

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-002522
Case No. 2010-CP-5743

RECEIVED
OCT 18 2018
SC Court of Appeals

Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, and
Upstate Lung & Critical Care Specialists, PC,

Appellants,

v.

Ray E. "Chuck" Thompson, and Charles M. Fogarty, MD,

Respondents.

RECORD ON APPEAL
VOLUME VI

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Greenville, SC 29607

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Spartanburg, SC 29303
(864) 680-5079

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Attorney for Appellants

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Attorneys for Charles M. Fogarty, MD

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., Joseph A.
Boscia, III, M.D., Upstate Lung and
Critical Care Specialists, P.C., and
Devendra T. Shantha, M.D.,

Plaintiffs,

v.

William Mark Casey, Ray E. "Chuck"
Thompson, and Charles M. Fogarty, M.D.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

) C.A. NO.: 2010-CP-42-05743

) PLAINTIFF JOSEPH A. BOSCIA, III, MD'S
) RESPONSE TO CHARLES M. FOGARTY, MD'S
) FIRST REQUESTS FOR ADMISSION (1-20)

Now comes the Plaintiff, Joseph A. Boscia, III, MD, responding to Defendant Charles M.

Fogarty, MD's First Request for Admissions (1-20):

1. Admit that you were a principal of S. Carolina Pharmaceutical Research
("S. Carolina") in 2007.

RESPONSE: Admit.

2. Admit that S. Carolina dismissed with prejudice its' claims against Fogarty in the
S. Carolina Action in February 2007.

RESPONSE: Admit.

3. Admit that as a principal of S. Carolina in 2007, you participated in the decision
to dismiss with prejudice S. Carolina's claims against Fogarty in the *S. Carolina* Action.

RESPONSE: Deny.



4. Admit that the document attached hereto as Exhibit A is a true and accurate copy of the "Stipulation of Dismissal with Prejudice" file in the *S. Carolina* Action.

RESPONSE: Admit.

5. Admit that the Medical Malpractice Action was among the reasons *S. Carolina* dismissed its claims against Fogarty in the *S. Carolina* Action.

RESPONSE: Deny.

6. Admit that Fogarty never told you that he would cause the Medical Malpractice Action to be filed or maintained against you unless *S. Carolina* dismissed its' claims against Fogarty in the *S. Carolina* Action.

RESPONSE: Admit.

7. Admit that you never received a demand by Fogarty in relation to the Medical Malpractice Action.

RESPONSE: Admit.

8. Admit that you never received a demand by Fogarty to take, or desist in taking, any action in relation to Fogarty's alleged involvement in the Medical Malpractice Action.

RESPONSE: Admit.

9. Admit that you never received a demand to settle the Medical Malpractice Action for anything other than the payment of money to Casey.

RESPONSE: Deny.

10. Admit that the document attached hereto as Exhibit B is a true and accurate copy of the Medical Malpractice Action Complaint.

RESPONSE: Admit.

11. Admit that the Medical Malpractice Action Complaint alleges, among other things, that Casey suffered permanent brain injury as a result of Plaintiffs' acts and/or omissions in providing medical treatment to Casey in 2004.

RESPONSE: Admit.

12. Admit that the Medical Malpractice Action Complaint is based, in part, on the Permanent Brain Injury Theory.

RESPONSE: Admit.

13. Admit that the Medical Malpractice Action Complaint states, among other things, what you contend is the Permanent Brain Injury Theory.

RESPONSE: Admit.

14. Admit that the document attached hereto as Exhibit C is a true and accurate copy of a subpoena dated June 16, 2006, that your counsel in the Medical Malpractice Action served on Lung and Chest Medical Associates, seeking that entity's medical records and billing records concerning Casey.

RESPONSE: Admit.

15. Admit that the document attached hereto as Exhibit D is a true and accurate copy of a cover letter dated June 16, 2006, that your counsel in the Medical Malpractice Action sent to Lung and Chest Medical Associates, enclosing a subpoena seeking that entity's medical records and billing records concerning Casey.

RESPONSE: Admit.

16. Admit that in August 2006, Lung and Chest Medical Associates produced records to your counsel in the Medical Malpractice Action in response to the subpoena dated June 16, 2006, that your counsel served on Lung and Chest Medical Associates in that action.

RESPONSE: Deny.

17. Admit that the document attached hereto as Exhibit E is a true and accurate copy of the July 21, 2005, Fogarty Office Note that Lung and Chest Medical Associates produced to your counsel in the Medical Malpractice Action in August 2006, in response to your counsel's subpoena in that action.

RESPONSE: Deny.

18. Admit that the July 21, 2005, Fogarty Office Note states, among other things, what you contend is the Permanent Brain Injury Theory.

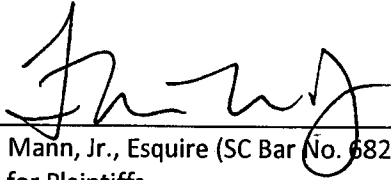
RESPONSE: Deny.

19. Admit that by February 2007, you knew that Fogarty had published the Permanent Brain Injury Theory.

RESPONSE: Deny.

20. Admit that by February 2007, you believed that the Permanent Brain Injury Theory formed a basis for the claims alleged in the Medical Malpractice Action Complaint.

RESPONSE: Deny.

By: 
F. Milton Mann, Jr., Esquire (SC Bar No. 68250)
Attorney for Plaintiffs
151 Harold Fleming Court
Spartanburg, SC 29303
864/680-5079
Milton.Mann@gmail.com

October 22, 2015

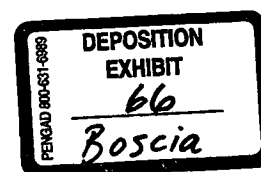
Ellen Cheek

From: Milton Mann <miltymann@gmail.com>
Sent: Wednesday, October 19, 2016 1:30 PM
To: Ellen Cheek; Matt; todd@m.dcoin.co
Subject: Fwd: CMF-Decem 22, 08-deposition records subpoena
Attachments: 201605111524.pdf; ATT00001.htm

Milton Mann
864/680-5079

Begin forwarded message:

From: Gregory Feldman <gfeld3232@aol.com>
Date: October 19, 2016 at 9:30:52 AM EDT
To: Milton <milton.mann@gmail.com>, Joe Boscia <bronchnu@aol.com>
Subject: Fwd: CMF-Decem 22, 08-deposition records subpoena



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
William Mark Casey,	)	
	)	
Plaintiff,	)	
	)	C.A. No.: 2006-CP-42-1728
v.	)	
	)	
Gregory J. Feldman, MD, Joseph A.	)	
Boscia, III, MD, Upstate Lung and Critical	)	
Care Specialists, PC, and Devendra	)	CERTIFICATE OF SERVICE
Shantha, MD,	)	
	)	
Defendants.	)	

I hereby certify that a copy of the Subpoena Duces Tecum and Notice of Deposition of Charles M. Fogarty, M.D. was served upon attorney for Plaintiff this 7th day of October, 2008 by depositing a copy of same in the United States Mail, postage pre-paid to the following address:

Ray E. Thompson, Jr., Esquire
 260 North Church Street
 Spartanburg, SC 29306

Mitzi Higgins
 Mitzi Higgins
 Paralegal to H. Spencer King

THOMPSON 052309

1 A. No, sir.

2 Q. Have you ever?

3 A. Only under supervision.

4 Q. Have you removed foreign bodies from the bronchus?

5 A. Yes, sir.

6 Q. When is the last time you removed a foreign body
7 from a bronchus?

8 A. When Dr. Feldman came to Spartanburg and joined our
9 practice, I basically stopped doing YAG laser
10 procedures and removal of foreign body procedures.

