Q. Now, in the course of the direct
9 examination by Ms. Cofield, she made reference to a
10 couple of records of surgeries you had performed in
11 your fellowship while you were with Dr. Klara.

12 Where did that information come from,
13 those records, by the way?

14 A. The record was a -- it was a record that
15 I kept. It was from the labels that you use for the
16 patients' charts. You have a little stamp plate and
17 you make a sticker, and I would keep them in a book.

18 Q. Let me show you --

19 MR. ALLEN: And if we may, Your Honor, I
20 would just like to mark this for identification.

21 THE COURT: All right.

22 BY MR. ALLEN:

23 Q. Let me show you a collection of
24 documents, sir, and ask you if you can tell the
25 members of the jury what that is?

1 A. This is the record of my cases from my
2 fellowship.

3 Q. And how many cases appear on each page
4 in that particular document? If you would just show
5 the members of the jury briefly, sir.

6 A. (Witness indicating.)

7 Q. So would those be all the cases you did
8 while you were in training with Dr. Klara?

9 A. Yes.

10 Q. All right.

11 MR. ALLEN: Your Honor, I would like to
12 mark that for identification.

13 THE COURT: All right. Let's see, then
14 that will be -- is that your first exhibit?

15 MR. ALLEN: I think it's No. 2, Your
16 Honor.

17 MS. COFIELD: It's for identification.

18 THE COURT: Well, I'm just trying to --

19 MS. COFIELD: I thought it would be the
20 first for identification, would it not?

21 THE COURT: Well, it is, but I'm keeping
22 them -- we'll mark it for identification at this
23 point, but presumably maybe at some point it would be
24 marked for something else. I don't know.

25 MS. COFIELD: Can I just have the

1 number? That's why I'm asking.

2 THE COURT: I'm putting a two on it.

3 (The list of fellowship cases was
4 marked Defendant's Exhibit No. 2 for
5 identification.)

6 BY MR. ALLEN:

7 Q. Dr. Borden, what is the general nature
8 of the information that you kept with regard to each
9 of those cases?

10 A. Well, I would keep the patient's name,
11 the date of the operation, and a description of the
12 operation.

13 Q. Would it include details like how long
14 the surgery took or who was present or the
15 participants, that sort of stuff?

16 A. No. That's much more detail than is
17 required.

18 Q. Was it your general practice to keep
19 information about things like whether there was a
20 revision, whether this was a third redo or things
21 like that?

22 A. Sometimes that information was recorded,
23 but generally not. I described basically what I was
24 doing.

25 Q. Did you keep similar records in your

1 other educational programs?

2 A. Yes, I did, in internship and in
3 residency.

4 Q. Is it unusual for students to keep that
5 information, medical students who are residents or
6 interns to keep that information, sir?

7 A. No. Everyone is required to keep that.

8 Q. Let me show you a collection of
9 documents which we're also going to mark for
10 identification, sir, and ask you if you recognize
11 that.

12 MS. COFIELD: And is that No. 1?

13 MR. ALLEN: No, it's not.

14 THE COURT: It will be No. 3.

15 (The list of internship cases was
16 marked Defendant's Exhibit No. 3 for
17 identification.)

18 A. This is a record of my cases for my
19 internship in general surgery at Northwestern
20 University.

21 BY MR. ALLEN:

22 Q. Would you show the members of the jury
23 approximately how many records are on each page in
24 that document, just generally?

25 A. Okay. (Witness indicating.)

1 MR. ALLEN: I would like that marked
2 for identification, if I may, Your Honor.

3 THE COURT: It will be for
4 identification, No. 4.

5 (The list of residency cases was
6 marked Defendant's Exhibit No. 4 for
7 identification.)

8 BY MR. ALLEN:

9 Q. Let me show you another collection of
10 documents. In fact, I want to put both of these in
11 front of you, Dr. Borden, if I could. Those two
12 documents, sir, what are they?

13 A. These are both records from my cases
14 during residency.

15 Q. And would you show the members of the
16 jury approximately how many there are and how many
17 records there are on each page?

18 A. (Witness indicating.)

19 Q. Thank you, sir. Let's go ahead with the
20 second one as well, if you would.

21 A. (Witness indicating.)

22 Q. And these are all the cases you had
23 worked on as a neurosurgeon in your residency
24 program; is that correct?

25 A. Yes, that's correct.

1 Q. Now, did these cases include, Dr.
2 Borden --

3 MR. ALLEN: I would like these marked
4 for identification, Your Honor.

5 THE COURT: All right. They will be
6 received for identification as 4 and 5.

7 MS. COFIELD: I'm sorry, sir, 5 is what?

8 THE COURT: It's 4 and 5. There are two
9 of them, the same thing, but it's --

10 MS. COFIELD: The residency?

11 THE COURT: The residency.

12 MR. ALLEN: One says residency, I think,
13 on the cover, and one says more residency.

14 THE COURT: One says more residency.

15 MS. COFIELD: Oh, I see.

16 (The list of more residency cases was
17 marked Defendant's Exhibit No. 5 for
18 identification.)

19 BY MR. ALLEN:

20 Q. What is the general nature -- tell the
21 members of the jury what the range of neurosurgery
22 procedures are that you would have participated in as
23 a resident and as an intern during this training
24 program.

25 A. There is a wide variety. During

1 internship there is a very large variety, because you
2 rotate through all sorts of different surgical
3 services, different specialties.

4 In residency there is a large variety
5 because you're operating on many different areas of
6 the body. You're doing brain operations and spine
7 operations and operations on nerves in the arms and
8 other things for skull deformities and injuries,
9 things like that.

10 Q. Now, when you were responding to Ms.
11 Cofield's questions earlier yesterday about the
12 number of anterior cervical diskectomies you had
13 done, did you use the date from those records in
14 order to respond to those questions?

15 A. Yes, I did.

16 Q. And approximately how many ACD surgeries
17 had you participated in prior to the time that you
18 started your fellowship?

19 A. During my residency I did 50.

20 Q. Now, that just includes cervical spine
21 surgery; is that correct?

22 A. Yes. That's just this approach.

23 Q. Did you also participate in spine
24 surgery at other levels of the spine?

25 A. Yes, in the thoracic and the lumbar

1 spine.

2 Q. And you didn't count those to respond to
3 Ms. Cofield yesterday?

4 A. No.

5 Q. And did you also participate in spine
6 surgery from a posterior approach?

7 A. Yes.

8 Q. And did you include those when you
9 responded to Ms. Cofield's question?

10 A. No.

11 Q. So the only surgeries you were talking
12 about when you said I did 50 were the exact same
13 approach that was used in the case of Ms. Washburn?

14 A. Yes, the exact same approach.

15 Q. At the end of your neurosurgery
16 residency program, did you seek additional training?
17 Did you do anything to seek additional training?

18 A. Yes, I did. I interviewed at several
19 spine fellowship programs.

20 Q. Which spine fellowship programs did you
21 interview at?

22 A. Well, I interviewed in Memphis and in
23 Milwaukee and here with Dr. Klara.

24 Q. What was the nature of your desire for
25 additional education? What is it you were trying to

1 find out?

2 A. I planned on specializing in spinal
3 instrumentation surgery, like I do presently, and I
4 wanted additional experience in complicated
5 operations.

6 Q. And what is the range of spinal
7 instrumentation? When you say spinal
8 instrumentation, first of all, Dr. Borden, in lay
9 terms what are you talking about?

10 A. Well, I'm talking about when we do a
11 fusion on the spine, and we use metal screws or rods
12 or plates to hold the spine still while it's fusing.
13 Because if there's any movement at the site where
14 you're trying to get the fusion, then it won't
15 fuse.

16 Q. Now, you've already testified a little
17 bit about a Harms cage and the plate that was used in
18 this case, which I think is called an A-line plate;
19 correct, sir?

20 A. Yes.

21 Q. Are there other kinds of instrumentation
22 that you were anticipating learning about and did, in
23 fact, learn about in this --

24 A. Yes.

25 MS. COFIELD: Your Honor, relevancy and

1 materiality as to what he anticipated.

2 THE COURT: Well, since the general
3 experience has been explored pretty thoroughly, I'll
4 overrule the objection.

5 MS. COFIELD: Thank you.

6 A. Well, I also got experience in using
7 pedicle screws, with rods that were connected for the
8 thoracic and lumbar spine, also hooks and rods. Where
9 a screw couldn't be used, we would place the
10 instrumentation on the spine with hooks. Also fusion
11 devices for the lumbar spine between the vertebral
12 bodies.

13 BY MR. ALLEN:

14 Q. This fellowship wasn't just about this
15 A-line plate?

16 A. Oh, no.

17 Q. Now, if I may have just a moment,
18 Doctor. Do you recognize the devices that are on
19 there, sir?

20 A. Oh, yes, I do. These are two different
21 brands of cervical plates.

22 Q. Would you show the members of the jury
23 and describe for them what they are?

24 A. Well, this is a Synthes plate, this one
25 up here made by the Synthes Company, and this one is

1 an Orion plate made by Danek.

2 Q. And are they generally referred to with
3 a generic description other than plates?

4 A. Anterior cervical plates.

5 Q. Doctor, did there come a time in the
6 course of your fellowship program with Dr. Klara at
7 EVMS where you came to treat Ms. Washburn?

8 A. Yes, I did treat her.

9 Q. And when did that begin, sir?

10 A. I first saw Ms. Washburn on the 17th of
11 September.

12 Q. Let me go ahead and hand to you, Doctor,
13 Plaintiff's Exhibit 15 and Plaintiff's Exhibit 2,
14 which the jury also has copies of. I want to take
15 you through those visits in some detail, and if you
16 need to refer to those records, of course, please
17 do.

18 Tell me, how was it you came to see Ms.
19 Washburn on the 17th of September 1997?

20 A. As part of my fellowship I saw patients
21 in Dr. Klara's office, and when I arrived there, I
22 was told that there was a patient for me to see.

23 Q. Do you remember who gave you that
24 information?

25 A. No.

1 Q. Did you have the opportunity before you
2 saw Ms. Washburn on the 17th to review her records?

3 A. I reviewed them right before I went in
4 the room so I would know about her case.

5 Q. What happened then on the 17th when you
6 first saw Ms. Washburn? What did you do?

7 A. Well, first I looked at Dr. Klara's
8 history and physical from his first visit. Then I
9 looked at her films. She had an X-ray with her.

10 Q. Were you able to determine either from
11 the chart or from your conversation with Ms. Washburn
12 or both what her principal complaint was, that is,
13 what she was seeing you all about?

14 A. Yeah. Her complaint was severe neck and
15 arm pain.

16 Q. What was the general nature of that, if
17 you would tell the members of the jury about that?

18 A. She had been seen by Dr. Klara
19 previously for neck and arm pain, and she came in on
20 the 17th saying that her pain was worsening.

21 Q. Can you tell the members of the jury
22 what your recollection is about how bad her
23 complaints were?

24 A. She described them as severe. It says
25 from my note that the pain was so bad that she was

1 avoiding using her left arm.

2 Q. And did you observe that as well on the
3 17th, that is, that she was --

4 A. Yes. She appeared to be in a great deal
5 of pain.

6 Q. And when you say she was avoiding using
7 her left arm, what do you mean? Describe for the
8 members of the jury what that meant.

9 A. She didn't want to move her arm.

10 Q. Held it in a protective posture like --

11 A. Yeah, in a protective posture and
12 minimized any movement of the arm.

13 Q. Did you do an examination on that
14 particular date, sir?

15 A. Yes, I did.

16 Q. Tell the members of the jury what
17 examination you did.

18 A. I examined her strength.

19 Q. How do you do that?

20 A. I ask the patient to hold the muscle
21 still while I try to move the arm through that range
22 of motion. For instance, I'll ask her to make a
23 muscle with her biceps, and then I'll pull on her arm
24 to test the strength of the muscle.

25 Then I'll have her extend her arm and

1 hold it real straight, and then I'll try to bend it
2 against resistance to see if she has normal strength.

3 Q. What finding did you make as a result of
4 that testing?

5 A. Her strength was normal, except in her
6 left deltoid muscle she had some give-away weakness
7 because of pain.

8 Q. Now, tell the members of the jury what
9 you mean when you say give-away weakness.

10 A. Give-away weakness is not weakness from
11 damage to the nerve or the muscle. It's when a
12 patient has a lot of pain, and they can't hold the
13 muscle out because trying to push against -- trying
14 to hold the arm up while I'm pushing on it causes
15 pain in the arm. It's not true weakness.

16 Q. And in your description right there,
17 sir, are you holding the area that would be the
18 deltoid?

19 A. This is the deltoid muscle. It makes
20 your arm go out like this.

21 Q. What did you find -- did you do any
22 further examination, sir?

23 A. Yes. I examined her sensation.

24 Q. What did you find about her sensation,
25 sir?

1 A. She had a loss of sensation in the
2 third, fourth and fifth fingers of the left hand.

3 Q. How were you able to determine that,
4 sir?

5 A. The way I determined that is I use a
6 toothpick, and I scratch the surface of the skin.

7 So I'll scratch up here where the arm is
8 innervated by the C5 nerve root, then down here where
9 the C6 nerve root goes, then over here where the C7
10 nerve root goes, over here where the C8 nerve root
11 goes, and determine what the pattern of loss of
12 feeling is.

13 Q. Did you also do any examination with
14 regard to reflexes?

15 A. Yes, I did.

16 Q. Tell the members of the jury what you
17 did.

18 A. What I do is I take a reflex hammer, and
19 I locate the tendon where the muscle attaches to the
20 bone. And I hit the tendon, and it produces the
21 reflex. And you can see the movement of the arm, or
22 you can feel the movement in the muscle.

23 Q. Now, you heard the testimony of Ms.
24 Powell, one of the functional evaluators in this
25 case, earlier in this court, didn't you, sir?

1 A. Yes.

2 Q. Was the reflex that she was unable to
3 elicit the same reflex you were unable to elicit on
4 September 17th, 1997?

5 A. Yes, it was.

6 Q. Those examinations with regard to
7 reflexes were completely consistent?

8 A. Were the same, yes.

9 Q. Did you do any other examination on that
10 date, sir?

11 A. I examined the flexor/plantar responses
12 to check for any evidence of spinal cord compression,
13 and those reflexes were normal.

14 I then, because I had seen the X-ray
15 that didn't go down far enough to show me the C6-7
16 level, I took Ms. Washburn down to the radiologist's
17 office down the hall, and I got better X-rays.

18 Q. Do you have an independent recollection,
19 sir, of doing that?

20 A. Yes.

21 Q. And as a result of receiving those
22 X-rays, did you have any additional information that
23 was significant?

24 A. I was able to see that C6-7 level, but I
25 wasn't able to determine if the pseudoarthrosis

1 existed or not.

2 I could tell that there wasn't a severe
3 enough instability to cause movement of the bones,
4 but I still suspected that there was a
5 pseudoarthrosis and instability because of her severe
6 pain.

7 Q. Now, your next to the last sentence on
8 your report, sir, refers to this subluxation. I
9 think you've already described that for the jury.

10 But perhaps so that they can put this in
11 context, if you would tell us again what you meant by
12 that particular line which says: Although she does
13 not have any subluxation on flexion and extension, et
14 cetera.

15 A. Yes. Subluxation is when the vertebral
16 bodies are so unstable that they don't stay in their
17 normal position. When you move your neck backwards
18 and forwards, the bones will actually move back and
19 forth. And if that happens, you can see that on an
20 X-ray.

21 Q. You didn't see that in this particular
22 X-ray; correct, sir?

23 A. No, she didn't have that.

24 Q. Did you have any plan at that point or
25 discuss any alternatives with regard to future tests?

1 A. Yes. Since that wasn't a conclusive
2 test, I thought that she needed additional testing.
3 If I would have seen an obvious gap in the bones
4 there, then I would have had the answer, but as it
5 turned out, she needed additional studies.

6 Q. Now, there is a line here that says: I
7 will discuss obtaining a CT scan for the C6-7 disk
8 space with Dr. Klara. Do you see that, sir?

9 A. Yes.

10 Q. Did you do that?

11 A. No, I didn't. I discussed the case with
12 Dr. Klara and I presented the information, and he
13 determined that a bone scan would be of more value in
14 this situation than the CAT scan.

15 Those are both additional tests that
16 would give more information about the
17 pseudoarthrosis.

18 Q. So did you obtain a bone scan?

19 A. Yes, I did.

20 Q. And what was the result of that scan,
21 sir?

22 A. The bone scan showed increased uptake of
23 the radioisotope that was used at the C6-7 level, and
24 the radiologist interpreted that as being consistent
25 with the pseudoarthrosis.

1 Q. What was the next occasion that you saw
2 Ms. Washburn?

3 Well, before we go there, sir, did you
4 have a discussion with Ms. Washburn on that occasion
5 about what her prognosis would be or what your
6 expectations were for treatment?

7 A. Yes. We continued to treat her with
8 physical therapy and with her medications, and we
9 needed the additional tests before I could tell her
10 anything about a diagnosis. We didn't have the
11 diagnosis at that point.

