

IN THE CIRCUIT COURT, 12TH JUDICIAL DISTRICT
IN AND FOR SARASOTA COUNTY

NATHAN BYRD,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID KLEIN, M.D., et al,)
)
 Defendants.)
 _____)

No. 2002-CA-2375 NC

CERTIFIED
COPY

DEPOSITION OF STEWART ZEMAN, M.D.

Walnut Creek, California

Monday, November 25, 2002

Reported by:
KARLA MARTIN
CSR No. 12025
JOB No. 38374


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1 IN THE CIRCUIT COURT, 12TH JUDICIAL DISTRICT

2 IN AND FOR SARASOTA COUNTY

3
4 NATHAN BYRD,)

5 Plaintiff,)

6 vs.)

No. 2002-CA-2375 NC

7 DAVID KLEIN, M.D., et al,)

8 Defendants.)

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10
11
12
13 Deposition of STEWART ZEMAN, M.D.,

14 taken on behalf of Defendant DAVID KLEIN,

15 M.D., et al, at 2121 North California Blvd.,

16 Suite 290, Walnut Creek, California, starting

17 at 2:37 p.m. and ending at 4:11 p.m.,

18 on Monday, November 25, 2002, before

19 KARLA MARTIN, RPR, Certified Shorthand

20 Reporter No. 12025.
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APPEARANCES:

APPEARED BY VIDEO CONFERENCE FOR DEFENDANTS:

DICKINSON & GIBBONS
BY: RALPH MARCHBANK
Attorney at Law
1750 Ringling Boulevard
Sarasota, Florida 34236

FOR PLAINTIFF:

LAW OFFICES OF THOMAS D. MASTERSON
BY: THOMAS D. MASTERSON
Attorney at Law
699 First Avenue North
St. Petersburg, Florida 33701

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2 pages 58

1 Walnut Creek, California, Monday, November 25, 2002

2 2:37 p.m. - 4:11 p.m.

3
4 STEWART ZEMAN, M.D.,

5 having been first duly administered the oath was
6 examined and testified as follows:

7
8 EXAMINATION

9 BY MR. MARCHBANK:

10 Q Would you state your full name please?

11 A Stewart C. Zeman.

12 Q Dr. Zeman, I'm Ralph Marchbank. I represent in
13 this case Dr. Klein in his professional association.
14 Have you given depositions before in your life time?

15 A Yes.

16 Q Approximately how many depositions have you
17 given?

18 A Wow I would say probably 75 to a hundred at
19 least.

20 Q I'm going to ask you a series of questions of
21 course in this deposition. Whenever possible please
22 respond verbally. Don't just shake your head. Does
23 that make sense to you?

24 A Yes.

25 Q If I ask you something you don't understand

1 tell me or tell Mr. Masterson who is sitting there to
2 your right. So I will have an opportunity to clarify
3 and make myself understood. Does that seem reasonable
4 to you?

5 A Yes.

6 Q Could you tell us please when you were first
7 approached about this case, Nathan Byrd's claim against
8 Dr. Klein?

9 A It was in August of 2001.

10 Q Who approached you? Who first contact with you
11 come from?

12 A I believe it was Mr. Gustafson if my memory
13 serves me correct there.

14 Q Do you know if Mr. Gustafson is a professional
15 legal assistant or attorney with Mr. Masterson's or
16 Mr. Fox's office?

17 A I believe so, yes.

18 Q Which office, do you know?

19 A I'm not a hundred percent sure.

20 Q Before being approached by Mr. Gustafson to be
21 involved in this case had you ever reviewed any type of
22 claim or case before for either Mr. Masterson who is
23 there with you or Mr. Fox who is at the Fox Bianchi firm
24 down in Miami?

25 A I had worked with Mr. Fox on a case before.

1 Q On how many cases before being contacted about
2 the Byrd case had you worked with Mr. Fox? Just one
3 time or --

4 A I believe just once. He may have called me
5 another time to ask me about a case. I'm not positive.
6 I think there was one formal case, but I'm not positive.

7 Q You think there may have been one formal case
8 and probably an informal contact where he called you up
9 or described the case or ran something by you?

10 A That's my recollection, yes.

11 Q Can you tell us how it was that you first came
12 to look at that first case which may be the only case
13 with Mr. Fox?

14 A I don't recall.

15 Q Have you brought with you into the deposition
16 room where you're situated everything that you have
17 received from any source in regard to Mr. Byrd or his
18 claim?

19 A Yes.

20 Q Did you in order to formulate opinions at any
21 time go and do any type of research yourself, look at
22 any articles, treatises, generate any product yourself?

23 A I did spend time looking in Campbell's
24 Operative Orthopedic, yes.

25 Q Can you tell us which edition?

1 A Eighth edition, eight.

2 Q Is that the current edition as far as you know?

3 A I'm not sure. There could be one other one
4 out. I'm not positive.

5 Q Could you tell us what page or pages from
6 Campbell's you looked at from the eighth edition?

7 A It was page 1867.

8 Q What is the matter that is dealt with at
9 page 1867 of Campbell's eighth edition?

10 A There is a discussion of the beach chair
11 position in the chapter on arthroscopy of upper
12 extremity.

13 Q What did you learn from that page of Campbell's
14 operative orthopedics that is of significance to your
15 opinions in this case if anything?

16 A Well, I wanted to see -- my recollection was,
17 should I say, that there was discussion of this? But it
18 had been a while since I looked at it. When I was
19 reading depositions, et cetera, about common knowledge
20 for orthopedics I decided to see what Campbell's had to
21 say. I guess there is two sentences that I underlined
22 under the beach chair position that I can read.

23 Q Would you please do that?

24 A It says, quote, the knees are flexed to provide
25 counter pressure against the posterior thigh which will

1 reduce the tendency to slide off the foot of the table.
2 This flexion also decreases tension on the posterior
3 neurovascular structures of the legs, period, end of
4 quote.

5 Q Do you believe that the current edition of
6 Campbell's Operative Orthopedics is authoritative as to
7 the issues that you have been asked to review in this
8 case?

9 A They are certainly pertinent, yes.

10 Q Is pertinent equal to authoritative?

11 A Not necessarily. I think anything that's
12 written in the literature needs to be taken with a grain
13 of salt up against your experience and what other
14 literature says. So authoritative to me is a little too
15 strong of a word.

16 Q Do you believe that there is any text, article,
17 treatise that is authoritative in the field of
18 orthopedics, orthopedic surgery as to any issue, any
19 matter?

20 A Again I would say it's literature and
21 experience combined.

22 Q And the answer to my question is therefore no,
23 you do not believe that there is any authoritative
24 textbook, treatise, literature on any subject matter
25 within the field of orthopedic surgery. Correct?

1 A Not in by itself. Correct, yes.

2 Q Let me ask you have you before being involved
3 in this case been involved in any other Florida cases of
4 alleged or suspected medical malpractice?

5 A I don't think so, but I can't be a hundred
6 percent sure. I have done some medical legal work for
7 almost 20 years albeit not a lot of my practice. And I
8 don't recall anything specifically in Florida but I
9 couldn't say for sure.

10 Q Can you tell us with regard to your work in
11 medical legal matters or litigated matters whether you
12 have ever been required to or -- maybe not required to
13 but simply prepared a list of cases in which you have
14 testified or depositions in which you have given
15 testimony?

16 A You mean as far as the content of the cases?

17 Q No. Just, for example, in most federal
18 jurisdictions it's my understanding that if you're an
19 expert witness you're required to produce a listing of
20 cases in which you have given testimony whether it's
21 deposition or trial and whether you were retained by the
22 plaintiff or defense. Do you have any list at all that
23 lists any testimony that you have given in the past?

24 A No, I haven't and I have never actually heard
25 of that. So that's a first.

1 Q Have you testified on behalf of defendant
2 doctors in medical negligence cases?

3 A Yes.

4 Q Other than giving testimony and opinions in
5 medical negligence cases or medical misfeasance cases,
6 have you been involved in the past as an expert witness
7 in think other types of medical legal matters?