11 Q. And about when was this? About what time was this?
12 Roughly year wise.

13 A. I'd say around 1992..

14 Q. Dr. Fogarty, we -- the notice of deposition asked
15 you to bring records with you. Have you seen that
16 notice?

17 A. Yes, sir. Mr. Thompson showed me the notice this
18 weekend.

19 Q. Did you bring those records?

20 A. Yes, sir.

21 Q. Can I see what you brought?

22 A. Do you want to put the box on the ---

23 Q. Yeah, that's probably the best thing.

24 A. Okay.

25 BY MR. GUNN:

ATTACHMENT "A"

1. All records regarding your treatment of Plaintiff William Mark Casey.
2. All reports regarding your treatment of Plaintiff William Mark Casey.
3. All notes, communications, memorandums including e-mails, to and from any third party related to this litigation or the parties to this litigation.
4. Copies of all questions, memoranda and documents furnished to Plaintiff's counsel related to the depositions of other witnesses.
5. All documents of any kind and nature related to this litigation.
6. If any records as described above have been destroyed, please provide documents with the dates of destruction, the name of the person who destroyed them, the basis for the destruction, and the reason for the destruction.

FILED
CLERK OF COURT
SEATTLE COUNTY
2008 NOV 25 PM 3:52
MARC KITCHENS

THOMPSON 052288

ISSUED BY THE C **STATE OF SOUTH CAROLINA**
40N PLEAS COURT IN THE COUN I OF SPARTANBURG

William Mark Casey,
Plaintiff,
v.

SUBPOENA DUCES TECUM

C.A. No. 2006-CP-42-1728

Gregory J. Feldman, MD,
Joseph A. Boscia, III, MD, Upstate Lung and
Critical Care Specialists, PC, and
Devendra Shantha, MD,

Defendants.

COPY

TO: Charles Fogarty, M.D., c/o Ray E. Thompson, Jr., Esquire, P.O. Box 3408, Spartanburg, SC 29304

☐ YOU ARE COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above case.

Place of Testimony -

Courtroom:

Date and Time:

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

Place: The Ward Law Firm
233 S. Pine Street
Spartanburg, SC 29302

Date and Time: 10:00 am on November 14, 2008

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time below:

All medical records from your practice including, but not limited to, doctor's notes, nurse's notes, laboratory studies, pathology reports, pathology specimens, radiology films and/or reports, reports in your files from other healthcare providers, as well as any and all other medical records and parts of your medical file concerning treatment of Plaintiff William Mark Casey, SSN 251-02-2977, DOB: 11/03/1958 and complete billing records for his care as well as the information listed in ATTACHMENT A.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

Premises

Date and Time

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

H. Spencer King, Esq.,
The Ward Law Firm, P.A., 233 South Pine Street
PO Box 3188, Spartanburg, SC 29304-3188 (864/582-4365)

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(b)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE: October 7, 2008

Attorney for Defendants Gregory J. Feldman, MD, Joseph A. Boscia, MD, and Upstate Lung and Critical Care Specialists, PC

SCCA FORM 254 (7/93)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on Reverse)

THOMPSON 052287

Ellen Cheek

From: Milton Mann <miltymann@gmail.com>
Sent: Wednesday, October 19, 2016 1:31 PM
To: Ellen Cheek; matt@henriksonlaw.com; todd@m.dcoin.co
Subject: Fwd: Knew no evidence for Brain Damage
Attachments: In their own writing.pdf; ATT00001.htm

Milton Mann
864/680-5079

Begin forwarded message:

From: Joseph Boscia <bronchnu@aol.com>
Date: October 19, 2016 at 1:28:16 PM EDT
To: Milton Mann <milton.mann@gmail.com>
Subject: Fwd: Knew no evidence for Brain Damage

Sent from my iPhone

Begin forwarded message:

From: Gregory Feldman <gfeld3232@aol.com>
Date: October 19, 2016 at 10:04:28 AM EDT
To: Joe Boscia <bronchnu@aol.com>
Subject: Knew no evidence for Brain Damage



Letter F___: Pulmonologist qualified to give air emboli opinion?

NEED: What areas will Fogarty testify to?

- 1.
- 2.
- 3.
- 4.
- Etc.

1. Neurological deficiencies due to air emboli - diagnosis - but medical records provide no objective data to substantiate this opinion?

Neurological exams (normal) - no focal deficits to support cerebral dysfunction associated with air emboli.

2. No chemical imaging studies/EEGs show abnormal association with focal cerebral lesions.

3. Neuropsychology findings consistent with depression and anxiety.

4. Temporal issue of manifestation of symptoms of air emboli.

5. June 2005 ___ 8/30/05 & 9/10/05 function not expected with cognitive deficit from cerebral lesions from air emboli where maximum onset one year to stability
(↓ exams not expected)

6. Reported decline (subsequent) in cognitive ability not associated with air emboli.

Rx

Narcotic Prescriptions

CVS - Spartanburg
CVS - Moore
CVS - Bolling Springs
Ron's Pharmacy

Q: On 2/12/06, Fogarty writes Hydrocodone (#150) with 5 refills?

THOMPSON 082935

Ellen Cheek

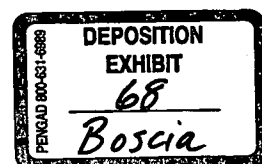
From: miltymann@gmail.com
Sent: Wednesday, October 19, 2016 1:40 PM
To: Ellen Cheek; matt@henriksonlaw.com; todd@m.dcoin.co
Subject: Fwd: Electronic Medical Records
Attachments: Wilson Smith-electronic Medical records.pdf; ATT00001.htm

Milton Mann
864/680-5079 cell

Begin forwarded message:

From: Gregory Feldman <gfeld3232@aol.com>
Date: October 19, 2016 at 10:26:50 AM EDT
To: Joe Boscia <bronchnu@aol.com>, Milton <milton.mann@gmail.com>
Subject: Fwd: Electronic Medical Records

Smith Secretary-Wilson Smith deposition
Nothing on the chart -that was not produced (2009)
Why would anyone be suspicious it exist



WILSON P. SMITH, M.D.

SHEET 5 PAGE 17

1 WILSON P. SMITH, M.D. 17
2 Medical Associates on Mr. Casey?
3 A. Yes, sir.
4 Q. Do you know of any other records that Lung and
5 Chest Medical Associates has on Mr. Casey?
6 A. We had gone to an electronic medical record, and I
7 glanced in there last night and I didn't see any
8 office visits there, but it's possible there's
9 something in that electronic record, but I do not
10 think there is.
11 Q. When did you go to electronic records?
12 A. Well, I looked at that yesterday.
13 Q. But, are there any ---
14 A. I can make a phone call and just answer that
15 question if you'd like?
16 Q. That's fine. While he's doing this I'm going to
17 mark this as Defendant's Exhibit number 1.
18 A. But I have myself not seen him since we've gone to
19 the electronic record.
20 Q. Okay.
21 (COURT REPORTER MARKS ENTIRE FILE OF DR. SMITH AS
22 DEFENDANTS' EXHIBIT NO. 1; ATTACHED TO DEPOSITION).
23 BY MR. KING:
24 And what we're going to do, we agreed we will copy
25 this, substitute the copy ---
DEPOSITIONS AND..., INC.
(864) 585-0642

PAGE 19

1 WILSON P. SMITH, M.D. 19
2 BY MR. KING:
3 If she could reproduce those.
4 BY THE WITNESS:
5 Would you make a physical copy of all those for me?
6 We'll deliver those to you tomorrow?
7 BY MR. KING:
8 That's fine.
9 BY THE WITNESS:
10 Thanks. Appreciate it, Crystal. Bye.
11 BY MR. KING:
12 Was that on the record?
13 BY COURT REPORTER:
14 Yes.
15 BY MR. KING:
16 So on the record we have that there are some
17 electronic records from the span of July 7, 2006 to
18 December 8, 2008. Dr. Smith's going to get us
19 copies of those, but none of those were visits
20 where Dr. Smith was involved in the care; is that a
21 fair statement?
22 BY THE WITNESS:
23 That's correct.
24 DIRECT EXAMINATION RESUMED BY MR. KING:
25 Q. Doctor, the first visit that I have that I believe
that you recorded when you saw Mr. Casey first
DEPOSITIONS AND..., INC.
(864) 585-0642