12 Q. Do you recall on that particular
13 occasion if Mr. Washburn accompanied Ms. Washburn to
14 the office?

15 A. I don't recall.

16 Q. Was there ever an occasion when you met
17 with Mr. Washburn independently from Ms. Washburn?

18 A. Never.

19 Q. What is the next occasion when you saw
20 Ms. Washburn for treatment, sir?

21 A. I saw her on the 22nd.

22 Q. And is the next page in that Plaintiff's
23 Exhibit 15 your note of September 22nd, sir?

24 A. Yes, it is.

25 Q. Tell us what you did on that particular

1 occasion.

2 A. Well, Ms. Washburn came back after her
3 bone scan, and I told her about the results of the
4 bone scan. She said that she still had the neck and
5 left arm pain that were radiating down into the
6 fingers of her left hand.

7 Q. What evaluation or examination, if any,
8 did you do that day, sir?

9 A. Well, then I examined her again. I
10 examined her strength again, all the muscles of the
11 arms. I did the sensory exam again. I did the
12 examination of the reflexes and the reflexes in the
13 feet also, so I repeated the entire exam.

14 I made the diagnosis of C6-7
15 pseudoarthrosis, and I told Ms. Washburn that I
16 thought that surgery would help with her pain.

17 Q. Now, had there already been a discussion
18 or any agreement reached between you and Ms. Washburn
19 and/or Dr. Klara about who might perform that surgery
20 when you reached the -- had that discussion with her?

21 A. No. I still had to present the
22 patient's information to Dr. Klara to see what he
23 thought.

24 Q. So you had a discussion with her about
25 surgery, but there was no discussion about you doing

1 it at that point?

2 A. Oh, no.

3 Q. All right. Tell us what happened next.

4 A. After I presented the data to Dr. Klara,
5 he agreed that she needed -- you know, would benefit
6 from the surgery most likely, and the surgery was
7 offered to Ms. Washburn.

8 Q. And was a date set for that surgery at
9 that particular occasion? Do you recall any
10 discussion about when the surgery might take place?

11 A. Well, when we were in the hall with Ms.
12 Washburn and Dr. Klara, Dr. Klara informed her that
13 he would be out of town, and she said that she wanted
14 the surgery as soon as possible.

15 Q. And was there any further discussion
16 between Dr. Klara and Ms. Washburn and you about how
17 and when the surgery would be performed out in the
18 hallway?

19 A. Yes.

20 Q. Tell the members of the jury what
21 discussion took place.

22 A. Since Dr. Klara said he would be out of
23 town, Ms. Washburn said that she wanted the surgery
24 as soon as possible, and that she wanted me to do the
25 surgery.

1 Q. Was there any hesitation on her part
2 that you observed about requesting you to do the
3 surgery?

4 A. None.

5 Q. Had you had any discussion with Ms.
6 Washburn up to this point about your qualifications,
7 your experience with regard to this surgery?

8 A. No.

9 Q. And after that discussion took place in
10 the hallway, what happened next, sir?

11 A. She was consented for surgery.

12 Q. Well, let's take that a little bit
13 slower. What do you mean by that? What do you mean
14 by consent?

15 A. She signed the paperwork.

16 Q. And where was she when she did that,
17 sir?

18 A. I don't recall.

19 Q. Did you have a conversation with her
20 about that paperwork before she signed it?

21 A. Oh, yes, I did.

22 Q. Tell the members of the jury what you
23 recall telling her.

24 A. I described the risks and benefits of
25 the surgery to Ms. Washburn, and I told her the

1 benefits were that her neck and her arm pain may be
2 relieved. I also told her about the risks.

3 Those included infection, bleeding,
4 blood clots in the legs or lungs, damage to the
5 trachea or esophagus, damage to the recurrent
6 laryngeal nerve which could result in hoarseness or
7 difficulty swallowing, damage to the carotid or
8 vertebral arteries which can result in stroke, damage
9 to the spinal cord or the nerve roots which could
10 result in weakness, numbness, tingling, loss of
11 bowel, bladder or sexual function, failure of the
12 graft to heal, or breakage of the screws or plates.

13 Q. Doctor, is that a discussion that you
14 have had on other occasions with other patients?

15 A. Yes, with every patient.

16 Q. And does that include -- in those 50 ACD
17 surgeries you had participated in earlier, did you
18 also have a similar discussion with the patient in
19 those cases?

20 A. Yes, with every patient.

21 Q. Do you recall Ms. Washburn having any
22 questions about the risks and benefits of this
23 particular surgery?

24 A. No.

25 Q. Did she ask you any questions about your

1 experience at that point?

2 A. No, she didn't. She asked me why I had
3 come to Virginia. And I told her that I was enrolled
4 in a spine fellowship, and that I came to get
5 additional experience in surgery of the spine.

6 Q. Did Ms. Washburn ever ask you if you
7 were board certified?

8 A. No, she never asked me that.

9 Q. Did you ever tell Ms. Washburn you were
10 board certified in neurosurgery?

11 A. No, I didn't.

12 Q. Are you presently board certified in
13 neurosurgery, sir?

14 A. No, I'm not.

15 Q. Who is Brandi Mikovits?

16 A. Brandi was a medical assistant and an
17 X-ray technologist that worked in Dr. Klara's office.

18 Q. What role, if any, did Brandi have with
19 regard to patients who were going to receive surgery
20 at Dr. Klara's office?

21 A. Brandi did the pre-op paperwork. She
22 would bring the consent form to the patient for them
23 to sign, and then she would set up an appointment for
24 the laboratory tests that we would need before the
25 surgery.

1 Q. Did Brandi say anything about board
2 certification in your presence, sir?

3 A. No.

4 Q. Did you ever hear Brandi say words to
5 the effect of all our doctors are board certified?

6 MS. COFIELD: Objection, Your Honor.
7 It's his witness, and he is leading. He can say what
8 -- he can ask what did you hear Brandi say, but he
9 can't suggest what she said.

10 THE COURT: Well, you can't hardly get
11 behind nothing, but go ahead. Rephrase the question.

12 MR. ALLEN: Your Honor, I think I need
13 to use the specific words, because there is an
14 allegation here about specific words being used. And
15 it's not leading. I just want to know --

16 THE COURT: I'll overrule it. Go ahead
17 and ask the question.

18 BY MR. ALLEN:

19 Q. Did Brandi ever say all our doctors are
20 board certified?

21 A. No.

22 Q. Dr. Borden, would you look at
23 Plaintiff's Exhibit 2? You recognize that document,
24 don't you, sir?

25 A. Yes. This is the consent form.

1 Q. Does your handwriting appear on this
2 document?

3 A. Yes, it does, at the top of the page.

4 Q. Beginning where, sir?

5 A. At I hereby authorize Dr. Borden and
6 Klara, it starts there, and --

7 Q. Let me stop you right there just for a
8 second, sir. Now, that indicates Borden, slash,
9 Klara. Why did you put both names there?

10 A. Because Dr. Klara is the professor. I
11 always put the professor's name on all the paperwork.

12 Q. Was there any misunderstanding or any
13 possibility that Dr. Klara was going to be present at
14 this surgery in your mind on September 22nd, 1997?

15 A. No. Dr. Klara told Ms. Washburn
16 directly he would not be in town.

17 Q. The next line, who filled out that C6-7
18 anterior cervical diskectomy? And tell us what that
19 little line over the C means.

20 A. With. That's an abbreviation we use in
21 medicine. This is my handwriting also. I described
22 the operation to be performed and then a description
23 in simpler terms.

24 Q. All right, sir. Did you give Ms.
25 Washburn an opportunity to read this document?

1 A. Oh, yes. She read this.

2 Q. Did she have any -- did you actually see
3 her look at it for a period of time?

4 A. Brandi brought her the document. I
5 didn't stand there with her while she read it.

6 Q. Would you read to the members of the
7 jury paragraph three, sir?

8 A. Okay. I authorize and request the
9 performance of such operations and procedures in
10 addition to or different from those now contemplated,
11 whether or not arising from presently unforeseen
12 conditions for which the above-named physician or
13 associate or designee consider necessary or advisable
14 in the exercise of his professional judgment in
15 accordance with reasonable medical standards.

16 Q. Did Ms. Washburn ask you any questions
17 about that paragraph?

18 A. No.

19 Q. Was there ever any discussion with Ms.
20 Washburn about levels above or below C5 and -- or C6,
21 rather, and C7?

22 A. No, there wasn't.

23 Q. Was there any limitation that she --

24 MS. COFIELD: Your Honor, this is all
25 leading.

1 THE COURT: No, it's not. I'll overrule
2 the objection. Go ahead.

3 BY MR. ALLEN:

4 Q. Did Ms. Washburn give you any limitation
5 whatsoever on the nature of the surgery that you were
6 going to be allowed to perform?

7 A. No, she didn't.

8 Q. And sir, do you recognize the signatures
9 underneath physician and witness?

10 A. Yes.

11 Q. And whose signatures are those?

12 A. That's my signature and Brandi's
13 signature.

14 Q. All right, sir. Would you tell the
15 members of the jury in lay terms what an anterior
16 cervical diskectomy at C6-7 with an autograft and
17 A-line plate means, and more specifically how you
18 described it, rather, to Ms. Washburn in lay terms?

19 A. Okay. It's removing the bone and
20 fibrous tissue that are in the area of the old fusion
21 that didn't take and replacing it with another graft,
22 and then placing a plate on the spine to hold it
23 together while it heals.

24 Q. And is that how you described it for Ms.
25 Washburn?

1 A. Yes.

2 Q. Now, when you do that procedure, Doctor,
3 or when you have done that procedure, is there a
4 difference between fibrous bone material that hasn't
5 healed and disk material which has never been
6 operated on?

7 A. Yes. The pseudoarthrosis is a very
8 dense scar. It's very hard.

9 Q. And how is it distinguished from disk
10 material?

11 A. Disk material is very soft.

12 Q. Did there come a time, Dr. Borden, when
13 you did an operation on Ms. Washburn?

14 A. Yes.

15 Q. And when did that occur, sir?

16 A. On September 25th.

17 Q. Would you tell the members of the jury
18 what you did in order to do this operation?

19 A. Okay. Well, first we brought Ms.
20 Washburn into the operating room, and we moved her
21 over from the cart over onto the operating table.

22 Then the anesthesiologist started his
23 portion. He placed an IV, gave her antibiotics, and
24 gave her medication to anesthetize her, put her to
25 sleep.

1 Q. Let me just stop you right there just
2 for a second, Dr. Borden. Is there a record that
3 measures the time from when the operation starts
4 until the time when the operation ends that's
5 generally kept in the course of these kind of things?

6 A. Yes, the operative record that's kept by
7 the anesthesiologist.

8 Q. And when does the clock start, if you
9 will, for the anesthesiologist to say this is when
10 the operation begins?

11 A. Well, there are different times recorded
12 on the form. There are times for coming in the room
13 and times for making the incision. The
14 anesthesiologist is responsible for that record.
15 It's not something the surgeon fills out.

16 Q. But in any event, it generally starts
17 sometime shortly after the patient comes into the
18 operating room?

19 A. Yes.

20 Q. And when does that record end, if you
21 will? When is the surgery over?

22 A. After you've dressed the incisions,
23 taken the drapes off, and you're moving the patient
24 out of the room.

25 Q. And about what was the time interval

1 from start to finish in this particular surgery on
2 September 25th?

3 A. I was told that it was six hours.

4 Q. And is that also reflected in the
5 records that you've reviewed?

6 A. I don't recall the exact number, but it
7 probably is.

8 Q. All right, sir. Now, tell us again, you
9 were at the point where the patient came into the
10 room. Tell us exactly what has to be done in order
11 to get the patient ready for surgery.

12 A. Okay. You bring the patient over to the
13 operating table, and the anesthesiologist starts the
14 IV, gives the antibiotics, and gives his medications
15 to put the patient to sleep.

16 Then he puts an endotracheal tube in to
17 hook her up to the ventilator during the operation to
18 breathe. Then he places a nasogastric tube. He puts
19 it in the nose and brings it down into the stomach to
20 clear any stomach contents.

21 Then the nurses start their portion
22 where -- what they do is they put on the Ted's
23 stockings on the legs, and they put on compression
24 boots on the legs so the patient doesn't get a blood
25 clot. They pump the legs to prevent that. And they

1 put in a Foley catheter.

2 I then pad all of the pressure points.

3 Q. What do you mean by that, sir?

4 A. The bony prominences, the elbows or the
5 heels. You have to pad them all with foam so the
6 patient doesn't get pressure sores, because they're
7 going to be laying in the same position during the
8 operation for a long period of time.

9 Then I put the Aesculap head holder on
10 the table.

11 Q. Would you tell the members of the jury
12 what the Aesculap head holder is?

13 A. The Aesculap head holder is a device
14 specifically designed to hold the head and neck
15 during anterior cervical spine surgery. It keeps the
16 neck still, and it keeps it straight in the midline
17 position.

18 It has to be placed on the table, then
19 you place the patient's head in it and make
20 adjustments for the neck, and then you fix the jaw to
21 it with what looks like a large rubber band that
22 holds the chin in place.

23 Q. And then do you do anything with regard
24 to the patient's arms, sir?

25 A. Yes. They have to put wrist restraints

1 on the arms in case you have to pull on the arms
2 during surgery. The arms are then positioned on the
3 sides, and I have metal sleds that hold the arms over
4 to the side so they don't fall off the table during
5 surgery.

6 Q. What happens next, sir?

7 A. Then I obtain a fluoroscopic X-ray to
8 make sure the neck is in the correct position.

9 Q. Tell the members of the jury how you do
10 that.

11 A. Well, we bring in a piece of equipment
12 that's an X-ray machine, and it shows me an X-ray
13 picture on a television screen.

14 Q. And what are you looking at when you do
15 that?

16 A. I'm looking to make sure the position of
17 her neck is correct, that there is the right
18 curvature to the neck. Because when performing a
19 fusion on the spine, you want to make sure that it's
20 going to be fused in the correct position.

21 Q. All right. And you did that in this
22 case?

23 A. Yes.

24 Q. What else did you do to get ready for
25 surgery?

1 A. Well, after that I take ten-ten drapes,
2 these are clear plastic drapes, and I drape off the
3 areas of the neck and the pelvis where I'm going to
4 be taking the graft from. Then the nurses prep those
5 sterilely.

6 Then I have to prepare myself, so I get
7 my loop glasses, which are high magnification
8 glasses. They provide about three and a half times
9 magnification for the surgery, so I have to put those
10 on.

11 Q. Do you have to -- did you do anything
12 with the X-ray machine in this case to locate the
13 site of the incision?

14 A. Yes, I did.

15 Q. Would you tell the members of the jury
16 what you did?

17 A. Okay. I took a surgical instrument and
18 I placed it on the skin where the old skin incision
19 was made, and I took an X-ray. And I saw that the
20 previous incision was above the level of C6-7.

21 Because after the patient was
22 positioned, I couldn't see below the top of C6. She
23 had very large shoulders and a short neck, so it was
24 impossible to see down into the area where the old
25 surgery was.

1 Q. Did Ms. Washburn look on September 25th,
2 1997, like she looks today?

3 A. No. She was much heavier.

4 Q. And do you know approximately how much
5 she weighed on that occasion?

6 A. I was told over 200 pounds.

7 Q. And when you did your fluoroscopy to
8 look for the incision site, you said you saw down to
9 C6?

10 A. Yes, to the top of C6.

11 Q. Does that mean you weren't able to see
12 C7 or T1 on that --

13 A. No, I couldn't.

14 Q. All right. What did you do to mark the
15 -- or did you do anything to locate the incision site
16 that you were going to operate?

17 A. Well, I noticed that since the old
18 incision was above the level where the surgery needed
19 to be performed, I had to make a different incision
20 to be directly over the correct area.

21 So I marked my incision maybe a
22 centimeter below the old incision so I would be
23 closer to where I needed to perform the surgery.

24 Q. Why would the incision be in a different
25 location, sir?

1 A. You know, Ms. Washburn had had
2 fluctuations in weight where she had become heavier
3 and then had lost weight, and this may have changed
4 the position of the skin incision from where it had
5 been made originally.

6 Q. All right. At this point I think you
7 were describing to the members of the jury that you
8 put on the loops. Would you tell the members of the
9 jury what the loops were?

10 A. Loops are magnifying glasses that -- the
11 outer rim of the glasses look like normal glasses,
12 but they have a large cylindrical lens that sticks
13 out on both sides, approximately that long, and they
14 provide a high magnification.

15 Q. And what else did you put on, if
16 anything?

17 A. Then I put on a headlight so that I can
18 have a light directed directly into the incision, so
19 I could get the best possible visualization.

20 Q. And you have to put those on before you
21 go do your surgical prep?

22 A. Before I go scrub my arms and my hands.
23 So then I went out and I scrubbed, and then I came
24 back in the room and I put on my sterile gown and my
25 sterile gloves.

1 Q. Has Ms. Washburn been under anesthesia
2 all this time?

3 A. Yes, she has.

4 Q. But as of yet you haven't made a cut on
5 her; correct, sir?

6 A. No. This all takes time.

7 Q. And approximately how much time elapses
8 in the preparation or did elapse in the preparation,
9 if you know, on this --

10 A. About an hour.

11 Q. At this point what happens next with
12 regard to the surgery, sir?

13 A. Well, then I go over to the table, and I
14 put on the sterile drapes to cover up any areas I'm
15 not going to be operating on. Then I mark the skin
16 incision, I take some local anesthetic, and I
17 anesthetize the area of the skin incision. Then I
18 make my incision after that.