8 A Well, I frequently will just give opinions
9 concerning care to patients, give opinions on workers'
10 compensation cases. So it's not all medical malpractice
11 but it's actually more in the care of patients that I
12 have treated.

13 Q Do you do any reviews for any insurance
14 carriers in medical negligence or medical misfeasance
15 type matters?

16 A Not those matters specifically. I have worked
17 for insurance companies and reviewed cases for necessity
18 of treatment and things, but not for medical negligence.

19 Q You indicated earlier that you have given
20 testimony in approximately 75 to a hundred depositions.
21 Did I understand you right?

22 A Yes.

23 Q How many reviews have you done in medical
24 negligence or alleged medical negligence cases? That's
25 a little different than deposition giving but how many

1 separate cases have you reviewed in which there was
2 alleged to be medical negligence? And I don't care at
3 this point whether you break it down between plaintiff
4 and defendants. But how many overall cases either
5 specifically or if you can give us an estimate.

6 A I guess I would say around 50 although it's
7 just a very rough guess.

8 Q Over what span of time were those 50
9 approximately cases reviewed?

10 A I would say about 20 years.

11 Q How did you first come to do a medical legal
12 review? How did that come about?

13 A I honestly don't remember. That was so long
14 ago. I think when I was first starting out in
15 practice -- well, actually I think most of the work I
16 used to do was seeing patients for Triple A when I first
17 started in practice in '83. And I would see people
18 injured in auto accidents. And then of course you would
19 be involved in depositions and attorneys would say do
20 you do IMEs? I think it probably started way back then.

21 Q Do you advertise your availability to the
22 involved medical legal matters to act as an expert
23 witness through any type of media at the current time
24 whether it's a magazine ad or over the internet or any
25 other type of media, radio for all I know?

1 A Well, I do have a website but I don't advertise
2 medical legal -- you know, my availability. I do have a
3 radio show and occasionally the topic comes up but I
4 don't offer as an expert. The only type of advertising
5 that I think is done is there is a family doctor in
6 Berkeley who does a fair amount of medical legal work.
7 He at one time asked if it was okay with me if he put my
8 name in his brochure for orthopedic consultation. I
9 said yes. I don't even know to be honest with you if I
10 have ever seen one of his pamphlets but it may be in
11 there.

12 Q What's that doctor's name?

13 A Dr. Thomas Stern in Berkeley, S-T-E-R-N.

14 Q Other than the possibility of your having been
15 in Dr. Stern's pamphlet or directory, have you to your
16 knowledge been listed with any other expert finder
17 service or thing of that nature, expert clearinghouse,
18 anything like that?

19 A I don't think so. I don't recall ever putting
20 my name into anything for that. I'm not positive. I
21 suppose I could have listed myself in something I got in
22 the mail but I just don't think so.

23 Q Have you had occasion to place any ads in
24 periodicals whether it's medical periodicals, general
25 periodicals, lawyer periodicals, local bar news in your

1 part of California, things of that nature? Have you
2 placed any advertisement alerting folks to your
3 availability to serve as an expert witness?

4 A I don't believe so.

5 Q What are your charges to Mr. Fox and
6 Mr. Masterson for the work that you have done and may do
7 into the future in this case?

8 A Boy, I don't really know what's been charged.
9 My secretary does all that. I think today was something
10 like \$1,500. And for the review of records initially I
11 think it was probably 750. As far as going to trial I
12 don't even know that we have discussed that.

13 Q Are you telling me that as you sit there today
14 that the total amount of moneys that have been paid to
15 you or are owed in combination are the \$750 that you
16 were paid to do the initial review and the
17 \$1500 deposition fee that I was required to pay?

18 A Again I don't do that. My secretary does that.
19 That's my recollection. I'm not positive. I met with
20 Mr. Masterson an hour or so before here. Maybe they
21 paid for that. I don't know to be honest with you.

22 Q How will I find out the answer to these
23 questions? Can you provide billing records to
24 Mr. Masterson and we can have them given to me?

25 A Sure.

1 Q Just in case we run into a problem what's your
2 secretary's name that handles the billing?

3 A Charlene.

4 Q What's Charlene's last name?

5 A R-E-A-V-I-S.

6 Q Do you have there with you in the deposition
7 any rate sheets or any forms or any letters or anything
8 that would reflect your usual and customary charges for
9 medical legal review and testimony or specifically your
10 understanding with Mr. Masterson or Mr. Fox in this
11 case?

12 A There is such a sheet. I don't have it with
13 me. It's not part of the records here but there is such
14 a sheet, yes.

15 Q What is your custom -- what do you usually
16 charge per hour for, first of all, review, reviewing
17 materials?

18 A Well, it depends on how much needs to be
19 reviewed. For whatever reason I guess when we found out
20 it was a couple of binders or three or four binders -- I
21 don't know. Charlene takes care of this but my
22 recollection was the initial fee was 750. And as far as
23 depos I think it's \$400 and half day court appearances
24 is 1500. As I say I don't have it here in front of me
25 but I think that's close.

1 Q Let me try to understand. Do you charge by the
2 hour for anything other than depositions and trial
3 testimony? Do you charge by the hour for review or do
4 you negotiate some sort of flat fee? That's what I'm
5 trying to understand.

6 A Again it depends on how much needs to be
7 reviewed. There are people who send boxes of records.
8 Usually Charlene will ask people how many records do you
9 want him to look at? And then she decides how much they
10 should send along with the records just by what is said
11 and usually it's some sort of arrangement. If you end
12 up sending more or a bunch of X rays with it, it can be
13 more. We have never had trouble dealing with attorneys
14 on that basis.

15 Q So sounds to me like you have set a fee after
16 you see how much material you're supposed to review and
17 it doesn't necessarily, this fee that's set, correlate
18 to the number of hours that it's going to take to review
19 the material or it does? I'm still at a loss.

20 A I think you're probably making it too
21 complicated. It's clearly related to the amount of
22 records which obviously has some element of time but if
23 it's a big stack of records Charlene says this amount.
24 If it's a small stack of records it's another. Other
25 than that I don't really know -- I don't really know

1 what else to tell you.

2 Q Let's say it becomes necessary for you to
3 review additional materials before testifying in this
4 case. How will you determine what to charge the
5 attorneys that retained you, who retained you?

6 A Charlene will ask them how many more records
7 are there? Are there -- is it a stack that's 10 inches
8 thick or just one small X ray report or I'm just going
9 to send the MRI for you to look at? That's what it's
10 based on. Sometimes she'll ask me if she is unfamiliar
11 with stuff. Other times she'll do it on her own.

12 Q Let's say Mr. Masterson and Mr. Fox had you
13 come down to Florida for trial. What's your
14 understanding as to what your expectation is as far as
15 your remuneration?

16 A Again it would depend on how long are you going
17 to need me and what sort of travelling accommodations I
18 can get. I mean if you're going to need me for just
19 half a day I probably can just come in the night before
20 and do what I need to do and leave.

21 Q Do you charge for travel time?

22 A Yes.

23 Q And what would be your charge for travel time?

24 A Usually like the half day rate, the court
25 appearance rate.

1 Q Okay. So let's say that you were out of -- you
2 left your office at 5:00 p.m. to go to the airport. You
3 got on a plane. You came to Sarasota, Florida. You got
4 in at midnight. You went to sleep. You got up. You
5 testified. You got on a plane and got back to your
6 office or back to the airport closest to your office at
7 5:00 p.m. the following day. What's the charge for
8 that?

9 A I would say the charge for that will probably
10 be -- I'm guessing -- probably around \$5,000 but that
11 would include the plane fare, et cetera.

12 Q How much of that would you anticipate would be
13 plane fare?

14 A Again it would depend on how quickly in advance
15 I knew because obviously the more notice the cheaper the
16 plane fares.