PAGE 18

1 WILSON P. SMITH, M.D. 18
2 Yes.
3 BY MR. KING:
4 --- for the exhibit and give ---
5 BY MR. THOMPSON:
6 Dr. Smith back his records.
7 BY THE WITNESS:
8 Hey, Crystal, this is Dr. Smith. Can you do me a
9 favor? Would you look up and see if we have any
10 electronic medical record on William Mark Casey.
11 He's about 50 years old.
12 BY MR. GUNN:
13 [REDACTED] 58.
14 BY THE WITNESS:
15 Birth date's [REDACTED] 58. We do. How many visits?
16 All right, do you want me to have them make a
17 physical copy of those?
18 BY MR. KING:
19 First question, what are the dates -- the span of
20 those visits?
21 BY THE WITNESS: Electronic 7-7-06 to 12-8-08
22 What's the span of the dates of those visits, the
23 first to the last? July 7th 2006. December the
24 8th of '08. And can you see if any -- were any of
25 those mine, or are they all somebody else's? None
of them were mine.
DEPOSITIONS AND..., INC.
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PAGE 20

1 WILSON P. SMITH, M.D. 20
2 time, July 14, 2004?
3 A. Yes.
4 Q. And was he referred to you by anyone at that time?
5 A. No, he was a self-referral.
6 Q. And you take self-referrals?
7 A. Yes.
8 Q. In the chart there is a medical history. It says,
9 "Medical History Information Sheet." Do you see
10 that?
11 A. Yes, sir.
12 Q. And in 2004 was that a form that your practice used
13 for new patients?
14 A. Yes, it was.
15 Q. And the information, is that recorded in the
16 patient's handwriting? Do you ask the patient to
17 complete that?
18 A. Yes, though I had made notes as well in the -- to
19 the side. 7-14-04
20 Q. Doctor, would you talk me through your notes?
21 A. Okay. "sleap wall, fatigue, Michalin, swing shift,
22 very physical job for several years, 2000 had a
23 stress test and a cath which was normal." And
24 follows over there in the ---
25 Q. And are these notes that you made during your first
visit with him?
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THOMPSON 002896

From: gfeld3232@aol.com
Sent: Thursday, August 07, 2008 7:47 PM
To: milton.mann@gmail.com
Subject: Fwd: Check out South Carolina Judicial Department - Opinions

what would be the reason not to send complete record to MUSC? among many other things

-----Original Message-----

From: GFeld3232@aol.com
To: Bronchnu@aol.com
Sent: Sat, 11 Aug 2007 2:49 pm
Subject: Check out South Carolina Judicial Department - Opinions

B. Civil Conspiracy

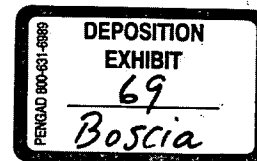
The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); see also Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp., 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) ("A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage.") (citation omitted). It is essential that the plaintiff prove all of these elements in order to recover. Lyon v. Sinclair Refining Co., 189 S.C. 136, 200 S.E. 78 (1938). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

[Click here: South Carolina Judicial Department - Opinions](#)

1. We have at least Casey plus his Lawyer and Possibly Fogarty plus Chuck Thompson's Wife
2. As for Abuse of Process that is already fact (He had no right to speak to Press about trial matter Violation of Civil Procedure)

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MANN 001168

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG) C.A. NO. 2010-CP-42-05743

Gregory J. Feldman, MD, Joseph A.)
Boscia, III, MD, Upstate Lung & Critical)
Care Specialists, PC, and Devendra)
Shantha, MD,)

Plaintiffs,)

Versus)

William Mark Casey, Ray E. "Chuck")
Thompson, and Charles M. Fogarty, MD,)

Defendants.)

DEPOSITION OF
DEVENDRA SHANTHA, M.D.

Pursuant to Notice of Deposition and/or agreement
in the above-entitled case, the deposition of DEVENDRA
SHANTHA, M.D. was taken on the 20th day of October, 2016,
commencing at the hour of 9:48 a.m. in the offices of
Wilkes Law Firm, Attorneys at Law, Spartanburg, South
Carolina.

REPORTED BY: Rosalind Poole Walters,
Certified Verbatim Reporter-Master

LEGAL EAGLE
Certified Verbatim Reporters
Post Office Box 5682
Greenville, South Carolina 29606
(864) 587-7050 or (864) 467-1373
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Attorney for Defendant Charles M. Fogarty, M.D.

Also attending: Mr. Charlie Fogarty

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Note: Exhibit retained by counsel.

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH
MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 STIPULATIONS:

2 It is agreed by and between the counsel for the parties as
3 follows:

- 4 1. That this deposition is being taken pursuant to Rule 30
5 of the South Carolina Rules of Civil Procedure;
6 2. That the deponent waives the right to read and sign the
7 deposition transcript.

8 *****

9 DEVENDRA SHANTHA, M.D., being duly sworn to tell the truth,
10 the whole truth, and nothing but the truth of his own
11 knowledge concerning the matter herein, testified as
12 follows:

13 *****

14 EXAMINATION BY MS. CHEEK:

15 Q. Dr. Shantha, good morning. My name is Ellen Cheek. I
16 represent Dr. Fogarty in this matter. You've been
17 introduced to other counsel. We have Todd Nichols on
18 the phone who represents Mark Casey. Matt Henrikson
19 represents Chuck Thompson. Also present is Charlie
20 Fogarty --

21 A. All right.

22 Q. -- who is Dr. Fogarty's son. And Milton Mann, your
23 lawyer. The court reporter has sworn you in to this
24 deposition. Until your deposition concludes you are
25 under oath, sworn to tell the truth and nothing but.

1 Also pursuant to our court rules, during any break in
2 your deposition while you are still under oath you are
3 not to discuss the substance of your testimony with
4 anyone, including your lawyer. Do you understand that?

5 A. Yes.

6 MR. MANN:

7 May I put something with this, also?

8 MS. CHEEK:

9 Sure.

10 MR. MANN:

11 If we happen to have a discussion on a lunch
12 break, any discussion is hereby waived, any discussion.
13 So we're going beyond the rule.

14 MS. CHEEK:

15 I understand and appreciate that.

16 EXAMINATION RESUMED BY MS. CHEEK:

17 Q. If you need a break during the deposition, please let
18 me know. We are happy to do so.

19 A. All right.

20 Q. This is not supposed to be a tortuous event, although
21 it's one I'm sure you don't choose to do on your days
22 off very often or days you've taken off very often. If
23 you do not understand a question that I've asked,
24 please tell me that and I will try to rephrase. Also,
25 our court reporter is taking down our conversation.

1 So, to the extent that you can provide a verbal answer
2 instead of shaking your head, then that will allow her
3 to take down your testimony. I will try my best to
4 allow you to complete your answers before I start
5 again, but if we could try to have me finish the
6 question before you start answering, that also makes
7 her job and the transcript easier. Do you understand
8 those instructions?

9 A. Yes.

10 Q. Could you please state your full name for the record?

11 A. Devendra K. Shantha.

12 Q. And your address?

13 A. 706 Hollywood Street, Spartanburg, South Carolina,
14 29302.

15 Q. Could you state your occupation, please?

16 A. Physician, anesthesiology.

17 Q. And with whom do you work?

18 A. Foothills Anesthesia Consultants.

19 Q. How long have you been employed with Foothills?

20 A. I've been a partner in the practice for 17 years total.

21 MR. MANN:

22 Dr. Shantha, I'm going to ask you to speak up just
23 a little bit for Todd's benefit because he's on the
24 phone. So if you could speak up a little bit, I think
25 that will help the process. Thank you.