19 Q. All right, sir. Would you describe for
20 the members of the jury the operation you performed
21 on Ms. Washburn? And if it would assist you, sir, to
22 do so with some charts --

23 A. That would be helpful.

24 MR. ALLEN: May we come down?

25 THE COURT: Yes. And counsel may

1 position themselves to observe.

2 BY MR. ALLEN:

3 Q. First, Doctor, before you get really in
4 depth with the operation, let me ask you, why did you
5 approach this particular surgery from the right-hand
6 side?

7 A. Dr. Klara told me to approach this from
8 the right side because he had two considerations. He
9 said that you should always approach it from the same
10 side as the previous surgery, and he also had a rule
11 that he always operated from the right side.

12 Q. Are there structures on the left-hand
13 side which can also be damaged during such surgery?

14 A. Yeah. Surgery on the left side includes
15 all of the risks of doing it on the right side plus
16 one additional risk. There is the thoracic duct
17 which is -- you have the thoracic duct which is on
18 the left side.

19 It's a large lymph vessel that loops up
20 into the neck and then comes back down and goes into
21 the vein that's underneath the collar bone. So in
22 addition to the risks that are present on the right
23 side, there is also a risk of damaging that if you
24 operate on the left side.

25 Q. All right, sir. Now, if you would,

1 using this chart -- well, first of all, sir, is the
2 anatomy when you open up Ms. Washburn or anyone else
3 as nicely color-coded as that chart is?

4 A. No, it's not. The blood vessels aren't
5 blue and red, and there are additional structures
6 that aren't on this chart.

7 Obviously, you have the trachea and the
8 esophagus setting right on the front of the spine,
9 and they're not pictured here. But this gives you an
10 idea of how many blood vessels are in the area.

11 Q. All right, sir. And what did you do?
12 Using that chart, would you describe to the members
13 of the jury what you did when you operated on Ms.
14 Washburn?

15 A. Yes. I made an incision over the C6-7
16 level with a scalpel blade. Then I brought the
17 incision down through the platysma muscle, which is
18 the layer of muscle underneath the skin and the fat
19 on the neck.

20 So I made an incision there. Then I
21 took some forceps and some scissors, and I dissected
22 underneath the muscle layer to make it more mobile so
23 that it could be retracted.

24 Then I developed a plane of dissection
25 between the trachea and esophagus, which set over

1 right directly in front of the spine and the carotid
2 artery and the jugular vein over here. So I --

3 Q. What do you mean by a plane of
4 dissection?

5 A. You have to go between these structures
6 in order to avoid any damage to them. So the area
7 over the C6-7 disk space has to be identified in the
8 bottom of the incision.

9 So these structures need to -- you need
10 to mobilize them enough so that you can move the
11 trachea and esophagus over this way and the carotid
12 sheath over this way.

13 Q. So what did you do after you made this
14 plane of dissection?

15 A. Well, there had been previous surgery in
16 the area, so there was scarring there. I created the
17 plane of dissection, and I identified the cervical
18 spine in the deep aspect of the incision.

19 I placed self-retaining retractors so I
20 could get a clear view of the spine, and then I took
21 a needle and I started inspecting the surface of the
22 bone. So I went along --

23 Q. What is the purpose of using a needle to
24 inspect the surface of the bone?

25 A. To differentiate between the bone and

1 the pseudoarthrosis.

2 Q. What would you expect to find different
3 when you're probing with that needle with regard to
4 bone and pseudoarthrosis?

5 A. Bone is very hard, and you can't push a
6 thin needle into the bone. But when you get down to
7 the pseudoarthrosis, it's fibrous scar tissue, and
8 the needle will pass into it.

9 Q. Is the response that you get with the
10 needle on disk different from bone and fibrous?

11 A. Yes, it is.

12 Q. And in what way, sir?

13 A. Since the fibrous pseudoarthrosis is
14 very dense, it feels different than the soft disk.

15 Q. All right, sir. And using that needle,
16 were you able to ascertain where the pseudoarthrosis
17 was?

18 A. Yes, I identified it.

19 Q. All right. What did you do next, sir?

20 A. Well, I then incised it with a scalpel
21 blade, and I started removing it.

22 Q. Would it be helpful to take away all of
23 the other structures?

24 A. Yes, it would. The pseudoarthrosis was
25 in the area of the previous diskectomy, so I incised

1 the scar tissue. I pulled some of it out with a
2 biting instrument, and then I took a drill like a
3 dentist uses and I drilled the rest of the scar and
4 the bone out.

5 Q. What did you do next, sir?

6 A. Then I identified the posterior
7 longitudinal ligament in the back that -- it's the
8 next layer before the covering of the spinal cord.

9 I incised that with a scalpel, and I
10 took another biting instrument and I bit that
11 ligament out so that I could inspect next to the
12 spinal cord and make sure that there were no disk
13 fragments pushing on the nerves of the spinal cord.

14 Q. And what is the purpose of doing that?

15 A. Well, you don't want to leave any disk
16 material that may have previously been there before
17 the first operation.

18 While you're there repairing the
19 pseudoarthrosis, you want to make sure that you take
20 care of all the problems that are there and not leave
21 anything behind to create pressure on the nerves.

22 Especially since she had this arm pain,
23 I had to make sure there was nothing pushing on
24 those nerves.

25 Q. Did any of the material that you removed

1 from between the C6-C7 space appear to you to be disk
2 material?

3 A. No, it didn't.

4 Q. What was it?

5 A. It was tough fibrous scar tissue.

6 Q. All right. What did you do next, sir?

7 A. Next I harvested a bone graft from the
8 pelvis here. You can feel the area where the bone
9 comes closest to the surface of the skin, that's
10 where the incision is made, and I took out a piece of
11 bone to use to do the fusion.

12 And then I inserted that in the area of
13 the pseudoarthrosis.

14 Q. And what did you do after that, sir?

15 A. After that I selected an A-line plate
16 that was of the appropriate length so I could put
17 screws in here and then down here.

18 Q. What does the term fusion mean, sir, in
19 lay terms?

20 A. Fusion is where you get the bones to
21 heal into one solid piece of bone.

22 Q. All right, sir. And did you fuse C7-T1?

23 A. No, I didn't.

24 Q. Did you fuse C6-C7?

25 A. I fused C6-C7.

1 Q. Now, what is the significance of placing
2 the plate in the surgery in this case? Why do you do
3 that?

4 A. Well, the plate is there to prevent
5 motion where you place the graft. Because if there
6 is motion, then the graft won't heal together, and
7 this won't be a solid fusion.

8 Q. Are there any general principles with
9 regard to the placement of a plate, that is,
10 significant things that you need to do to make sure
11 -- that's important?

12 A. You need to make sure the screws have a
13 firm purchase in the bone. You can't put them into
14 anything that's not going to hold them there. You
15 want them to stay perfectly still, so it has to be
16 solid bone.

17 Q. In your instruction with regard to the
18 placement of a plate, were you ever given any
19 instruction that was a prohibition on placing a plate
20 higher or lower than the area you were fusing?

21 A. No.

22 Q. All right, sir. What did you do next
23 with regard to this plate?

24 A. After I affixed the plate to the
25 vertebral bodies, I'd have to drill into the bone and

1 then tap the bone to put screw threads into the
2 bone.

3 Then I put in the screws, and then I put
4 in locking screws in the head of the screw so it
5 holds the plate and the screw together as one piece,
6 so the plate or the screws don't back out.

7 After that I irrigated with antibiotic
8 irrigation, and then I closed the platysma muscle and
9 then put a layer of sutures just underneath the skin,
10 basically adjacent to the fat layer, then a third
11 layer of sutures immediately underneath the skin in
12 what we call a subcuticular layer.

13 Then I dressed the incision in a sterile
14 manner, and the operation was completed.

15 Q. All right, sir. You can take your seat.

16 Were there any other physicians, Dr.
17 Borden, who were present in the operating room from
18 time to time during this surgery?

19 A. Yes. Dr. Michael Schlitt was there that
20 day.

21 Q. Who is Michael Schlitt?

22 A. He is a neurosurgeon from Seattle.

23 Q. Why was he there?

24 A. He was visiting me that day.

25 Q. And is he board certified in

1 neurosurgery?

2 A. Yes, he is.

3 Q. Was he board certified in neurosurgery
4 on September 25th, 1997?

5 A. Yes, he was.

6 Q. Was he scrubbed in in any way to assist?

7 A. No, not at all.

8 Q. Did you give a deposition in this case,
9 sir?

10 A. Yes, I did.

11 Q. Did you disclose the presence of Dr.
12 Schlitt during the operation during that deposition?

13 A. Yes, I did.

14 Q. What was Ms. Washburn's post-operative
15 course?

16 A. Oh, post-operatively Ms. Washburn was
17 greatly improved. She said that her neck and her arm
18 pain resolved. She had a good result.

19 Q. And did you see her in the hospital
20 after the surgery?

21 A. Oh, yes, I saw her.

22 Q. Let me direct your attention, if I may,
23 to the documents behind Tab 2 in that notebook,
24 Doctor, and if you would find your progress note
25 there, sir, for the 26th.

1 MS. COFIELD: I'm sorry. You're on the
2 office chart?

3 MR. ALLEN: No, hospital.

4 MS. COFIELD: The hospital. And the
5 date is the 26th?

6 MR. ALLEN: The 26th.

7 A. Yes, I see the note.

8 BY MR. ALLEN:

9 Q. All right, sir. Tell us what, if
10 anything, you found from Ms. Washburn on the 26th --
11 well, first of all, what is the time and date on
12 which you saw her first after the surgery?

13 A. The first note is from 9-26-97 at 1500.

14 Q. So 3 o'clock in the afternoon?

15 A. Yes.

16 Q. And what was your -- what examination or
17 what report did you take from her on that particular
18 occasion?

19 A. Her history indicated that her headaches
20 that she had before surgery had resolved, and that
21 her neck and her arm pain were improved.

22 Q. Anything else significant about your
23 post-op examination on that particular day?

24 A. She had -- her strength was normal
25 throughout the arms and legs, and the dressing was

1 dry.

2 Q. All right, sir. If you would go ahead
3 and take that document out, and let's set it aside.
4 I'm going to mark that in just a second as an
5 exhibit, if you would.

6 Did you see her on the next day, sir?

7 A. Yes, I did.

8 Q. And what did you find on that particular
9 occasion?

10 A. She was complaining of some spasms in
11 her arm.

12 Q. Is that unusual?

13 A. No. That's common after an anterior
14 cervical operation.

15 Q. And so what, if anything, did you do
16 with regard to that?

17 A. I prescribed some additional muscle
18 relaxants for her, and that was the treatment plan
19 for the day.

20 Q. Did she have any complaints on that
21 occasion about recurring neck or arm pain?

22 A. No, she didn't.

23 Q. And then when did you next see her, sir?

24 A. Let's see, I saw her later that day, and
25 she was still complaining of spasms.

1 Q. Did she have any complaint of neck and
2 arm pain during that visit?

3 A. No, she didn't.

4 Q. And then --

5 A. The next day I saw her again, and she
6 said that her spasms were improved.

7 Q. Any complaints about the neck and arm
8 pain at all, sir?

9 A. No, none.

10 Q. If you would take each of those
11 documents out, are all those documents you've just
12 been looking at, sir, your notes of her visit?

13 A. Yes, they are.

14 MR. ALLEN: If I might, Your Honor, I
15 would like to offer those as the next defense
16 exhibit.

17 THE COURT: All right.

18 MS. COFIELD: And that is what, sir?

19 THE COURT: It's the hospital notes
20 related to the --

21 MR. ALLEN: Progress notes.

22 THE COURT: The progress notes.

23 MS. COFIELD: All of those that you
24 discussed?

25 MR. ALLEN: Yes.

1 (The VBGH progress notes were marked
2 Defendant's Exhibit No. 6 and received
3 in evidence.)

4 BY MR. ALLEN:

5 Q. Was Ms. Washburn then discharged from
6 the hospital?

7 A. Yes.

8 Q. And approximately on what date, sir?

9 A. I would have to check my notes.

10 Q. If you would look at the front of Tab 2,
11 I think that will have your discharge summary.

12 A. On the 28th she was discharged to home.

13 Q. On the 28th of September when she left
14 the hospital, what condition was she in? That is,
15 what devices was she wearing, what equipment did she
16 have, that sort of thing?

17 A. She was in good condition. She didn't
18 have any devices that I recall.

19 Q. No feeding tubes, no --

20 A. No.

21 Q. Nothing of that sort?

22 A. No, she didn't.

23 Q. All right. When is the next time you
24 saw her in the office, sir? And if you need to refer
25 to Plaintiff's Exhibit 15, you have it there in front

1 of you.

2 A. I then saw her on the 1st of October.

3 Q. And would you tell the members of the
4 jury what your examination of Ms. Washburn disclosed
5 on that particular occasion?

6 A. She said that her neck and arm pain were
7 60 percent improved. She had some occasional spasms
8 and a little bit of pain from the graft site that was
9 improving. And she had some difficulty swallowing
10 thin liquids, but no shortness of breath.

11 Q. Was that the first occasion you became
12 aware of a complaint with regard to swallowing or
13 vocal cord issues?

14 A. Yes.

15 Q. And what did you do on that particular
16 occasion? Did you do an examination?

17 A. Yes. On that occasion I did examine
18 her.

19 Q. What did you find?

20 A. She had some hoarseness of the voice at
21 that time, and there was a small spot of drainage at
22 the incision. The incision was not infected. Her
23 strength was normal. She still had the same old
24 numbness that she had complained of before in those
25 three fingers.

1 Q. Did that change in any material way
2 throughout her visits with you, that is, the
3 numbness?

4 A. No, they haven't changed. Her reflexes
5 were normal in the feet. She was walking favoring
6 her right leg because of her hip incision. And I
7 obtained an X-ray that showed that the screws and the
8 plate were intact, and she was told to keep wearing
9 her cervical collar.

10 And I told her since she had these
11 complaints, that she should use thickened liquids
12 since she had trouble swallowing thin liquids, and to
13 limit her activity.

14 Q. Now, you were asked yesterday, Doctor,
15 and I don't see them over there, about some X-ray
16 reports that were taken at Virginia Beach General
17 Hospital. Do you remember that questioning?

18 A. Yes, I do.

19 MR. ALLEN: I thought those were
20 admitted into evidence, Your Honor.

21 THE COURT: Well, they were admitted
22 into evidence, and so I guess we need to look
23 around. I know without intention counsel was up and
24 down, and exhibits sometimes get set aside.

25 Would you take a glance, Ms. Cofield,

1 since those were your exhibits?

2 MS. COFIELD: Do what, Your Honor?

3 THE COURT: The X-ray reports.

4 MS. COFIELD: No, sir.

5 THE COURT: I'm just asking you to take
6 a look. I'm not suggesting that you have them, but
7 they don't seem to be there.

8 MS. COFIELD: Well, there's only one
9 that was admitted, sir. I have the others that
10 weren't.

11 THE COURT: Have you got it?

12 MR. ALLEN: I've got the one that was
13 admitted into evidence. I thought they all had been
14 admitted. Was it marked for ID?

15 THE COURT: What is it?

16 MR. ALLEN: This is the examination of
17 9-25-97.

18 THE COURT: All right.

19 MR. ALLEN: I don't know if plaintiff
20 marked it for ID.

21 THE COURT: We will mark it as
22 Defendant's 7.

23 (The X-ray report of 9-25-97 was marked
24 Defendant's Exhibit No. 7 for
25 identification.)

1 BY MR. ALLEN:

2 Q. Doctor, let me show you what appears to
3 be an X-ray report dated the 25th of September 1997
4 and ask you if you recognize that.

5 MS. COFIELD: And that one was performed
6 by whom?

7 MR. ALLEN: Dr. Stitik, I believe.

8 A. Yes, I do recognize this.

9 BY MR. ALLEN:

10 Q. Is that an X-ray report which you
11 received in Ms. Washburn's case while she was at
12 Virginia Beach General Hospital?

13 A. Yes.

14 Q. Would you read the line that begins
15 suboptimal?

16 A. Okay. Suboptimal examination with there
17 being an anterior fusion at C6-7 and C7-T1 levels
18 without further characterization. Further follow-up
19 is recommended, perhaps with plain film tomography if
20 clinically significant.

21 Q. Now, go up to the top part, if you would
22 as well, sir, and would you read the portion that
23 begins this area?

24 A. Okay. This area is not well visualized
25 on the lateral view, and the position of the screws

1 and bone graft cannot be ascertained on this
2 examination. The frontal view shows linear fibrosis
3 or discoid atelectasis in the right upper lobe.

4 Q. Now, that last sentence about discoid
5 atelectasis, what is that referring to?

6 A. He is referring to the fact that he
7 could see a small portion of the lung. When they
8 took the film of the neck, some of the lung was
9 visible on both sides, and so he was just commenting
10 on the area of lung he could see.