17 Q Before this deposition that we're in now when
18 did you last give a deposition in any type of legal
19 matter?

20 A I think it's been like three or four months
21 because I remember it was in my office. It was towards
22 the end of the summer. But that's about as much as I
23 can recall.

24 Q How many depositions have you given this year?
25 We're about 11 months through the year 2002. What's

1 your best estimate of the number of depositions you have
2 given up until now?

3 A I would say less than ten this year.

4 Q In terms of the medical legal work that you
5 have done in cases of alleged or claimed medical
6 negligence what's been the breakdown in terms of
7 plaintiff testimony versus defense testimony, claimant
8 being plaintiff, defense being on behalf of the doctor
9 or healthcare provider?

10 A I think it's roughly been about 50/50, maybe
11 60/40 plaintiff to defense. But it varies from year to
12 year, but usually it's about half and half.

13 Q Have you yourself ever been the subject of a
14 medical negligence lawsuit?

15 A Yes.

16 Q On how many occasions?

17 A Well, two involving malpractice. One for
18 alleged report writing.

19 Q Did any of those three involve any issues
20 regarding positioning of the patient during a surgical
21 procedure?

22 A No.

23 Q The two that did not involve report writing,
24 what is your understanding of the allegation? I'm not
25 suggesting that the allegation is true but what were the

1 allegations in those cases?

2 A One lady suffered a post operative arthroscopic
3 knee infection and the other gentleman suffered a
4 neurological deficit following the excision of a tumor
5 in his buttock region. Both cases clearly had
6 preoperative informed consent saying that these were
7 possibilities.

8 Q What was the result of the buttock excision
9 case? Was it settled, tried and won, dropped?

10 A It was settled.

11 Q Do you recall the name of the claimant in that
12 case?

13 A You mean the patient?

14 Q Yes, the patient.

15 A Name was John Mead, M-E-A-D.

16 Q What county in your area was the suit filed?

17 A I don't recall whether it was Contra Costa or
18 Alameda.

19 Q And the other patients you mentioned who sued
20 you, the female, do you recall her name?

21 A Theresa Cloney.

22 Q Do you recall which county that case was filed
23 in?

24 A Again I think it was Contra Costa but it could
25 have been Alameda.

1 Q That female patient's case was dropped,
2 settled?

3 A Settled.

4 Q The female case, approximately how long ago was
5 that case wound up?

6 A I think it was 15 years ago.

7 Q How about the buttock tumor case?

8 A That was about ten years ago I believe.

9 Q Are you currently licensed as a medical doctor
10 in the State of California?

11 A Yes.

12 Q Have you been licensed in any other
13 jurisdictions or are you currently licensed in any other
14 jurisdictions?

15 A No.

16 Q Has any action ever been taken against your
17 license by the California board of medicine or the
18 governing body there?

19 A No.

20 Q Have you ever had staff privileges suspended or
21 revoked?

22 A No.

23 Q What were you asked to do in this case? You
24 were retained as you told me -- initial contact,
25 Mr. Gustafson. What's your understanding of what the

1 scope of your employment was to be when you were first
2 retained?

3 A To review the records of this case and give an
4 opinion as to whether the post operative lower extremity
5 difficulties the gentleman was having was related to the
6 surgical procedure by Dr. Klein.

7 Q And do you believe that your scope of
8 employment has changed in any way or is that still your
9 mission here?

10 A Well, I think I probably agreed also -- did
11 agree that if it went to trial I would see it through to
12 trial.

13 Q In terms of your involvement in litigation
14 matters -- and I'm using that very broadly, not just
15 limiting it to medical negligence cases, but any matter
16 involving forensic issues, the interface between law and
17 medicine, courtroom testimony, deposition testimony,
18 opinions regarding issues of medicine as it might relate
19 to law -- what percentage of your professional working
20 life is devoted to that activity?

21 A Somewhere between a 10th or 15th of my
22 practice. It really is quite small.

23 Q How long has that been case, 10 to 15 percent
24 of your total working time?

25 A Pretty much since I started.

1 Q About 20 years ago?

2 A Yes.

3 Q What about percentage of income? I'm not
4 allowed to know how much money you make from testimony
5 or forensic medical legal but what percentage of your
6 total income that's estimated to be.

7 A Roughly the same numbers, a tenth or so.

8 Q Do you have with you in the deposition room a
9 paper or papers that might list all of the materials
10 that you have reviewed to date in connection with Nathan
11 Byrd's claim?

12 A Do I have a list? No, I don't.

13 Q Do you have any letters there or cover letters
14 or anything that we might be able to look at and use as
15 a shorthand way of referring to what you have reviewed?
16 If you don't, that's no big deal. We'll just have you
17 describe the materials.

18 A I don't have anything like that but it's
19 certainly not extensive.

20 Q Have you prepared any type of report, written
21 report, typed report, e-mail report, handwritten report
22 or outline of your opinions, anything like that?

23 A The only thing that I prepared was just notes
24 to myself that discuss dates that things happened,
25 questions that I had. That's all. No e-mails, no

1 letters.

2 Q The notes that you prepared to yourself how
3 many pages do those notes comprise?

4 A A half.

5 Q Half of one page?

6 A Yes, sir.

7 Q Why don't you do this to me. Slowly read it so
8 the court reporter is not taxed that half a page since
9 it's only half a page.

10 A Okay.

11 Q Could you just read it word for word please?

12 A Byrd, B-Y-R-D, notes, colon, February 2000,
13 playing with kids, felt pop in left shoulder, 4/10/00,
14 Dr. Ruffing, comma, neurologist, comma, stiffness in
15 lower extremities at night -- actually I shortened
16 extremities to E-X-T. 4/19/00, open cuff repair,
17 Dr. David Klein, K-L-E-I-N, parentheses, 1055, dash,
18 130, end of parentheses, 5/3/00, IND, left shoulder
19 parentheses, cuff detached, end of parentheses, 6/1/00,
20 IND, left shoulder, 6/4/00, IND left shoulder.
21 11/28/01, tripped, comma, fractured left elbow -- sorry,
22 fractured right elbow, comma, ORIF, 8/1/02, Dr. Wagshul,
23 W-A-G-S-H-U-L, comma, neurologist, comma, compressive
24 ISCH for ischemia neuropathies, secondary to positioning
25 and length of time in BC position. Questions, colon,

1 Dr. Klein, colon, why did surgery, SURG take so long on
2 routine repair, question mark. Ortho assist,
3 Dr. Frankle, F-R-A-N-K-L-E, colon, associate professor,
4 comma, unaware of this complication, question mark.
5 Repeated comments that surgery, SURG, would be done in
6 lat decub, L-A-T, D-E-C-U-B, dash, why wasn't it,
7 question mark, end.

8 Q Let me ask you now to list all of the materials
9 that you have received relating to this patient.

10 A I have a deposition of Deborah Byrd. I have a
11 neurological consultation dated 8/12/02 by Dr. Wagshul.

12 Q How many pages is that?

13 A Six. I have Tampa General Hospital records.
14 That's about a half-inch thick. I have one page of a
15 chart note of a telephone call from Nathan Byrd dated
16 9/23/02 which I'm afraid came detached from somewhere
17 but not positive. I have the deposition of Nathan Byrd.
18 I have the deposition of David Klein, M.D. And I have
19 the deposition of Mark Frankle, M.D. I have a thick
20 binder of Nathan Byrd medical records, and a thicker
21 binder of Nathan Byrd Sarasota Memorial hospital
22 records. That's it.

23 Q The first of the two binders containing Nathan
24 Byrd medical records, does that binder have any type of
25 list in the front or glossary?

1 A No, sir.

2 Q Are the records tabbed?

3 A Yes.

4 Q Would you read for me the different healthcare
5 providers who have sections devoted to their records
6 within that binder please?

7 A Kyle Ruffing, M.D., outpatient imaging,
8 Sarasota, Mark Frankle, M.D., Michael Milam, M-I-L-A-M,
9 M.D., Hudson Chiropractic.