1 EXAMINATION RESUMED BY MR. MANN:

2 A. Okay. I've been a member of Foothills Anesthesia
3 Consultants for over 17 years.

4 Q. Did you join Foothills directly after your training was
5 completed?

6 A. No.

7 Q. Where did you work before Foothills?

8 A. I was a locum tenens provider. So there are multiple
9 of places that I worked.

10 Q. Was that here in---

11 A. That was -- that was here in Spartanburg for several
12 weeks, but throughout the Southeast and Midwest.

13 Q. Where did you do your undergrad?

14 A. Gainesville College.

15 Q. And is that Gainesville in Georgia?

16 A. Georgia.

17 Q. Do you know, my husband attended Gainesville College
18 for a year. You went a lot further in school than my
19 husband did at Gainesville College, but how about that?

20 A. Yeah.

21 Q. Where did you grow up?

22 A. Atlanta.

23 Q. What part?

24 A. The northeastern part of Atlanta, northeastern DeKalb
25 County area. So in Emory, Emory-Druid Hills area.

1 Q. Well, we'll do on a break what we know in common there
2 from that area.

3 A. Okay.

4 Q. It is dear to my heart. Where did you do your medical
5 school?

6 A. University of Mysore in Southern India.

7 Q. How do spell Mysore?

8 A. M-y-s-o-r-e.

9 Q. And that was your four-year medical degree. Correct?

10 A. It's a British system. So it's a little bit longer
11 than that. It's four and a half years plus one year of
12 interning. So almost six.

13 Q. Where did you do your internship?

14 A. My PGY1 year would have been done in Medical College of
15 Georgia, along with my residency.

16 Q. Is it a two-year residency?

17 A. Three. So it's one year internship and a three-year
18 residency.

19 Q. Did you complete any fellowships after that?

20 A. No.

21 Q. After your residency is when you came to the
22 Spartanburg area or no?

23 A. No. I did locum tenens anesthesiology for, I don't
24 know, maybe 20 -- 20 months or 22 months. So I'd be
25 practicing many different places, wherever the need

1 was.

2 Q. And that brought you current up to your Foothills
3 tenure. Is that correct?

4 A. Yes.

5 Q. In what states are you licensed to practice medicine?

6 A. South Carolina.

7 Q. When did you receive that license?

8 A. 1997.

9 Q. And you're board certified in what fields?

10 A. Anesthesiology.

11 Q. Have you ever been deposed before?

12 A. Yes.

13 Q. About how many times?

14 A. Once.

15 Q. Was that deposition in the Casey versus Feldman
16 underlying malpractice suit?

17 A. That's correct.

18 Q. Have you ever been a party to a suit other than the
19 Casey versus Feldman malpractice suit?

20 A. Malpractice or---

21 Q. Any type of other lawsuit.

22 A. Yes.

23 Q. How many of those suits have you been a party to?

24 A. One suit, which is a business, ongoing business.

25 Q. It's currently pending?

1 A. Currently pending.

2 Q. Are you a plaintiff or a defendant in that suit?

3 A. I'm the plaintiff.

4 Q. Is that the present lawsuit or another one? And let
5 me make sure that I've got my terminology one that you
6 and I can use to converse. If I say the medical
7 malpractice action, I'm going to refer to the Casey
8 versus Feldman medical malpractice action. If I talk
9 about the present suit where you're a plaintiff along
10 with Dr. Feldman, Dr. Boscia, Upstate Lung against Mr.
11 Casey, Thompson, and Dr. Fogarty, I'm going to say the
12 current action. Does that suit you?

13 A. Okay. That will be fine.

14 Q. When you were telling me you've been a party in one
15 other suit, is that suit that you're describing the
16 present action?

17 A. No. This is a business. This is a separate.

18 Q. And you said that you were a plaintiff in that lawsuit.
19 Correct?

20 A. I'm the plaintiff in that lawsuit.

21 Q. Are there any other plaintiffs?

22 A. No.

23 Q. Who is the defendant in that lawsuit?

24 A. Andy Sharma or Anupam, A-n-u-p-a-m, Sharma, S-h-a-r-m-
25 a, and DAPS Investments, LLC.

1 Q. Did you say Gaps?

2 A. D-A-P-S, all caps, Investments.

3 Q. Is that a Spartanburg County suit?

4 A. No. It's Columbia County in Georgia.

5 Q. Who is your lawyer in that lawsuit?

6 A. It's Mr. Andrew Tisdale.

7 Q. Is Attorney Tisdale local or is he in Georgia?

8 A. He's in Georgia, in Augusta, Georgia.

9 Q. What is your claim or claims in that lawsuit?

10 A. Wind-up of financial affairs and a breach of fiduciary
11 duty of business partners or a business partner in this
12 case.

13 Q. What type of business were you winding up?

14 A. They were involved in the -- well, the business was
15 involved in real estate development and construction.

16 Q. Dr. Shantha, recently you filed a medical board
17 complaint against Dr. Fogarty. Is that correct?

18 A. Correct.

19 MR. MANN:

20 Objection.

21 EXAMINATION RESUMED BY MS. CHEEK:

22 Q. Was a medical board complaint recently filed on your
23 behalf against Dr. Fogarty?

24 MR. MANN:

25 Objection. You can answer.

1 EXAMINATION RESUMED BY MS. CHEEK:

2 A. I believe that to be correct.

3 Q. Are you a party to a medical board complaint that has
4 been filed against Dr. Fogarty?

5 MR. MANN:

6 Objection.

7 EXAMINATION RESUMED BY MS. CHEEK:

8 A. I'm not a party to -- to that, but we have independent
9 counsel that is representing us regarding that issue.

10 Q. Who is your---

11 A. Via Milton Mann.

12 Q. Do you understand that Attorney Mann is your counsel
13 with respect to this current action? Correct?

14 A. The current action now?

15 Q. Yes.

16 A. Correct.

17 Q. Do you understand Attorney Mann is your counsel with
18 respect to the medical board complaint against Dr.
19 Fogarty?

20 A. I do not understand that completely.

21 Q. Who is your counsel with respect to the medical board
22 complaint?

23 A. Well, we received a letter from -- is it Dessa? Dessa
24 --

25 Q. Is it Dessa Ballard?

1 A. -- Ballard stating that she's independent of what's
2 happening here is what I received in the letter.

3 Q. The letter you received from Dessa Ballard, was that a
4 letter of retainer?

5 MR. MANN:

6 Objection.

7 EXAMINATION RESUMED BY MS. CHEEK:

8 A. I'm not sure. I don't believe so, but I'm not sure.

9 Q. Has Dessa Ballard filed a medical board complaint on
10 your behalf against Dr. Fogarty?

11 A. I'm not sure.

12 MR. MANN:

13 Objection.

14 EXAMINATION RESUMED BY MS. CHEEK:

15 A. I don't know that she has or hasn't.

16 MS. CHEEK:

17 Milton, if I could clear up your objection I will
18 happily do so. I think that would also allow him to --

19 MR. MANN:

20 Sure. We can step outside.

21 MS. CHEEK:

22 -- answer more fluidly.

23 MR. MANN:

24 Absolutely.

25 (Off the Record; 10:01 -- 10:13 a.m.)

1 EXAMINATION RESUMED BY MS. CHEEK:

2 Q. Dr. Shantha, it has been represented to us that you are
3 represented by counsel Dessa Ballard with respect to
4 the medical board complaint that has been filed against
5 Dr. Fogarty. We are going to ask you questions about
6 your understanding of the medical board complaint. To
7 the extent that you have counsel and you've spoken to
8 her, she's given you information -- if she's given you
9 advice about it, that's not my intent of the questions
10 to delve into what your counsel, what your attorney has
11 told you about that action. I'm seeking your
12 understanding. Also it's been represented to us that
13 Attorney Mann is your co-client of Attorney Ballard
14 with respect to that medical board complaint, and to
15 the extent that Attorney Mann wants to assert some
16 blanket objection to my questioning on the record here,
17 what our intent is is to allow the blanket objection to
18 stand and cover all of the questions with respect to
19 the medical board complaint without Attorney Mann
20 having to assert the objection after each question. He
21 and I believe that will make the discourse go easier
22 but allow his objection to stand.