11 Q. What does the phrase that that was a
12 suboptimal examination mean?

13 A. It means that it's inadequate to make
14 any conclusions.

15 Q. Doctor, if the screws or the bottom
16 screws of this A-line plate were in the vertebrae T1,
17 is that of any clinical significance in your mind in
18 the treatment of Ms. Washburn?

19 A. No, it's not. The fusion was performed
20 at C6-7.

21 MS. COFIELD: Excuse me. Objection,
22 relevancy and materiality.

23 THE COURT: Well, it may not be. But
24 we've covered so much in this area, Ms. Cofield, it
25 seems to me that it's something that ought to be

1 heard. I'll overrule it.

2 BY MR. ALLEN:

3 Q. Please go ahead.

4 A. No, that wouldn't be significant. The
5 area of the fusion was C6-7, and that's where it was
6 intended.

7 Q. Thank you, sir. Let me show you what
8 was shown to you yesterday as well, which appears to
9 be a --

10 MR. ALLEN: And if we may, sir, I would
11 like to mark that for identification.

12 MS. COFIELD: What are you showing him?

13 MR. ALLEN: 9-28, Dr. Stitik.

14 MS. COFIELD: And 9-25 is number what?

15 MR. ALLEN: It's identification only.

16 THE COURT: No. 7 for identification.

17 MS. COFIELD: Oh, only for
18 identification?

19 THE COURT: D-7, and this will be D-8.

20 (The X-ray report of 9-28-97 was marked
21 Defendant's Exhibit No. 8 for
22 identification.)

23 BY MR. ALLEN:

24 Q. Would you read the sentence that begins
25 -- well, first of all, Doctor, would you just confirm

1 for the jury that this is the X-ray report you were
2 asked about yesterday that's dated September 28th,
3 1997?

4 A. Yes, this is it.

5 Q. Would you begin reading with the
6 sentence that begins again and just read the two
7 sentences there?

8 A. Starting with again?

9 Q. Yes.

10 A. Again, there is evidence of an anterior
11 fusion at the C6-T1 levels. The exact location of
12 the screws and anterior brace to the vertebral bodies
13 cannot be seen on this examination. Additional
14 imaging perhaps with plain film tomography may be of
15 value.

16 Q. Again, Doctor, on that occasion would it
17 have been of any clinical significance if your bottom
18 screws were in the T1 vertebrae?

19 A. No, it wouldn't.

20 MS. COFIELD: Again, sir, materiality
21 and relevancy.

22 THE COURT: I'll note your objection.
23 Overruled.

24 BY MR. ALLEN:

25 Q. What was the next visit where you met

1 with Ms. Washburn after the 1st of October 1997,
2 Doctor? And if you need to look at Plaintiff's
3 Exhibit 15, please do.

4 A. It was the 6th of October.

5 Q. What complaint, if any, did she have
6 about neck and arm pain on that particular occasion?

7 A. She said that her neck and arm pain had
8 resolved entirely.

9 Q. What do you mean by that? That's a note
10 in your --

11 A. They were gone. She had no neck or arm
12 pain.

13 Q. What other findings did you make on that
14 particular occasion, sir?

15 A. She still had the numbness in those
16 three fingers. Her strength was normal. Her
17 reflexes in the feet were normal. Her hip incision
18 was healing well. There was a small area of hardness
19 around the incision that indicated healing, and the
20 instrumentation on the X-rays was intact.

21 She also -- I asked her about her diet,
22 and she said she had some hoarseness and some
23 difficulty swallowing. However, she was getting an
24 adequate caloric intake and wasn't dehydrated. She
25 was drinking enough liquids.

1 Q. Had you made a similar inquiry on
2 October 6th when she told you about her swallowing
3 difficulties?

4 A. Yes.

5 Q. And did you get the same response?

6 A. Yes.

7 Q. Now, subsequent to or after October 8th,
8 1997, that's when you referred her to Virginia Beach
9 General Hospital for the feeding tube, and ultimately
10 she ended up at the Medical College of Virginia;
11 correct?

12 A. Yes.

13 Q. What is the first occasion after that
14 sequence of events that you saw Ms. Washburn in your
15 office?

16 A. I saw her on the 8th, and then I saw her
17 again on the 31st.

18 Q. On the 31st, Doctor, what complaint, if
19 any, did she have about neck and arm pain?

20 A. She again said that she didn't have any
21 neck or arm pain.

22 Q. What significant findings did you make
23 on October 31st with regard to your surgery, sir?

24 A. Her left triceps reflex was noticeable
25 then. Before she didn't have a triceps reflex, and

1 when I examined her on the 31st, I could see muscle
2 activity in that reflex.

3 Her strength was normal, her reflexes
4 were otherwise normal throughout the arms and legs,
5 and the reflexes in her feet were also normal.

6 Q. Setting aside, Doctor, the difficulty
7 she had with her vocal cord, did you make a
8 conclusion on that particular occasion about the
9 success of your neurosurgical intervention?

10 A. Yes.

11 MS. COFIELD: Object and move to strike,
12 Your Honor.

13 THE COURT: Well, I'm going to --

14 MS. COFIELD: That's for the jury, the
15 ultimate issue.

16 THE COURT: Well, but he is the witness
17 -- I mean he is the physician. He can answer the
18 question. I'll note your exception.

19 A. With respect to her neck and her arm
20 pain, she had an excellent result. They had both
21 resolved. I'm sorry that she had this unavoidable,
22 known risk of surgery with the hoarseness of the
23 voice, but there was nothing I could do to prevent
24 that.

25 MS. COFIELD: Again move to strike, Your

1 Honor.

2 THE COURT: I'll overrule that.

3 BY MR. ALLEN:

4 Q. Doctor, did you see Ms. Washburn again
5 January 16th, 1998?

6 A. Yes, I did.

7 Q. And is that the last occasion when you
8 saw Ms. Washburn?

9 A. Yes, it was.

10 Q. And did she have any neck or arm pain on
11 that particular occasion?

12 A. It says that she had good relief of her
13 neck and arm pain.

14 Q. Have you seen any record generated by
15 any doctor before this litigation was filed in the
16 middle of 1998 where Ms. Washburn complained of neck
17 and arm pain to anyone?

18 A. No.

19 Q. To the best of your knowledge, sir, did
20 Ms. Washburn have cervical mobility with regard to
21 her cervical spine, that is, the ability to move her
22 neck?

23 A. Yes. She has good mobility.

24 Q. Was it any different after the surgery
25 than it was before the surgery?

1 MS. COFIELD: Your Honor, it just keeps
2 being leading questions. It is his own witness.

3 THE COURT: Well, but he's just asking
4 whether it's different. He didn't say how. I'll
5 overrule the objection. He can answer.

6 BY MR. ALLEN:

7 Q. Is there any difference before or after?

8 A. I believe the chart reflects that
9 according to the physical therapist she had better
10 movement of her neck after the surgery.

11 THE COURT: Well, he can't testify as to
12 what the charts say, if he doesn't know on his own.

13 MR. ALLEN: Well, I'll withdraw it, Your
14 Honor. May I have one moment, Your Honor? I think
15 I'm done.

16 THE COURT: All right.

17 BY MR. ALLEN:

18 Q. Doctor, was there ever any evidence
19 after your surgery of subluxation?

20 A. No, none.

21 Q. Ever any evidence of instability of the
22 C6-C7 joint?

23 A. No.

24 Q. Was there any evidence of any
25 instability at any level in the cervical spine?

1 A. No, there isn't.

2 Q. What about at the cervicothoracic
3 junction, that is, at C7-T1? Was there ever any
4 evidence in your examination of instability in that
5 joint?

6 A. Not at all.

7 Q. Any complaints to you made by Ms.
8 Washburn about anything regarding your surgery except
9 the swallowing difficulties she had and her voice
10 difficulty?

11 A. No.

12 MR. ALLEN: That's all I have, Your
13 Honor.

14 THE COURT: All right. Do you have any
15 cross-examination?

16 MR. BLACKWELL: I think I do. I
17 wondered if I might have just a one-minute recess.

18 THE COURT: Well, I want to take a
19 recess, but I'm trying to get us down to -- okay,
20 let's take a short recess, then.

21 And you may step down, Doctor. We'll
22 take a short recess and then try to complete this.

23 * * * * *

24 THE COURT: All right. Mr. Blackwell,
25 you may cross-examine.

1 MR. BLACKWELL: Your Honor, I reserve
2 the right to -- I'm not going to inquire of Dr.
3 Borden at this time. I reserve the right to bring
4 him back as part of my case.

5 THE COURT: All right. Thank you. Ms.
6 Cofield?

7 MS. COFIELD: Surely, sir. Thank you.
8 I'm sorry, I wasn't prepared. I expected Mr.
9 Blackwell to -- just one moment and I'll be right
10 with you.

11 FURTHER REDIRECT EXAMINATION

12 BY MS. COFIELD:

13 Q. The big list of cases between internship
14 -- well, let's take internship first. Internship
15 you've just gotten your M.D., and it's your first and
16 second year out; right?

17 A. It's the first year.

18 Q. First year only?

19 A. Yeah. Internship would be the first
20 year.

21 Q. And all you're really allowed to do at
22 that point is open?

23 A. No.

24 MR. ALLEN: Your Honor, I'm going to
25 object to the line of questioning. It's irrelevant

1 at this point given the context of the case.

2 THE COURT: Well, let's go ahead and do
3 your cross-examination.

4 MS. COFIELD: Thank you.

5 THE COURT: All right. You may proceed.

6 MS. COFIELD: And I'll try to keep it
7 shorter.

8 THE COURT: Go ahead.

9 BY MS. COFIELD:

10 Q. In all those internship cases, they were
11 really done very much when you were new, and the
12 learning curve was all the way at the bottom; right?

13 A. I was new.

14 Q. And you were always assisted by
15 somebody. And in fact, the attending not only was
16 always in the room, but did the majority of the case
17 at first; correct?

18 A. At first, and later I did more myself.

19 Q. And out of all of those residency and
20 internship cases, you did eight cervical.

21 MR. BLACKWELL: Objection, Your Honor,
22 irrelevant.

23 MR. ALLEN: It is irrelevant.

24 THE COURT: Wait just a minute.

25 Counsel, approach the bench, please.

1 (Counsel approached the bench, and an
2 off-the-record discussion was held.)

3 BY MS. COFIELD:

4 Q. All right. You do agree, do you not,
5 sir, that there were no discussions -- I think that's
6 what you just told your counsel -- with Ms. Washburn
7 pre-operatively about operating at levels above C6 or
8 below C7?

9 A. No.

10 Q. Thank you. And on this chart,
11 regardless of what you looked at, what film or what
12 film she brought with her, what films you ordered
13 pre- or post-operatively, did you see any evidence of
14 disease at C7-T1?

15 A. Not that I recall.

16 Q. And whether or not it was avoidable or
17 unavoidable, as shown by your own admission to her
18 second hospitalization at Virginia Beach, she did
19 have complications from the procedure; correct?

20 A. Unavoidable complications, yes.

21 Q. And it is further correct, is it not,
22 sir, that you have no independent memory of what was
23 said by yourself to Ms. Washburn? You only know
24 what's recorded on the office chart and the hospital
25 chart; correct?

1 A. No.

2 Q. That's incorrect?

3 A. That's incorrect.

4 Q. All right. I draw your attention, sir,
5 to the deposition that you gave on December 6th, the
6 year 2000.

7 MS. COFIELD: Counsel page 10, line one.

8 BY MS. COFIELD:

9 Q. Do you have an independent recollection
10 of what you said to her on that date, or is it just
11 what's recorded? Answer: What's recorded.

12 You have nothing you can refresh your
13 recollection with either; correct? No. No diary,
14 memorandum or anything of this nature? Not that I'm
15 aware of. Well, you would be aware of it if you were
16 the one that generated it; correct, sir? Yes.

17 And there is nothing that you generated
18 while you were affiliated or working in Dr. Klara's
19 office, in the group practice, that is, that you left
20 at the group that you filled out in addition to and
21 distinct from the written consent form; correct?
22 Whatever is in the chart is the record.

23 Question: If it is in the office chart,
24 that is, the group's office chart, that is the extent
25 of anything you filled out while you were working

1 there concerning associated risks and advice advising
2 Ms. Washburn of those risks; correct? Either in Dr.
3 Klara's office chart or in the hospital chart.

4 Question: Did you have an independent
5 communication with Ms. Washburn about risks while in
6 the hospital pre-operatively? Answer: I don't
7 know.

8 Question: All you know is if it's
9 charted, it was done. If it wasn't, it didn't
10 happen? The objection, and then I say okay.

11 Dr. Borden, will you please tell me if
12 you would be able to go outside the hospital chart or
13 the office chart to have any information to
14 supplement what is recorded, or is what is recorded
15 there the extent of your recollection?

16 Is therefore the extent of your
17 recollection accurately reflected on the office chart
18 and the hospital chart? I don't recall if there were
19 any additional conversations. And you have nothing
20 to refresh your recollection in that regard? No.

21 Sir, was it true that you have no
22 independent --

23 MR. BLACKWELL: Objection, Your Honor,
24 and move to strike. I mean she has asked him if he
25 has an independent recollection of discussing

1 informed consent with this patient, and he says he
2 does. That's not impeachment.

3 MS. COFIELD: And here he says he
4 doesn't on three different pages.

5 MR. BLACKWELL: She simply described to
6 the doctor all the records that were compiled in the
7 office. It has nothing to do with his independent
8 recollection.

9 MS. COFIELD: Sir, I just asked him --

10 THE COURT: The court is going to
11 overrule the objection. I'll permit the testimony.

12 MS. COFIELD: Thank you, sir.

13 BY MS. COFIELD:

14 Q. Now, let's look at the hospital chart
15 and the office chart. Okay? Go first to the office
16 chart.

17 Go office visit by office visit, sir,
18 and you just tell me if there is any script, print,
19 type, I don't care in what form it is recorded,
20 anything on the first, second, third or fourth office
21 visit that records the risks associated with this
22 procedure?

23 There are only four of them, and they're
24 one page each.

25 A. The consent form discusses the risks.

1 Q. Is that the extent?

2 A. No. I have --

3 Q. Well, then, sir, if there is nothing
4 else on that chart, please --

5 MR. ALLEN: I don't think the witness
6 had finished his answer.

7 THE COURT: Let's finish the answer and
8 go from there.

9 MS. COFIELD: I'm sorry.

10 A. I described the risks of surgery to Ms.
11 Washburn as I previously indicated.

12 BY MS. COFIELD:

13 Q. Sir, you've told us under oath you had
14 no independent recollection of what was said. If it
15 was in the office chart, that's all you knew. So
16 please, sir, would you look at the office chart?

17 MR. ALLEN: Objection, Your Honor. Ms.
18 Cofield was testifying about her characterization of
19 the witness's testimony.

20 THE COURT: All right. Well, the
21 testimony is there, and the characterization is not.
22 You can ask the question. Go ahead, please.

23 MS. COFIELD: Thank you, sir.

24 A. Obviously, the consent form was signed,
25 and I did notify her of the risks at that point in

1 time. The conversation you're referring to in the
2 deposition, that's not the same thing.

3 BY MS. COFIELD:

4 Q. Sir, would you please look at the first
5 office visit? You weren't any part of that; correct?

6 A. Oh, no, I didn't see her on that first
7 visit.

8 Q. There is no recordation of the risks of
9 surgery discussed on that occasion, is there?

10 A. No.

11 Q. Look at the second office visit. Any
12 risks of surgery discussed the second time?

13 A. No, not by me.

14 Q. And what is the date of that?

15 A. The 17th.

16 Q. The third is the --

17 MS. COFIELD: Counsel, did you take the
18 exhibit, I think it's 15?

19 MR. ALLEN: It's on the witness stand.

20 No. 2 and 15 are up there.

21 MS. COFIELD: Still up there?

22 BY MS. COFIELD:

23 Q. Here they are for you, if you want to
24 look at 15. You can go to the next office visit. Is
25 there anything in that office visit that shows you

1 discussed those risks?

2 A. Yes. There's the consent form that was
3 signed on that day.

4 Q. No, I said the 17th, sir.

5 A. No, on the 22nd.

6 Q. Okay. So on the 22nd would you please
7 read into the record what risks that consent form
8 sets forth?

9 A. Well, this indicates that there is risk
10 to surgery, and I discussed those specifically with
11 Ms. Washburn.

12 Q. It says there are risks to surgery;
13 correct?

14 A. Yes.

15 Q. It says nothing about hoarseness, vocal
16 cord paralysis, esophageal injury, hemorrhage,
17 bleeding or death; correct?

18 A. Correct. I did tell her about those
19 risks myself.

20 Q. But you have no independent recollection
21 unless it's recorded. You can look at the hospital
22 chart, too, sir.

23 A. No, I do recall that discussion.

24 THE COURT: It's been asked and
25 answered, and there's nothing in the records. It's

1 been asked and answered.

2 MS. COFIELD: I just want to go to the
3 hospital chart now. We were only in the office
4 chart.

5 THE COURT: Okay. That's fine. Go to
6 the hospital chart, but I think it's been said there
7 too. But I'll give you that opportunity, Ms.
8 Cofield.