10 Q Are there any materials that you have received
11 or received and reviewed in connection with Mr. Byrd's
12 claim of any type that we haven't now identified for the
13 record?

14 A Not that I believe.

15 Q What percentage of your working time is devoted
16 to doing surgery as opposed to the radio show and the
17 medical legal consulting and office management issues?
18 Maybe the best way to tell me is if you have a typical
19 surgical schedule or surgical days. Maybe you can tell
20 me that way.

21 A I try and do surgery just on Thursday mornings.
22 And I would say that comprises about 20 percent of my
23 time.

24 Q How long has it been your hope that you'll be
25 able to do surgeries on Thursday morning only? I

1 understand it can't always work out that way but how
2 long have you been trying to keep to that surgical
3 schedule?

4 A I have been trying to keep to one half day a
5 week now for about ten years. Before I was going over
6 to the surgery center or the hospital sometimes twice a
7 day. So I have tried to just limit now to outpatient
8 surgery only a half a day a week on Thursdays.

9 Q That's 20 percent of your time. You estimated
10 I believe about 10 to 15 percent of your time these days
11 was devoted to medical legal review, testimony. That
12 gets us up to 30 to 35 percent of your working time.
13 How do you breakdown the other 65 percent?

14 A Mostly seeing patients in my office.

15 Q How many surgeries do you do on a typical day?

16 A Usually between three and five.

17 Q And what types of surgeries do you do?

18 A I would say the 70 to 80 percent is knee or
19 shoulder arthroscopy, knee and shoulder arthroscopy.

20 Q And the other 20 to 30 percent of the surgeries
21 you do?

22 A Open procedures, shoulders, hands, feet, other
23 things, elbows. I don't do any spine work or total
24 joint replacement.

25 Q The open rotator cuff repair of the type that

1 was attempted by Dr. Klein of this case back in April of
2 2000, what frequency do you do that procedure?

3 A It varies. But I would say twice a month,
4 sometimes more.

5 Q When did you last do an open repair of a torn
6 rotator cuff?

7 A I think it was about three weeks ago.

8 Q Where did you receive your training to perform
9 that particular procedure?

10 A University of California, Davis.

11 Q Have you taken any courses to upgrade your
12 skills or anything like that as far as open rotator cuff
13 repair?

14 A I did a fellowship in Beverly Hills in sports
15 medicine where we did quite an extensive number of
16 rotator cuff repairs.

17 Q What do you estimate to be the total number of
18 rotator cuff repairs that you have performed open
19 procedures where you have been the primary or lead
20 surgeon?

21 A Since I started?

22 Q Sure.

23 A Would that include like my residency or
24 fellowship?

25 Q Post residency, post fellowship. After

1 residency, after fellowship.

2 A I would guess 3- or 400.

3 Q Over the last ten years you believe that you
4 have probably done one or two a month?

5 A Yes.

6 Q So that would be steady over the last ten years
7 that your open procedure rotator cuff repair of the type
8 involved in this case two times per month, 12 months a
9 year times about the last ten years?

10 A I would say roughly. Again it's variable but
11 that's what it feels like.

12 Q Do you use the beach chair for that procedure?

13 A Yes.

14 Q Do you use the beach chair position for most of
15 your shoulder surgery?

16 A Not for arthroscopy, no.

17 Q What position do you place the patient in for
18 arthroscopic shoulder surgery?

19 A Mostly the lateral decubitus position.

20 Q You have no criticism of the fact that the
21 beach chair position was used in Nathan Byrd's case?
22 Use of the beach chair position to perform by Dr. Klein
23 an open rotator cuff repair, that's okay. Correct?

24 A It's okay to perform an open rotator cuff
25 repair in the beach chair position. Was it okay to do

1 it on this patient? I don't know that the answer to
2 that is yes. Can I take one moment?

3 (Discussion off the record.)

4 BY MR. MARCHBANK:

5 Q What other procedures do you perform using the
6 beach chair and the beach chair position?

7 A Other than rotator cuff?

8 Q Yes.

9 A AV joint work acromial clavicular work,
10 dislocating or subluxating shoulders to do a bankart,
11 B-A-N-K-A-R-T, repair. That would be the most common.
12 Clavicle fractures on occasion will fix with open
13 reduction internal fixation. The most common is either
14 a bankart or a rotator cuff repair.

15 Q Over the last ten years or during that period
16 of time that you have maintained that Thursday morning
17 surgical schedule over the last ten years can you tell
18 me how many surgeries you do on an average week or month
19 in which the patient is positioned in a beach chair, in
20 the beach chair position?

21 A I would say again roughly two to three times a
22 month.

23 Q Have you in the last ten years performed any of
24 these types of surgeries that you usually perform in a
25 beach chair, in the beach chair position in some other

1 position because of the particular concerns that you
2 have for that particular patient who is not given the
3 beach chair position?

4 A No.

5 Q What I'm trying to ask you is whether or not
6 you had occasion to have a candidate who -- a patient,
7 excuse me, who -- the type of surgery being performed
8 made that patient a candidate for the beach chair
9 position in a beach chair which you opted to do
10 something else because of something peculiar to that
11 patient? That has not happened in the last ten years?

12 A No, sir.

13 Q Has it ever happened that because of something
14 peculiar to a particular patient perhaps -- their body
15 size or some particular problem that was peculiar to
16 their situation -- you opted not to use a beach chair
17 position where you would have otherwise used a beach
18 chair position for the particular procedure?

19 A Well, I guess several years ago -- and I
20 honestly can't remember how many -- I remember there was
21 an overweight gentleman who we knew had a rotator cuff
22 tear and his major symptom was pain. But I wouldn't do
23 the rotator cuff repair because I wanted to avoid the
24 beach chair position. I told him the most we could do
25 surgically was to do what we call a subacromial

1 decompression, clean out areas around the shoulder that
2 may be giving him pain. But I told him that the rotator
3 cuff of course would not work any better.

4 I guess that was seven or eight years ago. I can't
5 even remember the patient's name. But I remember he was
6 a short heavysset man with a bald head. But that's the
7 only occasion I can think of where I sort of succumbed
8 to a surgical procedure in a different procedure that I
9 normally would have that I didn't want to do the beach
10 chair position.

11 Q You did no surgery at all on a patient?

12 A I did, but I did it in the lateral decubitus
13 and I did it arthroscopically.

14 Q This particular patient was how heavy? 52 and
15 500 pounds?

16 A No, he was more like 56, 57, but he weighed
17 230, 240. We had tried everything conservative,
18 physical therapy, cortisone injections. We knew the
19 cuff was torn because we had an MRI. He could not lose
20 weight which we tried to get him to do. I said the only
21 other alternative to doing this was to just do a clean
22 out arthroscopically. I recall he also went and got
23 another opinion from someone who actually was not
24 willing to do anything surgically.

25 Q This particular patient you didn't want to do

1 the operation because the obesity made the patient a
2 surgical risk from a medical clearance point of view?

3 A No. The obesity made to me the beach chair
4 position too risky.

5 Q Why did you come up with the notion that obese
6 people shouldn't be in the beach chair position? Is
7 that written down somewhere? Have you seen a study
8 somewhere? What made you come to that way of thinking?

9 A Mostly because it was pounded into my head
10 during my residency. The subject came up frequently,
11 not only in orthopedics, but I remember it came up
12 repeatedly when we did our orthopedic residency. It
13 came up repeatedly on my anesthesia rotation. We would
14 not do beach chair position on people who were
15 significantly overweight. It isn't so much the beach
16 chair position per se. It's the amount of time in the
17 beach chair position.

18 It really isn't any different than the hundreds of
19 patients I see every year who have low back pain. We
20 all know that any of us who have it including me that
21 the worst position of all is sitting. So we tell people
22 with back pain don't sit for long periods of time. This
23 is sort of a corollary to that. So I think all the time
24 in my residency, and as I say it is mentioned in
25 Campbell's also.

1 Q Are you aware of any article, treatise, case,
2 study, anything at all other than what you have quoted
3 me in Campbell's that supports what you just told me
4 about overweight people and the beach chair position?