23 MR. MANN:

24 And, you know, on the record, thank you, and Dr.
25 Shantha, what I'm going to do is I'm just basically

1 going to state my position. Number one, I think
2 questions respecting any complaint that has or has not
3 been filed with the medical board are inappropriate
4 because you have an attorney representing you in that
5 issue and that you should have the right to meet with
6 her prior to being questioned on those issues and you
7 should have the right to have her guidance and counsel
8 before being subjected to those questions. So I
9 definitely object on those bases. Thank you.

10 (Defendant's Exhibit Number 70 marked)

11 EXAMINATION RESUMED BY MS. CHEEK:

12 Q. Dr. Shantha, I'm going to hand you what's been marked
13 as Exhibit 70 in this matter. Would you agree that
14 this is an e-mail sent on September 8, 2006 to you from
15 Holly Mann stating that your deposition in this case
16 has been set for October 20?

17 A. Correct.

18 MS. CHEEK:

19 As I stated earlier, and I'll state this for the
20 record again, our position in this matter remains that
21 questions regarding the medical board action are
22 relevant to this suit and that I have the ability to
23 ask you about them and all propriety and that you have
24 also had since at least September 8 to prepare in any
25 manner that you saw fit for this deposition. Now I'll

1 continue with my questioning.

2 MR. MANN:

3 And I'll renew my objection as previously stated.
4 This line of questioning is inappropriate because he is
5 represented respecting this issue. That counsel is not
6 here and that counsel has not had the opportunity to
7 prepare him for this line of questioning. Thank you.

8 MS. CHEEK:

9 I will respond again that that counsel has had or
10 Dr. Shantha has had adequate time to seek whatever
11 counsel, advice, and assistance in relation to
12 preparing for this deposition as stated in Exhibit 70.

13 EXAMINATION RESUMED BY MS. CHEEK:

14 Q. Dr. Shantha, what is your understanding of your medical
15 board complaint that you've asserted against Dr.
16 Fogarty?

17 A. Well, my understanding is that upon discovery of this
18 MRI which came through an anonymous tip, apparently,
19 which is what's led to the current issue, that this
20 case was not really what it was meant to be, which is a
21 medical malpractice case.

22 Q. Have you seen a copy of the submittal that was tendered
23 to the medical board on your behalf?

24 A. No.

25 Q. You've not seen a copy of the complaint that was --

1 A. I've seen the --

2 Q. -- registered on your behalf against Dr. Fogarty?

3 A. I have not seen that. I've seen the letter that I
4 received that stated that -- that the defendants
5 involved should self report; otherwise, appropriate
6 action should be taken by their peers.

7 Q. Are you referring to a letter that Attorney Ballard
8 sent to counsel for defendants in this case dated June
9 6, 2016?

10 A. I believe so, but I don't know that for a fact. I
11 believe that's the letter.

12 Q. Other than that letter have you seen anything that was
13 submitted on your behalf to the medical board?

14 A. No.

15 Q. Did you review any documents in relation to your
16 medical board complaint?

17 A. No.

18 Q. Do you have a letter of engagement from Attorney
19 Ballard?

20 A. Not with me. Not on my person, no. I do not have any
21 letter that I've seen; however, via Milton Mann we may
22 have engaged that attorney to represent us.

23 Q. Have you paid Attorney Ballard any money?

24 A. No.

25 Q. Do you know whether you're expected to pay Attorney

1 Ballard any money?

2 A. I do not..

3 Q. Do you have a letter of engagement for any counsel in
4 the present action, not the medical board action but
5 the present lawsuit?

6 A. From Dessa Ballard?

7 Q. Do you have a letter in the present lawsuit from any
8 attorney that you've engaged to represent you in this
9 case?

10 A. I'm not sure if I have the letter on hand, but Milton
11 Mann is the engaging attorney.

12 Q. Have you paid---

13 A. And he may have that letter.

14 Q. Have you paid Attorney Mann any money in relation to
15 his engagement --

16 A. No.

17 Q. -- in this lawsuit?

18 A. No..

19 Q. As to the substance, again, of your medical board
20 complaint against Dr. Fogarty, your understanding is
21 that that concerns an MRI of Casey that was performed
22 in relation to the underlying medical malpractice
23 action?

24 A. Correct.

25 Q. whose idea was it to hire Dessa Ballard?

1 A. I do not know the answer to that.

2 Q. who first communicated to you regarding the possibility
3 or plan to file a medical action --

4 MR. MANN:

5 Objection.

6 EXAMINATION RESUMED BY MS. CHEEK:

7 Q. -- medical board action complaint against Dr. Fogarty?

8 MR. MANN:

9 Objection, and I'm going to instruct him not to
10 answer. I'm sorry.

11 EXAMINATION RESUMED BY MS. CHEEK:

12 Q. Did anyone other than Attorney Mann contact you about
13 filing a medical board action against Dr. Fogarty?

14 A. No.

15 Q. Have you spoken with Dr. Feldman about the medical
16 board complaint filed against Dr. Fogarty?

17 A. I've not spoken with him about the complaint, but he
18 has spoken to me saying that there will -- there
19 probably will be a complaint.

20 Q. When did that communication occur?

21 A. I cannot remember the date.

22 Q. Do you believe it was before the complaint was filed or
23 after?

24 A. Before the---

25 Q. Medical board complaint was filed or after.

1 A. Before the -- by Dessa Ballard?

2 Q. Correct.

3 A. I believe that communication took place before.

4 Q. Did you authorize the medical board complaint to be
5 filed on your behalf?

6 A. I was okay with the medical board complaint action to
7 be filed. I had no objection to it, but I did not have
8 any signature of approval from my part. I received the
9 letter and I had no objection to that letter.

10 Q. How many conversations have you had with Dr. Feldman
11 about the medical board complaint against Dr. Fogarty?

12 A. Maybe one or two, and that would have been briefly in
13 passing. It's not been a sit-down or on the telephone.
14 It's just briefly in passing, you know, kind of what
15 we're looking at.

16 Q. What did he tell you that you were looking at?

17 A. He said that due to the MRI that has shown up that was
18 taken of Mark Casey that wasn't produced during the
19 deposition, that he felt that that was, you know, not
20 appropriate, you know, care or diagnosis of the patient
21 and/or proceeding thereafter, you know. So he said
22 that that's a medical board issue. So not in those
23 exact terms, but I can't remember the exact terms that
24 he said, but something along those lines.

25 Q. Have you had any conversations with Dr. Boscia about

1 the medical board complaint?

2 A. No.

3 Q. Are you aware that Dr. Fogarty's counsel requested a
4 copy of what had been sent to the medical board in
5 relation to this complaint against Dr. Fogarty?

6 A. No.

7 Q. Dr. Shantha, I believe that this concludes my portion
8 of your questioning during your deposition today.
9 Attorney Henrikson and Attorney Nichols and also
10 Attorney Mann will have the opportunity to question
11 you. Since we are changing horses we're going to take
12 a short break.

13 A. Okay.

14 Q. And then resume. Thank you.

15 A. All right. Thanks.

16 (Off the Record; 10:29 -- 10:58 a.m.)

17 EXAMINATION BY MR. HENRIKSON:

18 Q. Dr. Shantha, my name is Matt Henrikson. We met very
19 briefly --

20 A. Yes.

21 Q. -- before the deposition, and I just have a couple of
22 follow-up questions first. Have you ever signed any
23 document that indicates that Ms. Ballard represents you
24 for any purpose?

25 A. No.

1 MR. MANN:

2 Objection.

3 EXAMINATION RESUMED BY MR. HENRIKSON:

4 Q. Have you ever signed any document that indicates that
5 any other attorney represents you regarding the matter
6 that we're here for today?