9 MS. COFIELD: Well, if Your Honor has
10 heard that, I'm just not sure I did.

11 BY MS. COFIELD:

12 Q. Is that correct what His Honor said?
13 There is nothing in the hospital chart either about
14 those risks?

15 A. I don't know.

16 Q. Okay. Where would it be under,
17 physician's orders?

18 A. I don't know. You show it to me.

19 Q. Well, here is your progress notes where
20 doctors record things. Would you have recorded any
21 pre-operative discussion with Ms. Washburn at that
22 time?

23 A. No, there is nothing there.

24 Q. Well, you wouldn't have put it in
25 doctor's orders. That's where you order medications;

1 right?

2 A. That's right.

3 Q. And you wouldn't have put it in nurse's
4 notes, because only nurses make entries there; right?

5 A. That's right.

6 Q. And you didn't do it in your H&P or
7 history and physical; correct? It doesn't appear in
8 that document?

9 A. Let me check.

10 Q. Surely.

11 A. No, it's not recorded there.

12 Q. And when you talk about that X-ray on
13 the swimmer's view, that went C6-C7?

14 A. I'm sorry?

15 Q. Down to C6-C7 on the swimmer's view?

16 MR. ALLEN: Objection, Your Honor.

17 A. I don't recall how far down it went, but
18 I saw the C6-7 level.

19 MR. ALLEN: I object to form, Your
20 Honor. I don't think there's been any -- that she's
21 established what X-ray she is talking about.

22 THE COURT: She said the swimmer's
23 view. I think that sufficiently identifies it, and
24 he said yes, he saw it.

25 BY MS. COFIELD:

1 Q. You relied on the evidence of the bone
2 scan and the swimmer's view, if I understood your
3 testimony correct; is that right?

4 A. And Ms. Washburn's history and physical
5 exam.

6 Q. And hers. But you can't tell from her
7 history or her physical exam if C5 or C6-C7 or T1 is
8 hurt. I mean you can't confirm that and justify an
9 operation on a patient's history. You would do --

10 MR. ALLEN: Objection, Your Honor.

11 A. There is evidence for that.

12 BY MS. COFIELD:

13 Q. Well, let me make myself clear.

14 THE COURT: I'm going to sustain the
15 objection. And you may rephrase it but --

16 MS. COFIELD: I will try to rephrase
17 that.

18 THE COURT: In light of the issues.

19 MS. COFIELD: Absolutely. Absolutely.

20 BY MS. COFIELD:

21 Q. You didn't operate solely because a
22 patient complains of continuing pain; correct?

23 A. No. It's the --

24 Q. And you wouldn't --

25 A. -- the location of the pain. It's also

1 any numbness or weakness that you find on exam.

2 Q. But you can't tell necessarily to a
3 point of a surgeon's comfort level what level is
4 causing the pain without doing the diagnostic tests
5 and the films you ordered; right?

6 A. The fact that Ms. Washburn had numbness
7 in the distribution of that C7 nerve root indicated
8 that there was probably a problem at that C6-7
9 level. Of course, I wanted more information in the
10 form of the bone scan and the X-rays to convince me
11 of that.

12 MS. COFIELD: Thank you, sir. I have
13 no further questions.

14 THE COURT: All right. Doctor, you may
15 step down.

16 MR. ALLEN: May I inquire?

17 THE COURT: Yes, you may.

18 FURTHER RECROSS-EXAMINATION

19 BY MR. ALLEN:

20 Q. Dr. Borden, on how many occasions were
21 you deposed in this case?

22 A. Twice.

23 Q. What were the circumstances of the first
24 deposition? That is, where were you located, and
25 where was Ms. Cofield located?

1 A. The first deposition I was in your
2 Norfolk offices, and Ms. Cofield was in the same room
3 asking me questions.

4 Q. What about the second deposition in
5 December of 2000? What were the circumstances in
6 that situation?

7 A. That was a telephone deposition. I was
8 in Bellevue, Washington, and she was here in Norfolk.

9 Q. Did you have any records from any of the
10 surgeries or any of the office notes or anything like
11 that with you in December of 2000?

12 A. No, I didn't.

13 Q. All right, sir. In December of 1998
14 when you were first deposed, let me direct your
15 attention, if I may, to page 78 and page 79 of your
16 deposition beginning on line 21 on 78 and ending on
17 line 7 on page --

18 MS. COFIELD: Your Honor, can we
19 approach for a second?

20 THE COURT: Yes.

21 (Counsel approached the bench, and an
22 off-the-record discussion was held.)

23 BY MR. ALLEN:

24 Q. Page 78, line 21 and page 79, line 7,
25 please.

1 MS. COFIELD: Just note my exception.

2 THE COURT: I'll note your exception.

3 MS. COFIELD: Thank you.

4 BY MR. ALLEN:

5 Q. Would you read that to the jury?

6 A. Yes. What are the risks associated with
7 an entry on the right?

8 The risks of surgery are infection,
9 bleeding, damage to the trachea, esophagus, carotid
10 artery, damage to the recurrent laryngeal nerve
11 resulting in hoarseness or difficulty swallowing,
12 spinal cord injury resulting in weakness, numbness,
13 tingling, loss of bowel, bladder or sexual function,
14 nonunion of the graft or breakage of the screws or
15 plates.

16 Q. Next question.

17 A. Did you advise Ms. Washburn of each and
18 every one of those? My answer was yes.

19 Q. That's it. Was that your sworn
20 testimony --

21 A. Yes.

22 Q. -- on December 4th, 1998?

23 A. Yes.

24 Q. And you have a recollection today of
25 advising Ms. Washburn of those risks back in 1997?

1 A. Yes, I did tell her of those risks.

2 Q. Dr. Borden, in the course of your
3 surgery, would there be any occasion for you to try
4 and dig out the nerve to make sure you could preserve
5 it, the recurrent laryngeal nerve?

6 A. No. The recurrent laryngeal nerve is
7 located between the trachea and esophagus. It's in
8 the midline; it's not in the plane of the surgery.
9 When you move the trachea and the esophagus over to
10 the side, the nerve moves with it, and it's not seen
11 during the operation, normally.

12 Q. And is that part of the -- is part of
13 the normal procedure of this surgery to dig that
14 nerve out and identify it?

15 A. No. I would never do that.

16 MR. ALLEN: Thank you.

17 THE COURT: All right. Ms. Cofield?

18 FURTHER REDIRECT EXAMINATION

19 BY MS. COFIELD:

20 Q. You had all of the documents in front of
21 you in the first deposition; right? That's what you
22 just told us.

23 A. There were some documents in the room
24 when I did the deposition that you referred to, and I
25 asked to see documents at certain times during that

1 time.

2 Q. The entire office chart was present,
3 wasn't it?

4 A. Yes.

5 Q. And you couldn't look at the chart and
6 find any reference to any risks advised. We know
7 that. So you must have on that day, then, had an
8 independent recollection of those risks; right? We
9 know the chart doesn't show them.

10 A. Oh, yes. I recall --

11 Q. You had an independent --

12 A. I recall very clearly telling Ms.
13 Washburn about those risks, and she signed the
14 consent form at that time.

15 Q. And you remember that independently of
16 any reference to the chart, which is silent on them;
17 correct?

18 A. Correct.

19 Q. Well, then, when were you telling us the
20 truth? When you said you had no independent
21 recollection, or the first time when you said you did
22 have an independent recollection?

23 A. I recall it very clearly.

24 MR. BLACKWELL: Objection to the form of
25 that, Your Honor.

1 THE COURT: You can ask him without the
2 adjectives.

3 MS. COFIELD: Okay, sir. I'll try
4 again.

5 BY MS. COFIELD:

6 Q. You told us in deposition number two you
7 had no independent recollection of these
8 conversations, and in deposition number one you did
9 have an independent recollection.

10 MR. ALLEN: Objection, Your Honor. I
11 think it's a mischaracterization of his testimony.

12 THE COURT: All right. Well, he can
13 answer it. Go ahead.

14 BY MS. COFIELD:

15 Q. Which was true? You did have an
16 independent recollection, or you didn't?

17 A. I do have an independent recollection.

18 Q. Okay. Thank you, sir.

19 THE COURT: All right. You may step
20 down.

21 (Witness excused.)

22 THE COURT: Anything else, Ms. Cofield?

23 MS. COFIELD: One moment, and I'll be
24 able to tell you if I rest.

25 THE COURT: Sure.

1 I'll tell you while she is looking, I
2 would inform the jury that the plaintiff has
3 voluntarily dismissed one of the counts with regard
4 to negligence, and therefore, it's taken this a
5 little bit out of order.

6 But in any event, there is some evidence
7 that won't be presented, because that claim against
8 the defendant has been dismissed voluntarily.

9 MS. COFIELD: If Your Honor will allow
10 me one more minute, I'll be able to complete it.

11 THE COURT: Go ahead.

12 MS. COFIELD: Thank you for bearing with
13 me. Okay. I am just going to read a few lines from
14 Dr. Klara's deposition.

15 THE COURT: All right. Where is that?

16 MS. COFIELD: On page 30 -- I'm sorry,
17 130. It starts for continuity on 129, I apologize,
18 for the context.

19 THE COURT: Go ahead.

20 MR. BLACKWELL: Which lines, Ms.
21 Cofield?

22 MS. COFIELD: Starting on line eight.
23 And I'm sorry, this is a deposition of -- can I
24 explain where I am?

25 THE COURT: Yes.

1 MS. COFIELD: This is a deposition when
2 I have Dr. Klara --

3 MR. BLACKWELL: Objection to that, Your
4 Honor. I don't think she should be able to argue --

5 THE COURT: Well, she is not going to
6 make argument. It's okay to say this is a deposition
7 taken of Dr. Klara. And Dr. Klara is a party, and so
8 the testimony in his deposition can be offered as
9 evidence.

10 All right. So you read that deposition
11 testimony, Ms. Cofield.

12 MS. COFIELD: Thank you, sir.

13 What were the possible etiologies of the
14 hoarseness which she experienced post-operatively
15 that you're sure you told her? Answer: Injury at
16 the time of surgery.

17 Anything else? Answer: That's a
18 possibility. Well, the lady has pre-operative
19 problems. She's had a potential injury previously
20 that could have been aggravated by the surgery or her
21 neurologic condition. She also has other factors.

22 She has hypothyroidism. I believe she
23 has lupus. These things can compound these problems
24 and can indeed cause these problems. People with
25 lupus develop hoarseness, yeah.

1 Did you on the occasion of 10-6-97
2 attribute her post-operative hoarseness to her
3 lupus? I don't think I specifically attributed it to
4 that, but it was in the differentials.

5 Question: And then did you on the
6 occasion of 10-6 attribute her hoarseness to
7 hyperthyroidism? No, I didn't.

8 Now, on 10-8, see if that refreshes your
9 recollection. Did you on that occasion discuss with
10 her the etiology of her hoarseness?

11 Answer: Through Dr. Borden we discussed
12 it. Obviously, the most likely cause is concurrent
13 injury during the time of surgery. It's a well
14 recognized complication. We have to at least assume
15 that there is some sort of proximal relationship.
16 The important thing is to evaluate the patient and
17 treat her.

18 It continues, counsel, on 132. I'm
19 concerned only with the communication -- I'm sorry,
20 line 21.

21 I'm concerned only with the
22 communication to her as a cause for the hoarseness.
23 This is a question from me. Not counseling for it,
24 not what to do, what conservative measures to take,
25 what delays to abide by, but the cause, the etiology,

1 once again, is a good synonym.

2 Answer: Again, I don't specifically
3 recall discussing this personally with Ms. Washburn.
4 But I know that at least in general the discussion of
5 the differential diagnosis, treatment and prognosis
6 was discussed with her through Dr. Borden.

7 And it being as you -- Answer:
8 Differential diagnosis, treatment and prognosis. And
9 among the differential diagnoses was the mechanical.
10 Answer: Intraoperative injury, correct.

11 And the other was hyperthyroid and
12 lupus? Answer: I don't think that was discussed
13 with her, because they're possible -- well, rather
14 than being primary causes, they may be compounding
15 effects. The most likely cause is an intraoperative
16 injury.

17 I'm sorry, that was the wrong page.
18 There's one other place. Let me make sure I'm right.
19 I think it's 112.

20 THE COURT: Whose deposition?

21 MS. COFIELD: It's still Dr. Klara's.

22 Okay. Line 9, counsel. And my
23 question: Further, then, other than saying --

24 MR. BLACKWELL: Which page was that?

25 MS. COFIELD: 120 -- or 112.

1 MR. BLACKWELL: 112? Thank you.

2 MS. COFIELD: Well, I can take it for
3 continuity up a little for you, 111 on line 23, the
4 question:

5 So even though it was planned for C6-C7
6 fusion, a C7-T1 fusion was really all contemplated as
7 well by the two of you? Answer: It's always a
8 possibility at the cervicothoracic junction, yes, it
9 is.

10 Question: And my question further,
11 then, other than saying hardware failure, was it ever
12 told to her, Ms. Washburn, that that might not just
13 be a fusion of C6-7 but also a fusion of C7-T1?

14 Answer: No, not specifically. Most
15 patients, including Ms. Washburn, wouldn't know what
16 a C7-T1 is. That goes along with hardware failure.

17 Question: I'm showing you the consent
18 form that shows C7-T1 anterior fusion. It doesn't
19 seem to mention C7-T1, does it? Answer: Not
20 specifically, no.

21 Question: Well, why is it you bothered
22 to identify the vertebral bodies C6-C7 and not
23 identify the vertebral bodies --.

24 Answer: You have to put something on
25 this form, but the patients are also told that at the

1 time of surgery if the anatomy prevents it,
2 additional levels must be done.

3 MR. BLACKWELL: Your Honor --

4 MS. COFIELD: I'm trying to get this
5 done, at page 113.

6 THE COURT: Hang on a minute, counsel.

7 MS. COFIELD: Sometimes there is just
8 not enough bone there, and you have to extend it a
9 level. And that was discussed.

10 I thought you just told me it wasn't,
11 because it wouldn't mean anything to most people and
12 certainly not to her. No, under the auspices of a
13 hardware failure, and hardware has its limitations.

14 MR. BLACKWELL: Your Honor, I think next
15 time if you're going to read pieces, I object to
16 counsel reading the answer in the intonation that she
17 sees fit for the witness.

18 THE COURT: All right.

19 MR. BLACKWELL: That's inappropriate.

20 THE COURT: Are you finished, Ms.
21 Cofield?

22 MS. COFIELD: Yes, sir, I am.

23 THE COURT: All right. So the plaintiff
24 rests now?

25 MS. COFIELD: That is correct, sir.

* * * * *

THE COURT: All right. Before we start on the motions and the posture of where we are, the plaintiff has rested.

There was a brief discussion at the bench which I think ought to be in the record, which is the defendant's motions to strike the testimony of Dr. Neal on the basis that he wasn't recalled, no chance to cross-examine and so forth, without regard to any issue of relevance or not.

To these issues the court would agree and grant that motion, that there hasn't been completion of the testimony, there hasn't been opportunity for cross-examination, and as a consequence, the testimony of Dr. Neal would be stricken as requested.

All right. Mr. Allen, I'll start with you, because the posture as the court again -- we went over it in the courtroom. We've got two issues. We've got fraud and battery and then the issue of vicarious liability then that flows over to Dr. Klara on the basis of those.

MR. ALLEN: Your Honor, if I may, we would move to strike all of the counts against Dr. Borden, and here is the reason why. There are only

1 two counts remaining. One is battery, and one is
2 fraud against Dr. Borden.

3 There are two theories that the
4 plaintiff explained to the jury at the outset. I
5 would submit to the court that one of those theories
6 is not a theory under which -- under the law by which
7 she can recover on the battery. The other one may
8 be, but the evidence is insufficient to support it.

9 The first one she says is that Dr.
10 Borden negligently exceeded the scope of his
11 authorization. That's an oxymoron, Your Honor. You
12 can't negligently commit an intentional tort.

13 If I'm driving my car down the highway
14 and I hit a patch of ice and I slide off the road and
15 strike someone, I may have negligently inflicted
16 injury. I did not commit an intentional tort. On
17 the other hand, if I take my car and point it at
18 somebody and hit them, that's a battery.

19 And that's precisely the same thing we
20 have here. Dr. Borden had every right to be where he
21 was. And all of the evidence in this case is that he
22 was given authorization to do a surgery at C6-C7. If
23 you give every inference to the plaintiff, there is
24 no question that he was given at least that much
25 consent.

1 Now, the plaintiff's theory is that
2 somehow he veered off course, didn't know where he
3 was and got to T1. If you buy that, that may be
4 negligence. It's not an intentional act.

5 And under the facts of this case and
6 under the law, you may not recover for negligently
7 inflicted battery for three reasons, actually, in
8 this case, at least against Dr. Borden. One is not
9 not a battery. It's an oxymoron.

10 Secondly, we know that -- actually, the
11 evidence does not support the proposition that he
12 exceeded the scope. The evidence in this case,
13 Plaintiff's Exhibit 2, is the consent document.