5 A It's mentioned also in the self assessment
6 orthopedic exam which I took three or four years ago.
7 The American Academy of Orthopedic Surgery puts out a
8 self assessment exam you can take. I remember it was
9 mentioned in that also. But I can't think of any
10 specific places that I have read it although I think
11 it's pretty common knowledge in orthopedic literature.

12 Q So it's your belief that someone who is above a
13 certain level of obesity should never be in a beach
14 chair?

15 A No, that's not what I said. Again it's not
16 focusing on the position. It's focusing on the length
17 of time in the position. I think it's okay to do
18 someone in the beach chair position if it's not going to
19 be a prolonged period of time. Now you may ask well,
20 what's a prolonged period of time, which is a good
21 question.

22 Q Right. What the next question was going to be.
23 Let me ask it. So we have a nice crisp record. Are you
24 telling me that -- let's talk about Nathan Byrd. Okay?
25 What's his height and weight?

1 A My recollection at the time of the first
2 surgery, it was like -- I don't know -- 5'8", 230 or
3 something like that. I don't remember the exact
4 specifics.

5 Q So someone who is 5'8" and 230 it's okay to do
6 shoulder surgery in the beach chair position on that
7 person so long as it is anticipated that the outset that
8 the surgery is not going to take more than a certain
9 length of time?

10 A I think that would be a fair way of putting it,
11 yes.

12 Q The length of time that someone who is 5'8" or
13 the size that you assume Nathan Byrd would have been is
14 how long?

15 A My personal rule of thumb -- and everybody I
16 know has different feelings about this -- but personally
17 I don't like ever going over an hour for any sort of
18 beach chair position. To be honest with you I don't
19 particularly like going over an hour with anybody at
20 really any weight but especially people who are
21 overweight. I don't like the beach chair position much
22 over an hour.

23 I do the beach chair position on people who are not
24 overweight at all but have a history of back pain. I
25 tell them not only may your back pain be worse after

1 this but if I think I'm going to exceed an hour and it's
2 a complicated rotator cuff tear I either won't do it or
3 I might recommend they have someone do it who might be
4 willing to do it in a lateral decubitus position, which
5 I don't do cuff repairs unless they're in a muscle
6 transfer.

7 Q At the outset of that rather lengthy answer you
8 indicated that there are differences of opinion among
9 orthopedic surgeons as to how long a person of the size
10 and weight you presume Mr. Byrd to have been be in the
11 beach chair position. So I understand you told me what
12 your personal preference is. I think what you're
13 telling me is that there are orthopedic surgeons
14 practicing within the standard of care for orthopedic
15 surgeons who would take Mr. Byrd to surgery in a beach
16 chair position to repair a rotator cuff for more than an
17 hour. Is that what you told me?

18 A There may be. I think the consensus is clearly
19 around an hour, hour and a half maximum. I don't know
20 too many people that would do it more than an hour and a
21 half. Even then they might reposition the patient
22 for -- some people if they say it's going to take an
23 hour and a half will reposition the patient on the table
24 for five or ten minutes to make sure that they're not
25 compromising any neurological or vascular structures.

1 Q How long did Dr. Frankle have this patient in
2 the beach chair position?

3 A I think it was roughly two and a half hours or
4 so.

5 Q So it's your opinion in this case that
6 Dr. Frankle was below the standard of care for an
7 orthopedic surgeon doing rotator cuff repair on
8 Mr. Byrd?

9 MR. MASTERSON: You're saying Dr. Frankle?

10 MR. MARCHBANK: Yeah, that's your opinion.
11 Correct?

12 THE WITNESS: I thought you were talking about
13 Dr. Klein's surgery.

14 BY MR. MARCHBANK:

15 Q Frankle was the word I used. You understand
16 Dr. Frankle took this man for surgery for two and a half
17 hours?

18 A No, that's my mistake. I thought you were
19 talking about Dr. Klein. Dr. Frankle's surgery I think
20 was around an hour. So I did not hear you correctly.
21 Sorry.

22 Q Oh, okay. Dr. Frankle took this man to
23 surgery, put him in the beach chair position even though
24 the patient had been promised according to the patient
25 that the patient wouldn't be operated on in that

1 position. Correct?

2 A That was my understanding, yes.

3 Q You put in your notes that you read to me that
4 you had a question about why Dr. Frankle would do that.
5 Correct?

6 A Yes.

7 Q Let me ask you. Do you think that Dr. Frankle
8 was below the standard of care in doing surgery in the
9 beach chair position on this obese patient at all in
10 light of the fact that the patient had already
11 complained to Dr. Frankle and others that he had
12 allegedly sustained a compressive neuropathy as a result
13 of Dr. Klein's April 2000 surgery?

14 A That question was almost as long as my answer a
15 minute ago.

16 Q Yeah, trying to get all the facts in there.
17 That's what I'm asking you basically. Do you have an
18 opinion held to a reasonable medical probability as to
19 whether Dr. Frankle was or was not within the standard
20 of care in doing the surgery that he did in the manner
21 he did in the beach chair position in the summer of the
22 year 2000?

23 A Well, let me answer that by saying I'm very
24 confused with all the notes I have because everything I
25 saw and read said lateral decubitus, lateral decubitus,

1 and then it was done in the beach chair. Having said
2 that -- that's why I put that in the notes because I was
3 confused and still am confused.

4 But having said that if Dr. Frankle felt that he
5 could best repair this cuff in that position and he had
6 a clear informed consent to the patient that you already
7 had a problem with this but I can best repair this in
8 this position but we risk making it worse and the
9 patient accepts that, then no, I don't believe that was
10 below the standard of care.

11 Q All right. Let's assume there was no informed
12 consent, that the patient thought that the procedure was
13 going to be done in a position other than the beach
14 chair position and the patient was never consented to do
15 it in the beach chair position. You would believe
16 Dr. Frankle was below the standard of care of doing the
17 procedure in the beach chair position?

18 MR. MASTERSON: I object to the form of the
19 question, assumes facts not in evidence.

20 THE WITNESS: Yes, I do believe that is below
21 the standard of care.

22 BY MR. MARCHBANK:

23 Q All right. Let's go back and talk about the
24 window of time that you believe a patient of this man's
25 size, Nathan Byrd's size can be in the beach chair

1 position. Do you think that surgery on Mr. Byrd would
2 have been within the standard of care if he had been in
3 the chair for up to an hour and a half?

4 A Yes.

5 Q Do you believe that it would have been within
6 the standard of care for this case for that April 2000
7 shoulder surgery to have been done on this gentleman in
8 the beach chair position for up to an hour and 45
9 minutes?

10 A Again to me an hour and a half is maximum. An
11 hour is desirable. Anything past an hour and 30 minutes
12 to me is risking serious problems with the lower
13 extremities and I would not exceed an hour and a half
14 without making some sort of adjustment in the table, in
15 the position to allow for vascularity and getting the
16 pressure off the nerve roots.

17 Q Okay. So let me ask you this then. Is it your
18 opinion that Mr. Byrd could have had the surgery in
19 April of 2000, that he had to repair the rotator cuff
20 and have been in the beach chair position for two and a
21 half hours and the surgeon still have been within the
22 standard of care so long as the surgeon took steps to
23 reposition and to ensure vascularity was maintained?

24 A I'm sorry. I guess I didn't quite get the
25 construction of that question.

1 Q The construction of the question is that you
2 have -- you'll agree with me that it's okay to have the
3 patient in the beach chair position for more than an
4 hour and a half and up to two and a half hours doing
5 shoulder rotator cuff repair if you do in fact
6 reposition the patient, shift the patient, take steps to
7 ensure vascularity is maintained. Correct?

8 A I don't like the wording of it's okay. No, I
9 don't think it's okay. It's not desirable for the case
10 to take at least in my opinion much longer than an hour.
11 If I can just finish.