7 A. I've signed a document with Milton Mann.

8 Q. All right. Before we get started, and I don't know how
9 long this is going to be. Because of some
10 representations that we had received before, I just
11 wanted to ask you, do you want to proceed as a
12 plaintiff in this case if all of the defendants in this
13 case were to offer reciprocal and mutual releases so
14 that you release them and they release any claims they
15 may have against you? Is that something you would be
16 interested in?

17 MR. MANN:

18 Matt, hold on.

19 EXAMINATION RESUMED BY MR. HENRIKSON:

20 A. I'll have to defer to Mr. Mann.

21 MR. MANN:

22 Hold on one second. Can we go off the record?

23 MR. HENRIKSON:

24 Yeah.

25 (Off the Record; 11:00 -- 11:33 a.m.)

1 MR. HENRIKSON:

2 My understanding, Milton, we've come to an
3 agreement that Dr. Shantha is going to dismiss with
4 prejudice his claims against Dr. Fogarty, Mr. Casey,
5 and Mr. Thompson, and Mr. Thompson, Mr. Casey, and Dr.
6 Fogarty are going to also release any claims that they
7 have against Dr. Shantha. It is going to be a mutual
8 reciprocal release of all claims related to the Casey
9 matter and to any claims which may arise out of the
10 medical board matter and that there will be -- we are
11 agreeing to this on the record. Dr. Shantha is here
12 and he agrees to it. Is that correct?

13 WITNESS:

14 Correct.

15 MR. HENRIKSON:

16 Okay. And then in the next day or two we'll have
17 a written mutual reciprocal release to submit to you
18 along with the stipulation of dismissal in this case,
19 and the date for the mutual reciprocal release will be
20 today back---

21 MR. MANN:

22 How about the date of execution?

23 MR. HENRIKSON:

24 The date of execution of the -- that's right.
25 That's better. The date of execution of the release.

1 And then we will have the stipulation filed. We'll
2 have the release. We will return all copies of any
3 financial material produced by Dr. Shantha in any form
4 whatsoever. We will give it to you. To the extent
5 that we have it stored digitally, we will double delete
6 it or whatever we have to do to get rid of it. We will
7 return everything back to you. And we will leave the
8 deposition open until those final documents are signed,
9 but this is our agreement. Right?

10 MR. MANN:

11 I need to modify that in a couple of fashions, and
12 let me see if you agree. That the effective date
13 moving backwards will be the date of execution.

14 MR. HENRIKSON:

15 of the release.

16 MR. MANN:

17 of the release. The beginning date will go back
18 into time to January 1, 2003, four, something like
19 that. It has to extend all the way through and
20 backwards of the underlying medical malpractice case.
21 Wouldn't you agree?

22 MR. HENRIKSON:

23 Sure, agreed.

24 MS. CHEEK:

25 Agreed.

1 MR. MANN:

2 Okay. So I just want to make sure that everybody
3 understands that when we're done we're done.

4 MS. CHEEK:

5 And in a relative housekeeping matter, in terms of
6 the return of records, Attorney Henrikson has mentioned
7 deletion of electronically stored documents. If you
8 want the option of the return of the physical records,
9 counsel in possession of the records can certify
10 destruction of them as an alternative, but that is
11 simply your choice, and I say that only because if you
12 want the boxed-up records, the physical ones that
13 you're going to destroy, then you just need to let us
14 know.

15 MR. MANN:

16 Let's do this right now since we have Dr. Shantha
17 here and we're all here as a group. Your tax returns
18 and things of that nature that we have produced in
19 conjunction with this case, those are to be destroyed
20 and returned to you. That was part of the order of the
21 court respecting certain documents and things of that
22 nature as well as an agreement between the parties. I
23 trust all the attorneys, to include Todd, implicitly,
24 and also his partner Joe Mooneyham implicitly. If they
25 tell me that those documents are destroyed, they will

1 be destroyed. They are officers of the court as well
2 as attorneys representing their clients. And so if
3 they attest to me, which can be done my e-mail which I
4 would of course forward to you, that those documents
5 have been redacted from this case, from consideration
6 and from any kind of future circulation respecting any
7 use whatsoever, that would be my recommendation to you,
8 to allow them to simply confirm to me that that has
9 occurred. Are you satisfied with that?

10 WITNESS:

11 Yes.

12 MR. MANN:

13 Thank you.

14 MR. HENRIKSON:

15 All right. Thank you.

16 MR. MANN:

17 All right. And we will adjourn.

18 (There being no further questions, this deposition ADJOURNED
19 at 11:38 a.m.)
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, ROSALIND POOLE WALTERS, a Notary Public in and for the State of South Carolina, do hereby certify that the foregoing 26 pages represents a true and accurate transcript of the deposition of DEVENDRA SHANTHA, III, M.D., which was taken by me on the 20th day of October, 2016.

That the witness was first duly sworn to tell the truth, the whole truth and nothing but the truth of his own knowledge concerning this matter.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Rosalind Poole Walters, CVR-M
Notary Public for South Carolina
Commission Expires: 12-18-16



Holly Mann <holly.jo.mann@gmail.com>

Casey - Deposition dates

Holly Mann <holly.jo.mann@gmail.com>

Thu, Sep 8, 2016 at 10:58 AM

To: "<dfoster@upstatelung.com>" <dfoster@upstatelung.com>, Milton Mann <milton.mann@gmail.com>, Greg Feldman <gfeld3232@aol.com>, dtshantha@yahoo.com, DocBill <bronchnu@aol.com>

All:

The depositions in the Casey case have been set as follows:

Feldman - October 17-18

Boscia - 10/19

Shantha - 10/20

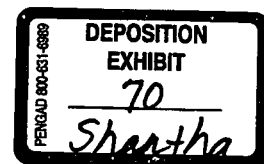
Please let me know if there are any issues with these dates.

Diann - Will you please mark Drs. Feldman and Boscia out for their respective dates, assuming there are no conflicts?

Thanks!

—

holly mann, j.d.
151 harold fleming court
spartanburg, sc 29303
cell: 864/384-0421
fax: 866/452-2276



STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG) C.A. NO. 2010-CP-42-05743

Gregory J. Feldman, MD, Joseph A.)
Boscia, III, MD, Upstate Lung & Critical)
Care Specialists, PC, and Devendra)
Shantha, MD,)

Plaintiffs,)

Versus)

William Mark Casey, Ray E. "Chuck")
Thompson, and Charles M. Fogarty, MD,)

Defendants.)

DEPOSITION OF
WILLIAM U. GUNN, ESQUIRE

Pursuant to Notice of Deposition and/or agreement
in the above-entitled case, the deposition of WILLIAM U.
GUNN, ESQUIRE was taken on the 2nd day of February, 2017,
commencing at the hour of 9:08 a.m. in the offices of
Holcombe Bomar, Attorneys at Law, Spartanburg, South
Carolina.

REPORTED BY: Rosalind Poole Walters,
Certified Verbatim Reporter-Master

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Also attending: Dr. C. Fogarty, Mr. C. Fogarty

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1 STIPULATIONS:

2 It is agreed by and between the counsel for the parties as
3 follows:

- 4 1. That this deposition is being taken pursuant to Rule 30
5 of the South Carolina Rules of Civil Procedure;
6 2. That the deponent waives the right to read and sign the
7 deposition transcript.