14 And the consent document has a paragraph
15 that says essentially -- there are several parts of
16 of this that are pertinent. One of them says, first
17 of all, medicine and surgery is not an exact science,
18 and we can't predict exactly where we're going to be
19 on the body.

20 I can tell you I'm going to do an
21 operation and I'm going to have to cut you, but I
22 can't limit it to two centimeters or three
23 centimeters, three and a half centimeters. And when
24 I go in here, yeah, I'm planning to do a C6-7, but
25 you know, I may need to go somewhere else.

1 And not only is that sort of implicit in
2 the document, it's explicit in paragraph three. It
3 says: I authorize and request the performance of
4 such procedures and operations in addition to or
5 different from those now contemplated, whether or not
6 arising from presently unforeseen conditions, which
7 the named physicians, Dr. Borden and Dr. Klara,
8 consider necessary or advisable.

9 There is no question that Dr. Borden was
10 doing what he thought was necessary and advisable
11 here, so he was operating completely consistently
12 with the express consent that he was given.

13 But more importantly and finally, the
14 last thing I want to add to this sort of negligent
15 scope issue is that if you buy plaintiff's argument,
16 it falls squarely within the ruling of sovereign
17 immunity.

18 That is, if you were going to say okay,
19 there is such a thing as negligently inflicted
20 battery, if that's the case, he has sovereign
21 immunity for negligent acts. And so that portion of
22 battery will carve out from the rest of intentional
23 battery, and he has sovereign immunity for it.

24 In any event, the last point I want to
25 make with regard to that portion of the battery claim

1 is that consent for battery is not the same as
2 informed consent.

3 Informed consent requires that the
4 patient know and appreciate all of the risks and
5 benefits that may occur with regards to the various
6 procedures; battery does not. All that battery
7 requires is that the patient say have at it, and the
8 patient can say that in 1,000 different ways,
9 including by implication.

10 The mere fact that Ms. Washburn showed
11 up at Virginia Beach General Hospital on September
12 25th, 1997, is evidence that she consented to this
13 procedure. The mere fact that she said to the
14 anesthesiologist go ahead, put me out is evidence
15 that she consented to this procedure.

16 She can imply her consent in any number
17 of ways. And this may be a good expression and good
18 evidence that there was, in fact, consent, but it is
19 not by any means the only evidence of what that
20 consent was. And she certainly consented to this
21 surgery.

22 Now, the other theory by which the
23 plaintiff wants to say there was a battery is
24 inextricably linked to her fraud claim. And the
25 reason why is because essentially what she is saying

1 is I gave you consent, but the consent you got from
2 me was obtained by fraud.

3 And Your Honor, I agree that consent
4 obtained by fraud is no consent at all. We have that
5 in any number of situations, including criminal
6 acts. A rape, for example, can be committed by
7 obtaining consent by fraud in some ways. So as a
8 theoretical issue, we can agree that that particular
9 theory might fly.

10 The problem is the evidence is
11 insufficient to support it. And the reason why is
12 because fraud, irrespective of whether it's alleged
13 directly as a count or as a portion of a battery
14 claim, nevertheless has to be proved by clear and
15 convincing evidence.

16 And there are five elements to that
17 particular claim. There must be a false
18 misrepresentation of a material fact made
19 intentionally and knowingly with the intent to
20 mislead, there must be reliance by the person who
21 received the information, and there must be damages
22 resulting from that.

23 That comes out in a couple of cases,
24 Metrocall versus Contel Cellular, 246 Virginia 365,
25 as well as Henderson versus Henderson is another

1 fraud case, Supreme Court fraud case which I have and
2 would certainly --

3 MS. COFIELD: I'll concede those are the
4 five elements of fraud.

5 MR. ALLEN: Okay. In any event, not
6 only must those elements be met, and there are two of
7 them really that are at issue. One of them is
8 reliance. Reliance has to be justified.

9 And I would cite the court to that
10 Metrocall case for the proposition that it's not just
11 a matter of saying subjectively I relied upon it. It
12 has to be objective. That is, the person relying on
13 it has to be reasonable in their reliance.

14 And in that case the Supreme Court -- in
15 the Metrocall case the Supreme Court said in the
16 present litigation the record affirmatively shows as
17 a matter of law that the plaintiffs had no right to
18 reasonably rely upon any misrepresentation or
19 concealment of facts. So the Supreme Court of
20 Virginia is buying into the proposition it has to be
21 reasonable.

22 In this case it's not, and it's
23 certainly not reasonable by the clear and convincing
24 standard. The reason why it's not reasonable is
25 because the only element that's pled with

1 particularity as required is that Dr. Borden said I'm
2 board certified.

3 The plaintiff in her cross-examination
4 said a number of things which demonstrated that
5 relying on that in order to give consent was
6 unreasonable.

7 One, she said that there's no -- she
8 confessed, essentially, that there is no relationship
9 between board certification and experience in this
10 surgery. In fact, I know that the court has already
11 struck the testimony on Dr. Neal, but we know that
12 from the testimony of Dr. Neal.

13 The man is board certified, has been
14 since the '60s and never done this surgery, and the
15 plaintiff knew that. The plaintiff knew that people
16 can be board certified in a specialty and have
17 absolutely no experience doing whatever it is that
18 they may be asked to do within that specialty. You
19 know, there is not a one-to-one correlation between
20 experience and board certification.

21 Secondly, the plaintiff had a duty to
22 inquire. If her concern was that I want to make sure
23 that somebody with qualifications operates on me, she
24 has a duty to make reasonable inquiry.

25 So she had a duty to say, for example,

1 Dr. Borden, how many times have you done this
2 surgery? She didn't say that. Now, if she had said
3 that, he would have said 50 and eight since I've been
4 here.

5 But she never asked him about that. And
6 so her reliance on board certification for the
7 proposition that he is experienced and, therefore,
8 she ought to consent is unreasonable.

9 Finally, she assumed he was board
10 certified. When he came into the room and Dr. Klara
11 introduced him and he began acting like a
12 neurosurgeon, she assumed that neurosurgeons had to
13 be -- had to go through medical school, get that
14 internship, get a residency, go to a fellowship and
15 get board certification. So she assumed he was, in
16 any event, so her reliance is simply not reasonable.

17 Secondly, the second element of fraud
18 that fails is that the misrepresentation has to be
19 made with an intent to defraud. The only way we can
20 infer Dr. Borden's intent when he made this, and
21 again, I'm making this argument conceding the
22 evidence in the best light to the plaintiff, is by
23 the circumstances surrounding when the representation
24 was made.

25 And we have nothing that demonstrates

1 that there is any evidence that he knew when he made
2 it that she was relying on that in order to consent
3 to the surgery.

4 If she had asked him what color tie are
5 you going to wear tomorrow and he said red and he
6 really knew he was going to wear blue, he couldn't
7 have known that she might be relying on that for
8 consent to the surgery. So under those circumstances
9 he did not make this with the intent that she rely
10 upon it.

11 Now, if she had said to him, Dr. Borden,
12 the only way I'm going under the knife, the only way
13 you can operate on me is if I know you're board
14 certified and he said and I am, we would have a much
15 different case.

16 But the circumstances here do not give a
17 sufficient indicia that he knew that she was relying
18 on what he was about to say, even if you believe her.
19 So for all of those reasons both the battery and the
20 fraud have to go away against Dr. Borden.

21 Finally, the fifth element of fraud is
22 damages. And there has to be something that we can
23 say about the injury to the plaintiff that could have
24 been avoided had the misrepresentation not occurred.

25 Now, the only thing that I heard is that

1 the plaintiff had the day before the surgery or
2 shortly before the surgery pain that was so severe
3 that she rated it at ten out of a ten. Now, it is
4 unreasonable to assume that the plaintiff would have
5 endured that pain rather than undergo surgery.

6 And indeed, we know that under the
7 impression that the person was board certified, she
8 went under the surgery. She was not going to avoid
9 this surgery. She was going to have the surgery,
10 even if you believe everything she said, perhaps by a
11 board certified surgeon, but she was still going to
12 have it.

13 There is not one drop of evidence that a
14 board certified surgeon would have had a different
15 result, not one. There isn't anybody who has come in
16 here and said, you know, if she'd had a board
17 certified surgeon, she would have been talking clear
18 as a bell today. It just isn't there, Your Honor.

19 And so for that reason all of those
20 claims and her damages need to be struck.

21 THE COURT: All right. Mr. Blackwell,
22 do you want to add anything?

23 MR. BLACKWELL: Judge, I have the same
24 motions. I would move to strike certainly the
25 informed consent count on several grounds.

1 First of all, with the court's ruling
2 that Dr. Neal's testimony is stricken, then there is
3 no competent evidence before the court from any
4 expert witness to describe what the elements of
5 consent would be given by a reasonably prudent
6 neurosurgeon to a patient.

7 There must be competent evidence put on
8 by expert testimony as to what the risks, benefits
9 and alternatives of the surgery must be. There is no
10 evidence of that whatsoever. It is simply what Ms.
11 Washburn says that she heard versus what Dr. Borden
12 says that he told her.

13 And there is no expert evidence which
14 has described what the elements of informed consent
15 would be, so informed consent from a negligent
16 standpoint, if that is still a viable claim after
17 dismissal of Count 1 --

18 MS. COFIELD: I'll concede it's not.

19 MR. BLACKWELL: It is not?

20 MS. COFIELD: We did that out there.

21 MR. BLACKWELL: All right.

22 MS. COFIELD: It is grounded in fraud,
23 absolutely.

24 MR. BLACKWELL: All right. So I take
25 it, then, your count as it relates to informed

1 consent, which was Count 4, is dismissed with
2 prejudice?

3 MS. COFIELD: No. I don't think you
4 understood me. Let me try it again. It is grounded
5 in two acts.

6 A, a negligence act which is related to
7 did you advise me of all the risks duly, and did you
8 increase those risks by not doing so. That goes, I
9 agree, because med mal falls. And as pled and as you
10 read into the record, it says and/or because of the
11 misrepresentation as to credentials, and that's the
12 aspect that remains.

13 So I concede your point as to the
14 negligence aspect and dispute it as to the fraud
15 aspect.

16 MR. BLACKWELL: All right. Mr. Davis is
17 going to be discussing the fraud and battery count,
18 so I would also have a motion to strike the damages
19 in this case.

20 Plaintiff has not put on any evidence
21 through an expert or through any other witness in
22 this case that the injury to the laryngeal nerve was
23 caused by any negligence on the part of the doctor,
24 now that Dr. Neal is stricken, and Dr. Neal never got
25 to that, quite honestly.

1 But there is no evidence that the injury
2 to the laryngeal nerve or the cause to her vocal cord
3 paresis or paralysis was caused at all by the
4 negligence of anybody.

5 Indeed, the only competent evidence
6 before the jury, with Dr. Neal having been struck
7 completely, is that this is a recognized complication
8 of --

9 MS. COFIELD: May I save it? I will
10 concede that as well.

11 THE COURT: Well, just so we're clear, I
12 take it the argument is going to the negligence
13 malpractice thing --

14 MR. BLACKWELL: Right.

15 THE COURT: -- that if there was
16 battery, then, and no right to touch at all, then
17 essentially everything flowed out of that.

18 MR. BLACKWELL: Well, incorrect in so
19 far as this, Your Honor. I don't believe that
20 there's been competent evidence -- she is going to
21 have to show, Ms. Washburn would have had to show to
22 the jury to get past a motion to strike that she
23 would have not consented to the surgery at all.

24 Indeed, she said that she would have
25 consented to a board certified physician doing it,

1 and indeed, she consented in this case on the belief
2 that he was board certified.

3 This was not a situation where -- the
4 evidence is not that she was not going to have the
5 surgery at all. On the contrary, in her own
6 examination by her counsel and in cross-examination
7 she said she was going to have the surgery by a board
8 certified physician.

9 There has been no evidence, however,
10 that whether a board certified physician does it or a
11 non-board certified physician does it would have
12 changed the outcome in terms of the injury. Dr. Neal
13 did not testify -- and he never got to this, but it
14 would have been stricken in the event that he covered
15 this in any degree.

16 He has never testified that because Dr.
17 Borden was not board certified, the patient suffered
18 a recurrent laryngeal nerve injury with persistent
19 hoarseness. That's never been any evidence that that
20 occurred as a result of inexperience, if you will, or
21 greater experience and so on and so forth.

22 So I think as to the damages, assuming
23 that the battery survives, she would be entitled to
24 perhaps nominal damages if a jury wished to give her
25 those, or whatever damages they wished to give her.

1 But it can't be based on medical bills
2 presented in this case, because there's been no
3 evidence that this injury is linked to the board
4 certification or non-board certification.

5 THE COURT: Okay.

6 MR. BLACKWELL: And the same is true of
7 the lost income. I would move to strike the lost
8 income as being -- that there's been no competent
9 evidence on that whatsoever.

10 MR. DAVIS: But that's associated -- as
11 Your Honor and I have discussed before, if the
12 laryngeal nerve is the cause of her not being able
13 to work, even though she has physical limitations as
14 well, that must fall as well because of the reasons
15 Mr. Blackwell and Mr. Allen have already explained.

16 In addition to that, though, even if
17 those damages survive, the lost income can't survive.
18 Because there's been absolutely no evidence that this
19 additional injury -- we take the plaintiff as we find
20 her -- that the additional injury to the laryngeal
21 nerve caused her not to be able to work at all.

22 In fact, she admitted I've never even
23 tried to find another job. There's been no expert to
24 come in and say she can't work. Their own experts,
25 on the other hand, Powell and Owen, the physical

1 therapists, said she can work. She can do sedentary
2 work.

3 For that reason we would move to strike
4 the lost income claim for those additional reasons as
5 the rest of the damages.

6 With regard to the fraud and the
7 battery, of course, the allegation is that we are
8 vicariously liable. We would move for the same
9 reasons that Mr. Allen does to dismiss the fraud
10 claims. There is no sufficient justifiable reliance.

11 And we have to have clear and convincing
12 evidence that she relied on him justifiably, and that
13 he intended to mislead her and trick her into doing
14 the surgery by saying I'm board certified. There's
15 absolutely no evidence of that, much less clear and
16 convincing.

17 For the battery, again, it's not based
18 on negligence; that's been dismissed. And we've
19 discussed the fraud issue. If the fraud fails, in
20 other words, the battery must fail as well. That's
21 the only claim as to the battery.

22 Lastly, with regard to vicarious
23 liability, we would move to dismiss any claim for
24 vicarious liability as to Peter Klara individually or
25 his group for two reasons.

1 Number one is Your Honor has already
2 ruled that Dr. Borden was not an employee of either
3 of these defendants as a matter of law, collateral
4 estoppel.

5 By the same token, Dr. Borden could not
6 have been an agent of these two defendants. If he
7 was an agent acting under the supervision and control
8 of Dr. Klara or his group, he would not have been
9 entitled to sovereign immunity. That issue has been
10 decided.

11 Lastly, there has been no viable
12 evidence of an agency relationship between Dr. Klara
13 or his group and Dr. Borden. The only evidence has
14 been, as Dr. Borden repeated on the stand several
15 times, I was operating in the scope of my
16 fellowship.

17 Now, obviously he was treating Dr.
18 Klara's patients. That does not in and of itself
19 create an agency relationship between Dr. Klara or
20 his group and Ms. Washburn. So we don't think the
21 evidence rises to the level of an agency
22 relationship.

23 THE COURT: All right. Ms. Cofield?

24 MS. COFIELD: Yes, sir. Largely the
25 arguments from all of those counsel that I've heard

1 from are absolutely controlled by Pugsley versus
2 Privette, if I'm pronouncing it right, 220 Virginia
3 892. In that case, it was a medical malpractice
4 case.

5 And I'm going to give Your Honor a copy
6 if you want it.

7 THE COURT: Okay.

8 MS. COFIELD: In that case there is a
9 surgery, a battery. Complications of the surgery
10 that flowed from the operation were all permitted.
11 Contrary to these same arguments, the Supreme Court
12 says no.

13 In fact, when the Supreme Court rejects
14 these same arguments, it says in part: The hazard to
15 a physician of performing an operation without the
16 consent of the patient is dramatically illustrated by
17 this case. Had plaintiff's recovery been an
18 uneventful one, the action most likely would not have
19 been brought.

20 But the recovery was anything but
21 uneventful, and this was the risk the defendant took
22 when he operated without consent, because it is
23 immaterial to the issue of battery that the jury
24 found the operation was not negligently performed.

25 So it can be performed very much in

1 compliance with the standard of care, which is very
2 clearly why plaintiff took the action she did in
3 dismissing Count 1. I first had to do my homework,
4 as I said, when I came in this morning.

5 And negligence is not only not an issue
6 for a battery claim, it could be done by somebody,
7 for example, who was right out of Johns Hopkins and
8 just got a Nobel prize and done beautifully and no
9 issue of it not being done beautifully and have
10 associated risks with the operation, not even
11 something untoward or unforeseen.

12 And simply because it is grounded in
13 this contract action, this idea that you didn't do
14 what you were told you could do, you went too far or
15 you went to the wrong place, wrong time, that is the
16 lack of consent.

17 So you can have associated risks. You
18 can have normal complications. Those complications
19 in this case are damages.