12 Q Sure.

13 A If you have some sort of a situation that you
14 didn't anticipate or some sort of complication during
15 the surgery or whatever that would require you to take a
16 longer period of time even though it's not desirable you
17 have to make some sort of accommodation after an hour or
18 so to ensure that the patient is not going to suffer
19 injury to the lower extremities, et cetera.

20 Q All right. Well, let me ask you this question.
21 Do you have an understanding as to how long Dr. Klein
22 anticipated at the outset Mr. Byrd's surgery would take
23 based upon all you have reviewed?

24 A Not really, no. All I read was that I thought
25 that he said it's a routine rotator cuff repair, which

1 according to the operative notes it seemed to be. But
2 that's all I recall.

3 Q All right. Have you ever taken a patient in to
4 surgery and found that the procedure that you undertook
5 took longer than you thought it was going to take at the
6 outset of the surgery?

7 A Are you talking about a rotator cuff or any
8 surgical procedure?

9 Q Any surgical procedure.

10 A Sure. I think most of us have, yes.

11 Q Now let's go specifically to rotator cuff
12 repair open fixation. Have you had those take longer
13 than you thought they were going to take?

14 A I can't really recall any ever taking longer
15 than about an hour and 15 minutes. Sometimes they're
16 not quite as easy. Sometimes you have to drill more
17 holes. Sometimes you have to put in more sutures. But
18 I can't recall the last time a rotator cuff repair took
19 me more than an hour, hour and 15 minutes.

20 Q You're not testifying that it's below the
21 standard of care for a procedure to take -- a rotator
22 cuff repair to take longer than the doctor thought at
23 the outset, are you, sir?

24 A No.

25 Q You're not faulting Dr. Klein for taking longer

1 than two and a half hours in this case if at the start
2 of the case he thought it was going to take an hour to
3 an hour and 15 minutes, are you?

4 A The answer is I guess I'm not faulting -- I
5 don't understand from reading the operative report why
6 it took that long. But faulting, I don't know that I
7 would use the word that I find fault with it.

8 Q Let me ask you this. Let's assume that
9 Dr. Klein started out to do surgery on this patient
10 thinking it would take an hour to an hour and 15
11 minutes. It turned out it took two and a half hours and
12 that Dr. Klein ensured that the patient was
13 repositioned --

14 MR. MASTERSON: Object to the form of the
15 question.

16 BY MR. MARCHBANK:

17 Q -- during that extra time to ensure
18 vascularity. If that were the case assuming
19 hypothetically then Dr. Klein would have been within the
20 standard of care?

21 MR. MASTERSON: Object to the form of the
22 question, assumes facts not in evidence.

23 BY MR. MARCHBANK:

24 Q Go ahead and answer, sir.

25 A I guess my understanding of the question is

1 even if it took two and a half hours if he would have
2 gone to the trouble of repositioning within an hour or
3 so, would that have been within the standard of care? I
4 guess my answer to that would have been yes.

5 Q How would you anticipate that the patient would
6 be repositioned? In other words, for him to have been
7 within the standard of care repositioning this patient
8 after an hour -- first of all, how many times would the
9 patient have to be repositioned?

10 A Well, in a two and a half hour period probably
11 twice because as I say after about an hour I would
12 reposition. And certainly the trouble is after about an
13 hour and a half, then you're sort of getting on a
14 proverbial curve that worsens quicker with time. So the
15 first hour, not so bad, but when you start causing
16 increased pressure in the spinal canal and on the nerve
17 roots it gets much worse within shorter periods of time.
18 So I would answer at least twice.

19 Q What would this positioning consist of at a
20 minimum to be within the standard of care?

21 A Well, you would need to get the patient more
22 into the normal supine position and out of the sitting
23 position. So it would be a combination of taking some
24 of the flexion out of the lumbar spine area out of the
25 knee area to relax the structures that I just previously

1 mentioned.

2 Q How about in this particular case in terms of
3 the way in which this patient was positioned, the way
4 the patient was padded? If the procedure had taken a
5 shorter period of time, let's say less than the hour to
6 hour and 15 minutes or at the hour to hour and 15 minute
7 range, would you have any criticism?

8 A Again I'm not sure of the question. Are you
9 saying if he would have been properly padded --

10 Q No. Bad question. Was he properly padded and
11 positioned for a procedure had the procedure, the
12 rotator cuff repair, taken only an hour to hour and 15
13 minutes?

14 A I don't really know the answer to that. I
15 wasn't there. I haven't seen pictures of the patient,
16 so on and so forth. A lot I think in this case have
17 been made of things like padding, et cetera, and the
18 beach chair position. But again I want to emphasize the
19 biggest problem with the beach chair position is the
20 time you're in it. It isn't the padding. It isn't any
21 of that other stuff. It's the time you're in that
22 position. That's the problem. Yes, flexion has a
23 little bit to do with it, whether it's 90 degrees or
24 80 degrees. All that contributes. But it's more a
25 question of the time you're in it rather than the

1 padding.

2 Q So in this case based upon all you have
3 reviewed to date you don't have any criticism of the way
4 in which he was positioned and the way in which he was
5 padded. Your only criticism that amounts to a standard
6 of care deviation accusation is the length of time in
7 the chair. Correct?

8 A Yes, sir.

9 Q You mentioned earlier the report from this
10 Dr. Wagshul, W-A-G-S-H-U-L. Correct?

11 A Yes, sir.

12 Q All right. Have you ever seen a case study, a
13 published case study or a published study of any type in
14 which anybody other than Nathan Byrd was ever claimed to
15 have suffered a neuropathy, a compressive neuropathy as
16 a result of being in a beach chair position for two and
17 a half hours?

18 A Actually I have over the last 20 years. I know
19 you're going to ask me for the source and where I saw
20 it.

21 Q I sure am.

22 A I honestly don't remember. Not frequently but
23 infrequently in the literature lower extremity problems
24 resulting from the beach chair position has been talked
25 about. If you're asking me are there large studies, I

1 don't know of any large studies. But I have seen
2 several notations in the literature of people with lower
3 extremity problems following the beach chair position.
4 Hence, all the discussion about it during residencies.

5 Q Weren't those people in the procedure for 10,
6 12, 14 hours?

7 A Oh, no. You have to understand that with the
8 advent of arthroscopy especially shoulder arthroscopy
9 this subject was discussed ad infinitum. The reason is
10 that thousands and thousands of orthopedic surgeons were
11 doing shoulder arthroscopy in the beach chair position,
12 and they were doing it on people they were afraid to do
13 rotator cuff repair on because these were obese people.
14 So they took the next best step.

15 That's when several articles in the literature kept
16 lamenting about avoiding the beach chair position for
17 long periods of time even though you think arthroscopy
18 is a simpler procedure than an open procedure, which it
19 is. Remember not to keep these people in the beach
20 chair position if you can for longer than an hour.

21 Q It sounds to me like we may have backed into a
22 discussion of all of the opinions that you hold in this
23 case with regard to the conduct of surgery. Have we
24 covered all your opinions?

25 A I think those certainly would be the

1 highlights, yes. I can't think of -- other than what I
2 have already told you about some of the review of
3 records of things that I just don't really understand.
4 But I would say that, yes, we have covered what I think
5 is the important issues.

6 Q All right. In terms of this gentleman's, that
7 is Nathan Byrd's, prognosis or lack of a prognosis in
8 terms of future recovery in terms of Nathan Byrd's
9 deficits and what they mean in terms of vocations, that
10 type of things, I would assume you have no opinions and
11 you're deferring to the neurologist. Is that correct?

12 A Yes, sir.

13 Q If in fact Mr. Byrd suffered a compressive
14 neuropathy as a result of the April 2000 surgery
15 Dr. Klein did, can you account for why Mr. Byrd reported
16 that after an hour in the beach chair position with
17 Dr. Ruffing he was no better or no worse than he was
18 before? Is that something you have an opinion on or do
19 you refer to the neurologist on that?