8 *****

9 WILLIAM U. GUNN, ESQUIRE, being duly sworn to tell the
10 truth, the whole truth, and nothing but the truth of his own
11 knowledge concerning the matter herein, testified as
12 follows:

13 *****

14 EXAMINATION BY MR. MANN:

15 Q. Could you please state your name for the record?

16 A. Yes. William U. Gunn.

17 Q. And Mr. Gunn, what do you do for vocation or
18 profession?

19 A. I'm a lawyer.

20 Q. And how long have you been a lawyer?

21 A. Forty -- 44 and a half years. Since September 30,
22 1972.

23 Q. Have you taken a deposition before?

24 A. Yeah.

25 Q. Are you familiar with all the rules, guidelines?

1 A. Yes.

2 Q. Accommodations?

3 A. Right.

4 Q. Is it safe to say you've taken more depositions than I
5 have?

6 A. Well, I don't know. I've taken a lot of them.

7 Q. So, anyway, have you had your deposition taken before?

8 A. Two times that I can remember.

9 Q. Not that it has any relevance for what we're doing
10 today, but thank you so much. Is it fair to say saying
11 that you're a lawyer is about like saying that you're a
12 physician; there's many aspects to that particular
13 field or profession?

14 A. Yes.

15 Q. In particular, what do you do?

16 A. Civil litigation.

17 Q. Do you find yourself working on the plaintiff's side or
18 the defense side?

19 A. I spend a lot more time defending cases. It seems like
20 I get a good worthwhile plaintiff's case, not medical
21 cases, but products or motor vehicle accidents or
22 industrial accidents. Seems like I get one every
23 couple of years. Sometimes I'll have a couple going
24 on, but by far I spend most of my time defending cases.

25 Q. And in defending cases -- and if I'm following what

1 you're telling me, would you say that that takes up 90-
2 plus percent of your practice?

3 A. I suspect so. That would be a fair estimate.

4 Q. And in that 90 percent of defending cases, how much of
5 that, what percentage would be defending medical
6 malpractice cases?

7 A. From a time standpoint, I guess three-fourths of that
8 90 percent, whatever the math would be on that.

9 Q. And how many years has that been the case?

10 A. I handled my -- I tried my first medical malpractice
11 case for Spartanburg Regional Medical Center, then
12 Spartanburg General Hospital, in 1978 or 1979, and
13 after that it just sort of -- those cases became more
14 and more prevalent, and it seems like it became the
15 bigger part of my practice.

16 Q. would you consider yourself very knowledgeable
17 respecting the defense of medical malpractice cases?

18 A. I feel like I'm -- I feel very comfortable practicing
19 in that area.

20 Q. And I would assume you've seen a variety of different
21 plaintiffs' claims --

22 A. Right.

23 Q. -- in the medical malpractice field?

24 A. I have.

25 Q. Okay. Things have changed since, and I think you're

1 aware that we're here respecting a case that you
2 represented.

3 A. Right.

4 Q. And that's the William Mark Casey case. Let me get
5 some bookkeeping out of the way, if I may.

6 A. Okay.

7 Q. Let me ask you if you recognize this before I have it
8 marked. Have you seen that document before, sir?

9 A. Yeah, I think this is the notice that was delivered to
10 me. I believe that's it.

11 Q. So that is a notice of deposition?

12 A. Yes.

13 Q. I'm going to ask that that be marked as Plaintiff's
14 Exhibit 1. Thank you.

15 MS. CHEEK:

16 Speaking of housekeeping, do you want to do
17 consecutively-numbered exhibits throughout the case, or
18 do you want to do Plaintiff's 1?

19 MR. MANN:

20 Off the record for a minute, please.

21 (Off the Record; 9:12 -- 9:14 a.m.)

22 (Defendant's Exhibit Number 78 marked)

23 EXAMINATION RESUMED BY MR. MANN:

24 Q. Okay. And, again, in the housekeeping jar, have you
25 seen this document before, sir?

1 A. Yes, sir. That is the subpoena that was given to me.
2 (Defendant's Exhibit Number 79 marked)

3 MR. MANN:

4 And Matt, you've received all these documents.
5 I'm not introducing anything new that you have not
6 seen, sir.

7 MR. HENRIKSON:

8 Okay, I appreciate that. I have the notebooks
9 that were sent over, so I can follow along. Thank you.

10 MR. MANN:

11 Yes, sir. These particular items are not in the
12 notebook. I just happened to think of them overnight.

13 EXAMINATION RESUMED BY MR. MANN:

14 Q. And Mr. Gunn, could you please tell me if you've seen
15 that document before?

16 A. Yes. This is the consent order that I was supplied
17 that apparently is in the present case, the case that
18 y'all are litigating now. I may have seen it some time
19 ago, but I know that you provided me a copy recently,
20 too. It's the confidentiality order and protective
21 order.

22 MR. MANN:

23 And let's please mark this Exhibit 80.
24 (Defendant's Exhibit Number 80 marked)

25 EXAMINATION RESUMED BY MR. MANN:

1 Q. And Mr. Gunn, let me direct your attention to the
2 notebook that was dropped off.

3 A. All right.

4 Q. That was dropped off to your office, I believe,
5 yesterday.

6 A. Okay.

7 Q. And looking at the first item in there under the first
8 tab, that is my unskillful markings, but that's
9 Defendant's Number 1, and let me please represent to
10 you that that document was attached to a deposition
11 previously in this case. Have you seen this document
12 before, sir, and could you identify it for us?

13 A. Yeah, I have. It's been a long, long time. As you can
14 tell, this was almost -- the complaint is dated almost
15 11 years ago, but it certainly appears to me to be the
16 original complaint in the Mark Casey lawsuit against
17 Dr. Feldman, Dr. Boscia, their practice group, and Dr.
18 Shantha.

19 Q. And if you notice, down at the bottom there's a Bates
20 stamp. I believe the first page is King 000750?

21 A. Yes, sir.

22 Q. That is the Bates stamp numbering system that we're
23 using in this case just for your benefit as we look at
24 documents. You will see things marked King, Gunn,
25 Thompson, Mann, and that is just the various files that

1 they came from. Let's go back to what we marked as
2 Defendant's Exhibit 80 for one-half second. What is
3 your understanding as to matters that you can testify
4 respecting today?

5 A. Well, in a broad sense, my construction of this would
6 be that all privileges of all type with regard to
7 things and matters from the prior lawsuit, the
8 underlying lawsuit are waived, no attorney-client
9 privilege is claimed, no work product, no -- I guess
10 attorney-client privilege and work product, and so,
11 pursuant to subpoena, I think I would have no choice
12 but to testify as to anything about the prior lawsuit.
13 As to the present lawsuit, even if I was privy to any
14 of that type stuff, I don't think I would be permitted
15 to testify, if I knew anything about that.

16 Q. And checking with joint counsel in this case, I think
17 that the intent---

18 MR. MANN:

19 And Mr. Henrikson, please help us, because you
20 helped draft this document. But that is the intent,
21 that Mr. Gunn's clients have waived any privileges that
22 may be assertable. Is that your understanding?

23 MR. HENRIKSON:

24 That is my understanding.

25 MS. CHEEK:

1 Agreed.

2 EXAMINATION RESUMED BY MR. MANN:

3 Q. So Mr. Gunn, I think we're all on the same sheet of
4 music there. All right, and as to the waiviture of
5 that privilege, you did indicate to the underlying
6 lawsuit which I previously showed you that is
7 Defendant's Exhibit 1 which is in your notebook.

8 A. Okay.

9 Q. All right. Can you please give us an overview of your
10 involvement in that litigation? What was your role in
11 that underlying litigation?

12 A. After the lawsuit was commenced, JUA, who was -- which
13 was the carrier for Dr. Shantha and his group,
14 contacted me and asked me if I would undertake to
15 represent Dr. Shantha as to any liability he might have
16 and serve as his counsel in that case. I did that for
17 a period of time. Depositions were taken. Discovery
18 was conducted, et cetera. There came a time that I
19 moved for summary judgment on behalf of Dr. Shantha.
20 Judge Cole granted that motion for summary judgment,
21 and Dr. Shantha was dismissed. And at that point, JUA,
22 which also had the insurance coverage on Dr. Feldman,
23 asked me if I would stay involved in the case and
24 represent Dr. Boscia and assist, thereby assisting in
25 the remaining defense of the case. I assessed it, and

1 it was clear to me Dr. Shantha and I had engaged in
2 nothing that would -- there would be no conflicts or
3 anything like that. The appeal -- it didn't look to me
4 like there was going to be any appeal from the order
5 ultimately dismissing Dr. Shantha. So I proceeded to
6 undertake representation of Dr. Boscia.