20 The defendants in this case and in the
21 one I am referencing both argued they shouldn't have
22 been allowed to consider those normal associated
23 risks, like pulmonary embolism and intracranial
24 bleeding as a complication of the surgery. They were
25 allowed specifically for these reasons, and I won't

1 try to recite all of them:

2 They also argued, as they do in this
3 case, that they shouldn't have had wages as part of
4 the damages. I must be living right for the moment,
5 because I can tell you this woman also claimed wages.
6 And she put it forth as part of her recovery, and it
7 was a delayed recovery.

8 W-2s were submitted. They argued W-2s
9 were not sufficient to prove lost wages. The Supreme
10 Court rules that a W-2 was just fine and dandy to
11 prove lost wages.

12 And that on the second page the evidence
13 established plaintiff suffered intense pain,
14 discomfort, physical, mental, psychological injuries,
15 some permanent. She was making 8,000 a year. The
16 testimony shows for two years thereafter her income
17 was reduced. And it does allow them on W-2s.

18 The court also goes on to say, which is
19 what I would say to Your Honor, that the critical
20 issue in that case, as in this, is fact. It's not
21 negligence, which is why we don't have an issue of
22 any negligence here.

23 I could concede that Dr. Borden, if I
24 were so inclined to stipulate, in other words on the
25 record, did everything beautifully, and this was a

1 horrible complication and an anticipated one and
2 normal sequela, and I could still have the battery
3 claim. That I will submit to you surely, Your Honor.

4 And the only other, in my mind,
5 important thing in that case that it brings up is it
6 shows that she had signed a consent too, because that
7 issue was brought up by these people, and there is no
8 doubt that she had signed the consent and for the
9 exact operation that was done.

10 I mean the scope was right. Everything
11 was right about that one, unlike this case where we
12 say the scope was limited and he exceeded scope. In
13 this case the only condition to that consent was I
14 don't want you to put me to sleep until Dr. Hall is
15 here, because I trust Dr. Hall and I want him
16 present.

17 THE COURT: Was that in the consent?

18 MS. COFIELD: No, it wasn't. It was
19 silent, so that's the good similarity for me. I see
20 where Your Honor is going.

21 THE COURT: No, you don't see where I'm
22 going. All I'm doing is asking a question.

23 MS. COFIELD: Okay. Well, that wasn't
24 in there. That was just an oral. The consent itself
25 just simply said you can do the operation that he

1 did, so there was no exceeding scope. However, he
2 put her to sleep before and absent Dr. Hall being
3 present.

4 It became a battery not because he was
5 even explicit, but because the jury could imply or
6 infer that that was a revocation of consent by
7 definition, not because of anything in writing.

8 Okay. I think that's -- yes, testified
9 the injury could occur under the best of surgical
10 procedures and techniques. And nobody could state to
11 a reasonable degree of medical certainty that the
12 injury to the plaintiff was a result of negligence
13 and anything except just an intraoperative injury.

14 That's the -- can I just write down the
15 whole thing? If I'm going to give you this, I just
16 want to write down the cite.

17 THE COURT: 220, 892?

18 MS. COFIELD: It is, indeed.

19 THE COURT: Okay. Then you don't have
20 to give it to me. I can read it.

21 MS. COFIELD: All right. I don't think
22 that's entirely dispositive, but I do think it's
23 largely.

24 Also in Woodbury, which is 239 Virginia
25 651, in that case we have some similarity factually

1 as well, and that is the situation again of medical
2 malpractice and battery. All of the cases I'll be
3 citing to Your Honor are on point.

4 The patient in that case gave permission
5 to do a biopsy. He exceeded the scope of that
6 permission, and he performed a modified or partial
7 mastectomy. So he took more tissue than she wanted
8 him to take, but there was no issue that she hadn't
9 agreed, like counsel said, to be in that operating
10 room at that time and with that doctor.

11 The court in that case held, and it was
12 not indictio but as part of the ratio decedendi
13 there, sub-heading six, reading in part to Your
14 Honor: We agree with the trial court that plaintiff
15 -- excuse me. Wait a minute, let me be sure.

16 Yes. The plaintiff was not entitled to
17 inject issues of negligence in this litigation,
18 because those issues are not relevant to her battery
19 claim.

20 Woodbury is, however -- Woodbury being
21 plaintiff -- entitled to ask the doctor what
22 surgical procedure he actually performed, how he
23 performed it, and how that procedure differed, if at
24 all, from the procedure which she gave him permission
25 to perform.

1 And that is what we did in this case.
2 We very much have on the record, I discussed C6-C7.
3 I gave you permission for C6-C7. You didn't do just
4 C6-C7. You exceeded the scope of that permission
5 when you went down to T1.

6 We had that on the record not only --
7 certainly prima facie and taking all inferences in
8 plaintiff's favor and the light most favorable, et
9 cetera, under those standards of Renner on motions to
10 strike. And I can give you that full cite, if Your
11 Honor is interested. I have it in here on the Renner
12 versus something case, the standard on a motion to
13 strike.

14 THE COURT: That's all right. I think I
15 understand it.

16 MS. COFIELD: Okay. But if I can just
17 recall accurately some of the evidence, not all of
18 it, that would bring it up to the level of prima
19 facie and inference most favorable to sustain a
20 motion to strike or rather withstand the challenge,
21 there is certainly evidence of an operation at C7-T1.

22 It was indeed sponsored by the defendant
23 when he himself read into the record, not on
24 cross-examination or on direct -- I mean not on
25 direct or in the case in chief but in cross from his

1 counsel, Dr. Stitik's 9-25 and 9-28 X-rays that you
2 marked for identification but he read into the
3 record, over no objection from me or other counsel.

4 So McMunn was waived, and so was
5 everything else. And there then is a finding for the
6 jury, if they choose to believe it, that there was a
7 fusion at T1 -- C7 to T1, excuse me.

8 THE COURT: Was there anything in those
9 reports that indicated fusion, or was it --

10 MS. COFIELD: Yes, sir.

11 THE COURT: Okay. It seems to me that
12 there was a plate, but in any event, go ahead.

13 MS. COFIELD: You are correct that they
14 talked about a plate there, but yes, that language
15 was in there, fusion at C7-T1. And that from Dr.
16 Stitik's 9-25 and 9-28 which reiterates yes, again, I
17 see fusion, C7-T1.

18 Then you have also the consent itself,
19 Exhibit 2, which doesn't, of course, encompass that.
20 You have from Dr. Borden his statement when I called
21 him, I didn't intend to operate at C7-T1. I didn't
22 operate at C7-T1. I cannot reconcile the radiographs
23 with the fact that they show things at C7-T1.

24 Nobody else was in the operating room
25 that put the hardware in. The hardware was not in

1 with Dr. Richmond's procedure of 1991 or '94. I
2 don't remember the date. So the first time hardware
3 was inserted was by me, and nobody else in the
4 operating room inserted it. So it got there in that
5 location from any inference from him on 9-25.

6 I have read into the record Dr. Klara's
7 admission that he did not discuss C7-T1, that the
8 only way you get to anything is, in his mind, because
9 this patient was told the hardware may fail, that
10 implied we could go further. There is no evidence on
11 that record this hardware has failed. We don't have
12 that issue.

13 There is also a why didn't you talk
14 about C7-T1 with her, and his statement, most people
15 don't know what it is. I think there is a decent
16 inference for the jury to draw well, if she knew
17 enough about C6-7, she might have figured out one
18 later was C7-T1 if it had been shown to her.

19 THE COURT: That was the question,
20 though, to Dr. Klara.

21 MS. COFIELD: Correct.

22 THE COURT: And Dr. Borden was the one
23 who had the conversation with regard to that. Am I
24 right on that?

25 MS. COFIELD: No, sir. I don't --

1 THE COURT: Weren't you reading Dr.
2 Klara's deposition last that said --

3 MS. COFIELD: Yes.

4 THE COURT: -- that talked about the --
5 and again, I don't want to get bogged down, because I
6 don't think -- you know, they're slightly related to
7 the issues, of course. But it was Dr. Klara's
8 deposition that you were reading where he said about
9 the patient's not understanding?

10 MS. COFIELD: Correct. That is correct.

11 THE COURT: Okay. And Dr. Klara wasn't
12 the one who provided the information to the patient.
13 It was Dr. Borden who had the discussion with Ms.
14 Washburn so --

15 MS. COFIELD: If I remember everything I
16 read, he said he did do it, though, because it
17 contemplated hardware failure, which was discussed.

18 THE COURT: After the fact. Well, in
19 any event, I'll rely on my recollection of that for
20 these purposes. Okay. But you were reading Dr.
21 Klara's deposition.

22 MS. COFIELD: I certainly was reading
23 Dr. Klara's.

24 THE COURT: Okay.

25 MS. COFIELD: And Dr. Klara was talking

1 about the scope of the consent that she had been
2 given directly by him as well as by Borden, and what
3 he had given was hardware failure, which implied the
4 other.

5 THE COURT: Okay.

6 MS. COFIELD: There is evidence in the
7 case in chief that it was a healthy site. Several
8 times I asked Dr. Borden was there any reason
9 medically to exceed it, and the answer was no. There
10 was nothing at C7-T1.

11 I have here consented, operated and
12 acted, that is, Dr. Borden within the regular course
13 of business, that you obtain the consent as a surgeon
14 because you have to. And so I certainly have what
15 the law requires as far as the element of the act
16 itself.

17 If any act of misrepresentation occurred
18 and any exceeding of consent occurred, all occurred
19 in the course of business and occurred in the course
20 of treating Dr. Klara's patient and occurred within
21 the scope of the authority that he had been granted.

22 And if I can go back for a moment, then,
23 from what I remember to the law, the consent form
24 counsel brought up, that somehow that controls,
25 well, it doesn't legally for two reasons.

1 The first reason -- excuse me. Wait a
2 minute. I wanted to be sure that last case -- yes,
3 the last case I have discussed fully. Which one is
4 it? Oh, Rizzo.

5 The consent form does not control.
6 Because if Your Honor, I hope, remembers and I hope
7 the jury will remember if you let me get there, that
8 when I said please look at Exhibit 2, where is it on
9 Exhibit 2 you find any reference to the risks
10 discussed or itemized in any regard, he couldn't find
11 it. And it doesn't exist. I mean you can read it;
12 it doesn't exist. It's in evidence.

13 Rizzo versus Schiller, 248 Virginia 155,
14 in that case again mom is having baby, consent is
15 signed. Consent does not include, that is,
16 specifically does not itemize and you cannot find on
17 there a use of forceps having been previously agreed
18 to.

19 The argument is you would well
20 anticipate, as it is from these defendants, that it
21 was associated with the delivery, that it was
22 anticipated, same way, you know, I had to go one
23 lower. I had to use forceps to get this baby out.
24 It was stuck, you weren't pushing, could have had
25 horrible consequences if this child weren't born when

1 it was born.

2 The court finds in finding the plaintiff
3 presented sufficient evidence to establish a prima
4 facie case that Dr. Schiller failed to obtain the
5 patient's informed consent on the use of obstetrical
6 forceps, finds that a generalized -- it requires more
7 than simply securing the patient's signature on a
8 generalized consent form, similar to the form present
9 here.

10 So a blanket we can do this without
11 saying what the risks are, without saying how we're
12 going to mechanically do it and so forth is no
13 consent at all under Rizzo.

14 Now, certainly the judge -- I mean the
15 jury can believe that Dr. Borden independently,
16 because he remembers it one time independently,
17 advised her of these risks. She has testified he
18 never said a thing about trachea, esophageal
19 injuries, laryngeal injuries, et cetera.

20 So it's a red light/green light as far
21 as what risks were told to her, if they were told to
22 her. You have Dr. Borden contradicting himself, at
23 least in my mind.

24 One time he said he had no independent
25 recollection of it. One time he said he had an

1 independent recollection of it. One time he said
2 whatever is in the office chart is there; there is
3 nothing in the office chart. Whatever is in the
4 hospital chart controls; there is nothing in the
5 hospital chart.

6 So that doesn't, in my mind, help him by
7 way of what is in the consent prove that a consent
8 was given. It still is an issue for the jury.

9 And then you have Glisson versus Loxley,
10 which is 235 Virginia 62. That case is a little bit
11 different because there were two counts, two
12 allegations, one sounding in tort on informed
13 consent, one saying it was just a special contract
14 claim. I say you can't do certain things, and that
15 was an oral you can't do certain things.

16 And admittedly, that one is a little
17 factually distinguishable, because I don't have any
18 evidence where Ms. Washburn specifically said don't
19 do A, B, and C. But I certainly have the converse,
20 and I think this applies by analogy.

21 If you can have a cause of action for
22 battery when the patient says don't do something, in
23 a standard battery where the patient doesn't say
24 don't go to C7-T1 but doctors admit it wasn't ever
25 discussed, you can infer no consent is given to go

1 there.

2 In Gonzales, 239 Virginia -- it's around
3 309. I'm not sure of the exact cite. I pulled it;
4 It's on my desk. In the Gonzales case the patient's
5 toe was lacerated during a physical therapy session
6 by a sharp metal object inside a whirlpool.

7 And in that case, again, I don't think
8 it has great application here, but it just stands
9 again for the principle that negligence isn't the
10 issue here. Because obviously, the doctor didn't do
11 anything wrong, or the physical therapist, inside the
12 whirlpool. Her toe got lacerated.

13 It was medical malpractice whether --
14 and that was a battery. I'm sorry, it does arise out
15 of battery. It has that much application, and it
16 does stand for the proposition that plaintiff has
17 been propounding. Negligence has nothing to do with
18 battery, so that's just another instance of that.

19 You also have Pierce versus Kaday (ph)
20 244 Virginia 285. Again, factually distinguishable
21 in one regard, because that sounded in a breach of
22 confidentiality, applicable in that it was an agency
23 situation.

24 And it was the doctor's agents who
25 breached that confidentiality. It wasn't the doctor

1 himself, but the corporation is responsible for that.
2 And they did in that case, as it happens, for the
3 first time in Virginia recognize a cause of action
4 for breach of confidentiality.

5 Now, specifically to counsel's
6 arguments, and I think in light of having discussed
7 these, it might go real quick.

8 Counsel said I was arguing you somehow
9 negligently exceeded the scope of permission. I'm
10 not arguing that. I've never argued that, and I'm
11 not sure why the argument is made at this time. You
12 have permission, or you don't. It is or it isn't a
13 battery. It has nothing to do with negligence.

14 Counsel also argued about the consent
15 form. I think I have addressed that. The consent
16 form in and of itself is not decisive. And moreover,
17 under Rizzo a general consent absent specific risks
18 will not suffice as a matter of law.

19 And then Mr. Allen argued, if I'm not
20 mistaken, there was a duty to inquire on the part of
21 Ms. Washburn when he was talking about the fraud
22 count. Specifically, model jury instruction 39.050
23 says there is no duty to inquire.

24 When fraud is committed, there is no
25 duty of the individual to inquire whatsoever about

1 the misrepresentation, unless they are somehow put on
2 notice that that misrepresentation is false, and a
3 reasonable person would have then inquired.

4 But I had her testify, and I do recall
5 her saying I had no reason to disbelieve him. I
6 never thought he would lie to me. And I think it is
7 also reasonable on a motion to strike to believe her
8 testimony and infer that that not just subjective but
9 objective standard is reasonable.

10 You don't think your doctor is going to
11 lie to you. If you believe her testimony, are you
12 credentialed, yes, I am, and the statement was made.
13 And therefore, I think his argument on the fraud
14 fails there.

15 He also talks about another reason it
16 falls, and he says damages, because there is no --
17 and his argument was there is no evidence if a board
18 certified physician had done it, there would have
19 been any difference in the world.

20 It doesn't matter if not only a board
21 certified physician did it. It doesn't matter who
22 did it. It doesn't matter if Dr. Klara with great
23 mechanical skills did it and did it beautifully. If
24 sequela followed a battery, they are recoverable.

25 So the damages issue I think I have

1 addressed. Oh, and the duty. That leaves him with
2 his argument that -- a mistake.

3 And he, I submit to Your Honor,
4 erroneously argues to you that there must be fraud.
5 That's wrong. There must not be fraud. That has
6 separate elements at law. I agree, fraud has five
7 elements; battery does not. They are different
8 claims.

9 Battery to be proven does not have to
10 have a misrepresentation of a fact that is material
11 or immaterial. There need be no reliance on it,
12 nothing be done for the purposes of inducement. Four
13 out of the five fail. Indeed --

14 THE COURT: It has to go beyond the
15 consent.

16 MS. COFIELD: That's it, sir. That's
17 just it. And so his argument, I say, is ill-founded
18 at law, because I don't have to prove fraud.

19 THE COURT: But you do have a fraud
20 count.

21 MS. COFIELD: And I may not prevail on
22 fraud, I understand that, but that's a separate issue
23 for me. I haven't yet addressed do I get past a
24 motion to strike on fraud, but it just doesn't have
25 anything to do with battery. That's all. And he

1 said it has to fall --

2 THE COURT: Well, it has something to do
3 with battery, because if there is fraud and the
4 consent goes out, then we have a battery.

5 MS. COFIELD: Yes, there is an
6 interwoven aspect to it, certainly. But what I'm
7 trying to say, maybe inartfully, is that you can have
8 in fraud an intentional or an unintentional
9 misrepresentation.