20 A Are you talking about Dr. Frankle?

21 Q Yeah, bad question. The question is do you
22 have an explanation for why if you assume hypothetically
23 if this patient sustained a compressive neuropathy in
24 the April rotator cuff repair the patient wasn't made
25 any worse by Dr. Ruffing taking this allegedly already

1 impaired patient back to surgery in the beach chair
2 position? Do you have an opinion regarding that?

3 MR. MASTERSON: I object to the form of the
4 question. It includes facts not in evidence.

5 MR. MARCHBANK: Maybe it does. I'm just trying
6 to find out whether you're deferring to the neurologist
7 on that issue.

8 THE WITNESS: I would say yes and no. My
9 comment would be I think it proves what I'm trying to
10 explain to you. And that is, if you're in this position
11 roughly an hour, hour and 15 minutes you can sort of get
12 away with it if you will. I don't know if that's the
13 right way to put it. But you can get away with this
14 sort of position in someone like Mr. Byrd. You get past
15 that hour and 15 minutes, hour and 30 minute window,
16 then exponentially things get worse in a hurry. Having
17 said that I would defer to the neurologist. I'm not
18 trying to say it proves my point but that's sort of what
19 I'm saying I guess.

20 BY MR. MARCHBANK:

21 Q Okay. Have you previously testified either in
22 deposition or trial in any other cases of alleged
23 medical negligence that involved issues of positioning
24 during surgery or compressive neuropathy as a result of
25 surgery, that type of thing?

1 A I can't recall anything quite like it, no.

2 Q Have you ever personally seen a compressive
3 neuropathy in a surgical patient resulting from beach
4 chair position? When I say personally I'm meaning one
5 of your patients or in patients that you encountered
6 firsthand during your training or through consulting on
7 behalf of a colleague, a partner, that type of thing?

8 A I saw one case when I was on physical medicine
9 and rehabilitation at U.C. Davis as a resident rotating
10 through the PMFR service of a gentleman who had a
11 extensive rotator cuff repair that had had bilateral
12 neuropathies which is why we were seeing him in the
13 clinic. He walked with a walker, had severe neuropathy,
14 weakness. That's the only one I saw in training.
15 Another patient I saw with one leg in neuropathy
16 following a rotator cuff repair many years ago when I
17 shared office space with Dr. McDonnell in Berkeley, but
18 that was transient and after about a week or ten days it
19 went away.

20 Q The patient that you mentioned with bilateral
21 neuropathy complaints, do you recall the length of
22 positioning for that patient?

23 A He was in the position over two hours and I
24 recall that the reason was is they had bleeding problems
25 and he was -- I remember he was a bigger man. He was an

1 overweight man but a big man like 6'2", 6'3". They had
2 bleeding problems they couldn't control bleeding. I
3 remember he was in the beach chair position for I'm
4 going to say two and a half maybe close to three hours.

5 Q And for how long a period did you follow that
6 patient?

7 A I remember seeing him two or three times in the
8 clinic while I was on physical medicine, which I was on
9 for three months.

10 Q Do you know if he ever recovered?

11 A He was already a couple years down the road. I
12 remember the reason he was there is he was being fitted
13 for orthoses for his legs.

14 Q Did you read the deposition of Dr. Ruffing?

15 A I don't believe I have seen a deposition of
16 Dr. Ruffing. I think I have seen the report.

17 Q What about EMGs and nerve conduction velocity
18 test. Do you administer those kinds of tests?

19 A No.

20 Q Do you consider yourself to be an expert on
21 those tests?

22 A No.

23 Q Were you aware that Dr. Ruffing diagnosed this
24 man with myositis that he thought was either
25 mitochondrial or metabolic?

1 A Yes.

2 Q Are you deferring opinions as to whether this
3 fellow has that problem to let the neurologist in this
4 case battle with that?

5 A Again as far as what caused it, I think you
6 have already heard my opinion. What the pathology of
7 the nerves are on EMG I'm not -- I'm just not qualified
8 to say.

9 Q I think what you're saying is you have no
10 opinions as to whether the problem that developed around
11 surgery is the result of a mitochondrial or metabolic
12 myositis or as a result of some other microscopic
13 explanation, you would defer that to the neurologist.
14 Correct?

15 A Again to me there is no question about the
16 cause. The pathology, the mitochondria or whatever, I
17 don't know.

18 Q Do you know whether or not -- I mean in terms
19 of -- to a professional standard of probable certainty,
20 are you in a position to tell us that this man does not
21 have a mitochondrial or metabolic myositis?

22 A Pathophysiologically what you call it I don't
23 know.

24 Q It is -- basically what I think you're telling
25 me is your opinion regarding his complaints is since

1 they developed after the surgery you think it must be
2 related to the surgery?

3 A Correct.

4 Q As to whether or not his problem on a
5 pathophysiological basis is something that doesn't
6 happen as a result of compression and as the result of
7 systemic disease unrelated to compression, you don't
8 know. That's something the neurologists will have to
9 argue about. Correct?

10 A I'm not really sure how different to say it
11 than I have already said it. I have heard neurologists
12 and neurosurgeons argue endlessly over this and that and
13 what the cause of the mitochondria looks like and all
14 this kind of stuff. I'm not qualified to look at EMGs
15 or nerve conduction studies and give prognoses or any of
16 that. I just thought that you shouldn't keep someone
17 like this in a beach chair position for two and a half
18 hours.

19 Q You have not reviewed the EMGs and nerve
20 conduction velocity studies that were done before this
21 surgery. Correct?

22 A No, I have not.

23 Q If this patient could have been operated on --
24 bad question. If this patient had been operated on in
25 an hour and it had the same result, the same complaints

1 of neuropathy, you would not criticize the doctor for
2 falling below the standard of care?

3 MR. MASTERSON: I object to the question.

4 Calls for facts not in evidence speculative.

5 MR. MARCHBANK: It's hypothetical.

6 THE WITNESS: I would say the answer to that
7 question is I would think it would be far less likely
8 that this patient would have had a complication as he
9 had.

10 BY MR. MARCHBANK:

11 Q Right. But you can't rule out that I'm correct
12 it's possible this patient could have had the same
13 complaints even if the surgery had taken an hour, an
14 hour and 15 minutes. Fair?

15 A I suppose anything is possible, yes. I have
16 never seen a person have a surgery like this for one
17 hour with this kind of complaint in my experience. Is
18 it possible? I suppose anything is possible. I got
19 into medical school.

20 Q Hypothetically if Dr. Klein had done the
21 surgery that he did, all other things had been as you
22 understand them to be, but the surgery had only taken an
23 hour to an hour and 15 minutes and this patient ended up
24 with the same neuropathy complaints, it proves that this
25 was possible. You would not be able to criticize

1 Dr. Klein for being below the standard of care.

2 Correct?

3 A Correct.

4 MR. MASTERSON: Same objection.

5 BY MR. MARCHBANK:

6 Q Have you ever published any articles or
7 participated in the publication of any articles as a
8 joint author with anyone else on the issues of surgical
9 positioning or compressive neuropathies?

10 A Of the shoulder area?

11 Q In general.

12 A No, not really. I have done articles that
13 dealt with neurological structures on wrist fusions and
14 so on and so forth but of the shoulder and beach chair
15 positioning, no.

16 Q You made reference in your c.v. to internet
17 worldwide website that you maintain. How long have you
18 maintained that website?

19 A It's been six or seven years I believe.

20 Q Is it one website or two different websites?

21 A All the websites connect just to the sports
22 DRZ, dot, com.

23 Q What are the different websites that connect it
24 to sports DRZ, dot, com?

25 A Well, for a while we had sports, dash,

1 medicine, dot, com. And then we didn't renew that
2 address. So I guess what happens if someone types that
3 out it goes to sports DRZ, dot, com.

4 Q Looking at your c.v. it appears that the last
5 scientific publication that you have participated in was
6 Flints Emergency Treatment and Management, seventh
7 edition?