10 So Borden could have either out and out
11 lied about his credentials, alternative one.
12 Alternative two, the testimony is that Brandi
13 Mikovits made the statement that all our doctors are
14 boarded, and that could be unintentional. And she
15 could have been referring to our doctors --

16 THE COURT: Let's just deal with --
17 we're getting a little bit too much in the argument
18 category. I want to hear any cogent points, and
19 you've made a number of points that I'll consider.

20 But the issues are what they are. And I
21 listened to the evidence too, so I'm pretty familiar
22 with what was said.

23 MS. COFIELD: Just on fraud, then, my
24 argument there is you have both the intentional and
25 the unintentional misrepresentation. And I don't

1 think as a matter of law drawing the inferences most
2 favorable you can find that he could not have made
3 that statement as a matter of law.

4 I guess that's where it breaks, because
5 it's a red light/green light again.

6 THE COURT: Okay.

7 MR. ALLEN: May I respond, Your Honor?

8 THE COURT: Just briefly.

9 MR. ALLEN: First of all, Your Honor,
10 Risk and Rizzo are out. Risk had to do with informed
11 consent. Rizzo has to do with informed consent.
12 That case has absolutely no application here. The
13 language that Ms. Cofield read to you said informed
14 consent. That's the whole issue.

15 I would submit to the court -- and I do
16 want to talk about Pugsley and Courtney just briefly
17 in just a second, and Woodbury -- Pugsley and
18 Woodbury. But here is sort of the four-step process
19 I think the court has to go through.

20 One, is there evidence that she gave
21 consent, and two to what? It's absolutely clear she
22 gave consent to something, no question about it. And
23 the question as to what has to do with what were the
24 circumstances, all the circumstances of the
25 communication.

1 If you look at the Woodbury case, the
2 Woodbury case is a case where the doctor said he did
3 a partial mastectomy, and the plaintiff said I
4 consented to a biopsy.

5 And on the morning of trial the court
6 granted summary judgment, because there was not going
7 to be any expert testimony from anyone on the
8 plaintiff's side that those two things aren't exactly
9 the same. And the doctor had expert testimony saying
10 they were the same.

11 The Supreme Court said no, she gets to
12 go to the jury without an expert. She can say I was
13 -- my understanding was this and the facts and
14 circumstances were such of our communication that my
15 understanding of what I consented to and our
16 agreement as to what I consented to was something
17 different from a partial mastectomy.

18 That's not the case here. All of the
19 facts and circumstances presented by the plaintiff
20 are that the consent she gave was very broad, and I
21 come back to the clear language of paragraph three,
22 among other things. There isn't any limitation
23 placed on this in any discussion between Ms. Washburn
24 and Dr. Borden. She didn't say don't go to T1. She
25 didn't say don't go to C5.

1 When she came to his office she said
2 essentially, implicitly get rid of my pain. And
3 that's what she came to him for; that's what she
4 consented to. He didn't get a consent from her when
5 he sent her down on bone scan. He didn't get a
6 consent from her, an explicit, written-out consent
7 for any of those therapies.

8 But he had consent, and that was not a
9 battery when he did that, because she impliedly
10 consented to all those things. And the same thing is
11 true with that. So she did give consent, and it was
12 given to essentially relieve my pain.

13 Was it exceeded? The answer to whether
14 or not it was exceeded is important only if you're
15 willing to buy this negligent infliction of battery
16 theory.

17 Because if we give Ms. Cofield her due
18 and just simply say okay, I went to T1, even if you
19 say that, the only evidence about how it got there
20 was it went there by negligence. Now, you can't get
21 a battery by negligence.

22 If you and I are in a discussion and I
23 ask you if I can punch you in the nose and you say
24 yes and I swing, you duck and I hit you in the eye, I
25 am not liable for battery, even if that was my

1 negligence, because you consented to what I did.

2 On the other hand, if I say can I hit
3 you in the nose and you say yes and I punch you in
4 the stomach, I exceeded the scope. Dr. Borden didn't
5 punch Ms. Washburn in the stomach. At best he hit
6 her in the eye when she ducked, and that's the best
7 evidence they've got. So if that's the case, battery
8 goes out.

9 Pugsley is interesting, because Pugsley
10 -- the Supreme Court said Ms. Pugsley clearly
11 withdrew her consent. There was a form in that case
12 which was very much like the form we have here. It
13 didn't mention Dr. Hall's name at all.

14 And if the Supreme Court had been
15 limited to that document, they would have had to have
16 come to the conclusion that she gave consent.

17 But on the morning of surgery her
18 evidence was that while she was laying there on the
19 table before she went under, she said: And I said I
20 do not want to be put to sleep until he gets here,
21 referring to Dr. Hall, and at that moment I felt the
22 sodium pentothal hit my vein. And I remember nothing
23 else.

24 And the Supreme Court said because she
25 made that express declaration about what her consent

1 was, saying whoa, whoa, whoa, whoa, he ain't here,
2 I'm not going for this, that she had withdrawn that
3 consent, and therefore, there was a battery.

4 We don't have that here. At best we
5 have fraud. That's her best theory. Her best theory
6 is that it was obtained by fraud, and as I say, even
7 that theory doesn't fly because of all the things
8 that we've addressed about fraud.

9 But I would submit that yes, the court
10 should read Pugsley and Woodbury very closely. What
11 they demonstrate is we know the plaintiff gave
12 consent, we know she gave consent to the relief of
13 pain, and it was not exceeded.

14 At best if it was exceeded, it was
15 exceeded negligently, which is not battery, and it
16 was never withdrawn. And for that reason they have
17 to go.

18 THE COURT: Okay.

19 MS. COFIELD: Two-second response or no?
20 Had enough?

21 THE COURT: Go ahead. Well, yeah, I've
22 probably had enough, but go ahead. I want everybody
23 to feel like they've had their say.

24 MS. COFIELD: No, I understand.

25 THE COURT: If it's important, tell me.

1 MS. COFIELD: All right. I disagree. I
2 do want you to read that, and I specifically would
3 like Your Honor to focus on two provisions of that
4 case.

5 THE COURT: What is that, 239?

6 MS. COFIELD: Pugsley is 220, 892.

7 THE COURT: 220, 892. Okay.

8 MS. COFIELD: Yes. The Supreme Court
9 didn't find, as he just said --

10 THE COURT: Well, do you want me to read
11 it, or do you want to read it to me?

12 MS. COFIELD: You've got a point.
13 Okay. I do want you to focus also on sub-heading
14 four, where the court finds that it is certainly a
15 factual issue, and there can't be a motion to strike
16 granted unless there is no evidence to support a
17 finding of proximate cause and no room for reasonable
18 minds to differ that these damages or injuries
19 received and ill effects were caused by a battery,
20 not negligence. And it rules out negligence.

21 THE COURT: All right. Do you want to
22 give me the case?

23 MS. COFIELD: Surely.

24 THE COURT: That's fine. I'll take it
25 that way, and I won't have to look it up.

1 MS. COFIELD: I'll submit all of them,
2 sir, if you want. That's just as easy.

3 THE COURT: I'm going to take a few
4 minutes. Some of this I'm familiar with; some of
5 them I'm not as familiar with. So I will take a few
6 minutes, and when I'm ready, I'll come out on the
7 bench and I'll rule on the motions.

8 (Short recess.)

9 THE COURT: All right. Ladies and
10 gentlemen, I have reviewed some of these cases and
11 the law stated therein, in addition to what the court
12 had previously done in addressing these particular
13 issues.

14 There are three motions, essentially, to
15 strike. There were some other small pieces as
16 relates to damages and so forth, but I'll get to
17 those.

18 The first issue, the first motion was on
19 the question of fraud. The parties agree, I think,
20 on the elements of fraud. The alleged fraud in this
21 case was on the question of board certification. On
22 the issue of fraud the standard is clear and
23 convincing evidence, clear, cogent and convincing, I
24 guess the court has said.

25 There are several elements involved in

1 it. And the first I would deal with is on the
2 question of even assuming that there was a
3 misrepresentation, which I will and do for the
4 purposes of this motion, whether there was reasonable
5 reliance on this question that came out of the, more
6 or less -- I don't want to use the word casual, but
7 informal conversation.

8 The question is asked, are you board
9 certified. The answer presumably is yes from the
10 plaintiff's evidence, but that is the bare statement
11 that we're talking about.

12 It was never raised before the fact with
13 Dr. Borden or Dr. Klara that board certification is
14 an essential element, different, for instance, from
15 Pugsley in which there was a three-week back and
16 forth of the patient making arrangements with Dr.
17 Hall and doing a whole variety of things. And there
18 isn't a withdrawal of consent here.

19 So based on that bare statement,
20 assuming it is true, the court finds that there is no
21 clear, convincing document in evidence and no basis
22 for the jury to speculate on that issue with regard
23 to the question of certification.

24 The plaintiff could not, particularly
25 someone who is a nurse but for anybody, reasonably

1 rely upon that statement without there being any
2 demonstration of anything following, if it was that
3 important.

4 There is no notation, thereafter signed
5 the consent form, raised no reservations on the
6 consent form, added no conditions, no conditions were
7 subsequently added in any kind of way, nor was the
8 consent withdrawn in any kind of way.

9 There is no evidence in this case that
10 has been presented that board certification is
11 related in any way to competence. The plaintiff
12 called Dr. Borden as an adverse witness, and the
13 testimony was that it was a time-related thing, that
14 is, a year or 15 months, I think, was the length of
15 time in sitting for a test and the orals.

16 But in any event, there is no evidence
17 relating to any relationship between that time and
18 experience level as to materiality. Both of them go
19 together. And the upshot is there just is no clear
20 and convincing evidence at all of any fraud on the
21 part of Dr. Borden in the securing of the consent.

22 Again, in Pugsley there was a clear
23 finding of withdrawal of consent that took place in
24 the course of that in the operating room and lots
25 that went on otherwise with regard to that. The

1 court will grant the motion to strike as it relates
2 to the issue of fraud in this case.

3 And based upon the evidence that has
4 been presented in this case, the court believes that
5 the issue of fraud goes a long way in addressing and
6 carrying the issue of the battery, and that is the
7 scope of the consent.

8 The evidence that has been presented in
9 the form of the consent itself and around the reading
10 of the consent and the extent of the consent and the
11 language that is involved in the consent, that it
12 fully encompasses the ordinary operation that was
13 performed in this case beyond the complications.

14 But what was done by Dr. Borden and what
15 was consented to, the court -- you know, I think in
16 our system as it relates to medical responsibility
17 and medical malpractice and the scope of consent
18 forms and the scope of consent to surgery and what
19 they contain in this case, the court finds no
20 evidence to contradict the very clear and specific
21 language within the consent that took place in this
22 case and what was done in the surgery.

23 The only evidence of what was done in
24 the surgery was that presented by Dr. Borden when
25 called as an adverse witness by the plaintiff in this

1 case as to the procedure, complications aside.

2 The counts for negligence have been
3 withdrawn, including anything that would have
4 implicated Dr. Klara or may have implicated Dr. Klara
5 in terms of at least the allegations related to
6 oversight and supervision, if there was anything
7 there related to this particular case.

8 So there simply is no evidence that this
9 court finds that can support either a fraud issue to
10 submit to the jury under the standards that have been
11 articulated for fraud claims, nor under the evidence
12 presented by the plaintiff in this case given the
13 scope of the consent that was executed, indicating in
14 the body of the consent that it was fully discussed
15 and the scope of that.

16 There is no basis for the jury under the
17 evidence in this case presented to speculate on that
18 battery issue.

19 The court believes that it's unfortunate
20 that there was a complication that came out of the
21 surgery, but the evidence presented would say that on
22 these issues that it was within the scope of what was
23 authorized and what was done. And accordingly, the
24 court will grant the motion to strike as it relates
25 to the battery.

1 The vicarious liability issue was one
2 that necessarily follows the battery and the fraud.
3 And there being no issue to go to the jury on the
4 battery and the fraud, the motion to strike with
5 regard to the vicarious liability of Dr. Klara is
6 also granted.

7 That being the case, the court has no
8 reason to address the damage questions that were
9 previously raised. I note the plaintiff's objections
10 and exceptions to the court's rulings.

11 MS. COFIELD: And so the record is
12 clear, it's also on the Renner versus Stafford case,
13 245 Virginia: Motion to strike is an inappropriate
14 vehicle to short-circuit litigation.

15 CaterCorp versus Catering Concepts was
16 another case in which a trial court incorrectly
17 short-circuited litigation. Pretrial decided the
18 dispute without permitting the party to reach a trial
19 on the merits.

20 I do not believe that it was appropriate
21 for the court, with all due respect, to decide as a
22 matter of law that a contract and -- to interpret a
23 contract, which is the consent here, Exhibit 2, to
24 encompass body parts, being here C7-T1, on a contract
25 which is silent in that regard.

1 As a medical matter and as a factual
2 matter, therefore, as a legal matter it did encompass
3 all of those things when it was disputed not just by
4 the plaintiff that C7-T1 was discussed, but admitted
5 by the defendants that those body parts were not
6 discussed.

7 With those admissions, party admissions
8 by the defendants and those allegations by the
9 plaintiff, Your Honor has taken the context of the
10 evidence so far adduced and said despite the parties'
11 admissions and despite the plaintiff's allegations, I
12 will set those aside and find as a matter of law, as
13 a matter of construing this contract that it is
14 sufficient to encompass a body part that otherwise
15 would form a battery.

16 THE COURT: All right. Well, I guess
17 the -- what the evidence is will be the evidence and
18 not the recitations of counsel. The court listened
19 carefully to the evidence.

20 The court also notes the extensive
21 discussions that took place as to the spine and the
22 relationship of the two vertebral bodies setting next
23 to each other and any evidence related to touching or
24 not touching and so forth.

25 But in any event, the court has looked

1 at it in terms of the consent that was entered into
2 in this case, which was a broad consent, that was
3 never contested in any way in terms of the substance
4 or content of the consent, went to the surgery and
5 went through the surgery with regard to that consent.

6 And given the evidence that was
7 presented in this case, the jury would have to
8 speculate beyond the scope of which jurors are
9 entitled to speculate as it relates to deviation from
10 the scope of the consent and beyond what may be
11 contained in opening statement or other statements
12 that are not part of the evidence in this case.

13 But again, I've noted your exception,
14 and when we were inside everything has been in the
15 record. Unfortunately, we have a system that
16 everybody is entitled to follow, and occasionally
17 judges have been known to be wrong.

18 MS. COFIELD: It could happen.

19 THE COURT: That's what we have appeals
20 for. Sometimes litigants have been found to be wrong
21 when they follow that process.

22 MS. COFIELD: That too happens.

23 THE COURT: But that's why we have it
24 and make the judgments based on our perception. In
25 this case the court based it on my view of the facts

1 presented in the plaintiff's case and the law
2 applicable thereto, and that is the basis of the
3 rulings in this case.

4 MS. COFIELD: Thank you, Your Honor.

5 THE COURT: I will speak to the jury
6 when they come out, and counsel can be here or not be
7 here as the case may be. I'm just going to tell them
8 that --

9 MS. COFIELD: We will be here.

10 THE COURT: Well, you all sit tight,
11 then, and let's bring the jury in. I'll discharge
12 the jury, and then everybody will have time to clean
13 up.

14 (The jury entered the courtroom, and the
15 following proceedings were held:)

16 THE COURT: All right. Ladies and
17 gentlemen, before you went to lunch I indicated that
18 certain issues or counts in the claim had been
19 dismissed voluntarily on the part of the plaintiff,
20 and the plaintiff rested at the conclusion of that.

21 There were discussions, arguments that
22 were made, and the court has ruled as a matter of law
23 that on the remaining counts that the evidence is not
24 sufficient to support those particular claims.
25 Accordingly, there is nothing for you to consider as

1 jurors in this case.

2 You have sat here patiently and
3 attentively for four days listening to evidence which
4 may or may not have enhanced your knowledge. But in
5 any event, the court appreciates your patience and
6 attention that you paid to the case.

7 We know, again, that jury service is not
8 voluntary. But it is also an essential part of our
9 system, and we are grateful when citizens exercise
10 that responsibility.

11 But as far as this case is concerned,
12 your responsibilities are concluded. You can hand
13 your pads back to the bailiff as well as your badges
14 when you go out, and you're excused from any further
15 consideration.

16 (At 2:30 p.m. the trial was concluded.)

17

18

19

20

21

22

23

24

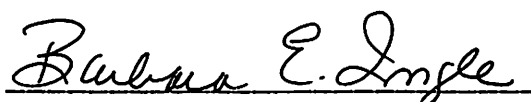
25

CERTIFICATE OF REPORTER

I, Barbara E. Ingle, RPR, do hereby
certify that I reported verbatim the proceedings in
the Circuit Court of the City of Norfolk, in the
above-entitled matter, heard by The Honorable Joseph
A. Leafe, Judge of said Court, and a jury.

I further certify that the foregoing
is a true and accurate excerpt transcript of said
proceedings.

Given under my hand this 13th day of
March, 2001, at Norfolk, Virginia.



Barbara E. Ingle, RPR