8 A Yes.

9 Q What year was that? There is not a year on
10 this copy.

11 A I honestly don't remember. It was over ten
12 years ago though.

13 Q Haven't you done any scientific or participated
14 in any scientific publications since that Flints over
15 ten years ago?

16 A I think publications at least for people not in
17 academics are things you do or at least I did during my
18 residency and fellowship. I think when you're in
19 private practice you're way too busy to do this sort of
20 thing. So I was pretty successful and happy to do it
21 during my training but not after I got out.

22 Q There is also on your c.v. a listing of
23 scientific paper presentations. Do you have a c.v. in
24 front of you?

25 A Yes, sir.

1 Q When was the last one of those?

2 A Those were all in the late 70's, early 80's.

3 Q It says course faculties. You list courses
4 that you served as a faculty member on. When was the
5 last one of those?

6 A I think the last one was in the early to
7 mid-90's. I did do several of those within the last ten
8 years.

9 Q Have you spoken to anyone about this case to
10 gather information to have an understanding of the case
11 or formulate the case before you sat down for the
12 deposition other than the plaintiff's counsel?

13 A No.

14 Q For example, you haven't talked to any
15 colleagues and done an informal survey of your
16 colleagues as to how they would do this or that?

17 A No.

18 Q Okay. Let's pause for a second. I want to
19 look over my notes.

20 I asked you about your involvement with either
21 Mr. Masterson or Mr. Fox, the plaintiffs lawyers in this
22 case. Before being asked to get involved in this case
23 have you seen any cases since this case from either one
24 of them if they referred any cases to you since you
25 became involved in the Byrd case?

1 A No, sir.

2 Q Let's take this time to mark as exhibits to the
3 deposition, first of all, a copy of your c.v. Let's
4 mark that as the first exhibit of the defense in to this
5 deposition. Let's also mark the one page of notes that
6 you prepared and read to me as Exhibit 2, the page from
7 Campbell's Orthopedics, let's mark that as 3.

8 A I also have a copy of the cover of Campbell's.
9 So you know it's the eighth edition.

10 Q Let's mark that as a composition exhibit at
11 this time with 3 consisting of those two materials.

12 (Defendants' Exhibits 1, 2, and 3 were marked
13 for identification by the court reporter.)

14 THE WITNESS: Okay.

15 BY MR. MARCHBANK:

16 Q Have you been -- other than those items that we
17 have marked, the only other materials that you have
18 received or ever reviewed in connection with this
19 person, Mr. Nathan Byrd, and his allegations against my
20 client, Dr. Klein, are the two bound volumes of the
21 medical records in the black binder. Correct?

22 A Yes, sir.

23 Q And there is also a couple of things you have
24 got. Those are depositions. Those depositions that you
25 have reviewed are the only two depositions you have

1 reviewed?

2 A Well, they're the depositions of Nathan Byrd,
3 Dr. Frankle and Dr. Klein, and Deborah Byrd, those four.

4 Q Other than the length of time this patient was
5 in the beach chair position you don't have any other
6 criticisms of Dr. Klein? No. Bad question.

7 Other than the length of time the patient was in the
8 beach chair position you have no other allegations that
9 Dr. Klein was below the standard of care. Correct?

10 A Below the standard of care, my only other
11 comment would be as I'm concerned that I didn't really
12 see any informed consent. I think if you are going to
13 do a surgery on a gentleman such as this, you need an
14 adequate informed consent. Maybe I missed it in the
15 records, but I don't see any adequate informed consent.

16 Q Other than possibly informed consent the only
17 place where you feel that Dr. Klein fell below the
18 standard of care is in the length of time the patient
19 was in the beach chair position. Correct?

20 A If an adequate informed consent was done, yes.

21 Q What do you think would have been required of
22 Dr. Klein for him to have obtained adequate informed
23 consent so that informed consent would have been within
24 the standard of care?

25 A I think just the typical informed consent for a

1 rotator cuff especially in an overweight gentleman which
2 would include the usual discussions of the possibility
3 of complications which in most of our hands would be
4 problems with anesthetic, damage to neurovascular
5 structures, no improvement, and possibility of
6 neurovascular compromise, as I mentioned, in the upper
7 or lower extremities.

8 Q So if Dr. Klein had had that discussion with
9 the patient, then Dr. Klein would have been within the
10 standard of care as far as obtaining informed consent?
11 If he didn't have that or a similar discussion he would
12 have been outside the standard of care?

13 A Correct.

14 Q Damage to neurovascular structure is the type
15 of thing that you believe happened to Nathan Byrd in
16 this case?

17 A Yes.

18 Q Now in obtaining informed consent talking with
19 the patient you recognize that it's not possible for the
20 orthopedic surgeon to predict every possible bad
21 outcome? In other words, you can't -- you tell a
22 patient, for example, that they could have a reaction to
23 the anesthetic and you're not going to be able to tell
24 him all of the myriad of possible anesthetic reactions.
25 Correct?

1 A The answer is yes and no. Certainly you can't
2 list all 150 possible complications, but I think general
3 orthopedic surgeons would agree if you're doing shoulder
4 work this is sort of the typical informed consent. If
5 you're doing ligament repair of the knee, so on and so
6 forth. Typically when you do surgery on a shoulder
7 especially in the beach chair position you talk about
8 possible neurovascular complications. I think that's
9 very commonly done.

10 Q All right. If Dr. Klein had told the patient
11 that he could have possible neurovascular complications,
12 that would have been within the standard of care?

13 A Of the lower extremities?

14 Q Yes.

15 A Yes, that would be within the standard of care.

16 Q If he had told him that he could have had
17 possible neurovascular complications to all of his
18 extremities that also would have been within the
19 standard of care?

20 A Yes.

21 Q I think you told us you're not at this point
22 offering a definitive criticism that Dr. Klein was below
23 the standard of care. What you are saying is you don't
24 know because you don't have an understanding of the
25 informed consent discussion that he did have or didn't

1 have?

2 A I couldn't find one. That doesn't mean it's
3 not there.

4 Q For example, if he wasn't asked in the
5 deposition to describe informed consent, then you would
6 not be able to look to Dr. Klein's deposition as a
7 source of what happened in that conversation. Correct?

8 A Again if the informed consent was done, it was
9 done.

10 Q Okay. That's all the questions I have. I
11 would like to have copies of the originals or copies of
12 those items that we marked as my exhibits to the
13 deposition attached to the deposition and would like to
14 request that you provide to plaintiff's counsel copies
15 of your billings and I will send him a letter reminding
16 him to send those to me. Does that seem reasonable to
17 you?

18 A Sure. As long as I can make copies. I would
19 prefer not to let originals of my records go out.

20 Q That's fine. I don't care if you want to leave
21 the originals. That would be fine. Have you had any
22 conversations with this Dr. Wagshul fellow at all?

23 A No.

24 Q You have not recommended that Dr. Wagshul be
25 retained by the plaintiffs in this case?

1 A No.

2 Q That's all the question I have.

3 MR. MASTERSON: I have no questions. Under the
4 rules we have in Florida we can either read or waive.
5 We would like the doctor to read it.

6 THE REPORTER: Counsel, would you like a copy?

7 MR. MASTERSON: Yes.

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I, STEWART ZEMAN, M.D., do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this ___ day of _____,
2002, at _____, _____.
(City) (State)

STEWART ZEMAN, M.D.

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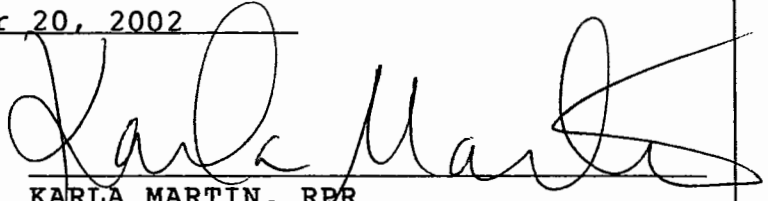
I, the undersigned, a Certified Shorthand Reporter of the State of Illinois, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: December 20, 2002



KARLA MARTIN, RPR
CSR No. 12025