7 Q. And you had mentioned earlier that there were four
8 defendants in the underlying case?

9 A. I think that's correct. Yeah, Feldman, Boscia, their
10 group, and Dr. Shantha.

11 Q. And there was another attorney involved in the defense?

12 A. Yeah. Mr. King. Spencer King had already appeared on
13 behalf of Dr. Feldman, Dr. Boscia, and the group. And
14 I think part of the intent there was so that Mr. King
15 would have another set of hands and assistance in the
16 case.

17 Q. There was the same carrier involved, also?

18 A. Right. Right.

19 Q. And by carrier, I mean insurance carrier provided --

20 A. Yes, sir.

21 Q. -- the defense as well as indemnification?

22 A. Right.

23 Q. And I believe -- and I'm going to defer to you, because
24 you're my expert today, at least on some of these
25 things. But since this original Complaint in the

1 underlying lawsuit was filed, there's been a change in
2 how the proceedings occur in a medical malpractice
3 case, and I believe they call that the Tort Reform Act?

4 Q. Correct. In 2005, I think it applies to actions filed
5 subsequent to a certain date in 2005. There are pre-
6 suit mediation. Pre-suit mediation is required.
7 There's requirement of an affidavit of an expert.
8 First is the filing of a notice of intent with an
9 affidavit from an expert. Within 90 days of filing,
10 but no more than 120 days from filing, there has to be
11 a pre-suit mediation. Then if there's an impasse, the
12 plaintiff is eligible to file suit. There are some
13 caps on -- caps on recovery now, too.

14 Q. None of those apply to this lawsuit that we're talking
15 about today?

16 A. I don't believe so, because -- and I didn't realize it
17 had been this long ago, but after looking at the
18 documents, the events giving rise to the lawsuit took
19 place in the spring of 2004. So---

20 Q. That's my understanding.

21 A. There were no -- none of the tort reform provisions
22 were applicable.

23 Q. And Mr. Gunn, if you don't mind me burdening you, but
24 could you, for lack of a better term, go over the
25 anatomy of a medical malpractice case prior to the

1 inception of the Tort Reform Act?

2 A. A plaintiff would, through his or her -- his or her
3 lawyer, simply file a Summons and Complaint, serve it
4 on the defendant. There was no requirement of an
5 expert prior to one being asked for by the other side.
6 There was no pre-suit mediation. It was a -- it was a
7 similar simpler, less cumbersome process.

8 Q. What are the elements that a plaintiff would have to
9 prove in a pre-tort reform? What was the plaintiff's
10 burden?

11 A. The plaintiff by a greater weight or a preponderance of
12 the evidence is required to prove that the negligence
13 of the defendant -- that there is negligence or a
14 departure from the standard of care. Secondly, that
15 the plaintiff has suffered some cognizable damage. And
16 thirdly, that damage must be directly and proximately
17 caused by the negligence or departure from the standard
18 of care. Three elements.

19 Q. Yes, sir. Can you tell us a little bit more what you
20 mean by standard of care?

21 A. Standard of care is I think defined in the law,
22 strictly speaking, as what would the reasonably prudent
23 practitioner of that specialty do under the same or
24 similar circumstances. You know, there are a lot of
25 negligence cases, such as operation of an automobile

1 and things, that jurors have the ability to establish
2 the standard of care themselves through their own
3 experiences and through statutes, but things that
4 require expertise, usually great expertise, such as the
5 practice of medicine and architecture and engineering
6 and things like that, an expert witness has to come in
7 and establish what that standard of care is and then
8 whether or not the defendant met that standard of care.

9 Q. And if I'm following and understanding what you're
10 telling me, simple negligence is not enough to hold the
11 physician liable for damages to a potential claimant or
12 plaintiff?

13 A. Well, I think -- I think simple ordinary negligence is,
14 but unless it's something that is within the purview of
15 common knowledge, expert testimony is usually required
16 to show that simple negligence. In other words,
17 recklessness is not necessarily required, but, you
18 know, if a medical malpractice claim is made, the
19 plaintiff has to come forward with expert testimony
20 unless it's something such as amputating the wrong limb
21 or leaving a sponge in the patient's body or something
22 like that.

23 Q. I've heard it said that that standard of care being
24 testified to by physicians is pretty close to being 10
25 out of 10 physicians are going to say that this is a

1 deviation from that care owed to the patient. Is that
2 your understanding, or am I off?

3 A. No, I -- no, I don't -- I would have to disagree a
4 little bit. I think -- I think sometimes in cases
5 there will be a dispute as to -- a dispute between the
6 plaintiff's experts and the defense experts as to what
7 is the standard of care. Some -- you know, a physician
8 or a surgeon at a very, very advanced teaching
9 institution might view the standard of care as X while
10 a good, competent, hard-working physician or surgeon in
11 a community might view it otherwise. So standard of
12 care can vary dependent upon what different experts
13 say.

14 Q. I've also heard that in medical practice cases that the
15 evidence being offered to either establish standard of
16 care or causation has to rise to a certain scientific
17 level. Is there an interplay there?

18 A. Yeah. First of all, it has to be more probable than
19 not, which is 51 percent. That's not, you know -- it's
20 more probable than not as opposed to beyond a
21 reasonable doubt or clear and convincing evidence or
22 something like that. And it has to be -- it has to be
23 reasonable probability. It has to be reasonable. It
24 doesn't have to be perfect. It can't be a shot in the
25 dark. It has to be reasonable, more probable than not.

1 Q. And I appreciate your patience on the law school class
2 today.

3 A. Reasonable degree of medical or scientific certainty is
4 the...

5 Q. And within the -- moving out of the medical field or
6 the expert field or the scientific field, but moving
7 into the legal field, do the courts apply tests to this
8 evidence being offered to establish these things?

9 A. Well, I think the test is is it more probable than not,
10 and if -- and if a plaintiff in a case comes in and
11 proves the standard of care and a departure from the
12 standard of care to a reasonable degree of medical
13 certainty and more probably -- more probable than not,
14 then there's sufficient evidence to go to a jury.

15 Q. I've heard of motions testing these things such as a
16 Frye motion or a Daubert motion or things of that
17 nature. Are you familiar with some of those?

18 A. Yeah, although Daubert does not apply in state court,
19 and I think it's generally known that state court, at
20 least in South Carolina, state court judges are more --
21 don't scrutinize expert testimony as closely as what's
22 done in federal court.

23 Q. All right. You have already said that you represented
24 Dr. Shantha and you ultimately started representing Dr.
25 Boscia --

1 A. Right.

2 Q. -- in the underlying litigation. And I'm going to
3 borrow a statement from a question Mr. Henrikson asked
4 earlier in this litigation, but there are different
5 levels of participation between clients.

6 A. Right.

7 Q. And some clients are, for lack of a better term, I will
8 do the least amount that is required of me, thank you
9 very much. Is that one level of client that you have
10 encountered?

11 A. Right.

12 Q. And then the opposite extreme would be an individual
13 that is pretty involved with the litigation, may even
14 attempt to do legal research on your behalf and
15 inundate your inbox and other things as to whether or
16 not you're even his attorney. Is that another realm on
17 this spectrum?

18 A. Yes. I mean, I think it's certainly fair to say that
19 some -- some clients, not just in the medical field,
20 but all fields, some -- some are more active
21 participants in the defense of their case than are
22 others. Some -- some just don't want to fool with it.
23 They want it to go away. Some are there, they're all
24 over you.

25 Q. How would Dr. Shantha have fallen in that range?

1 A. Dr. Shantha was -- was pretty easy-going about it. He
2 was there when I needed him. He always responded. He
3 was there to answer any questions I had about anything,
4 but he pretty much stayed out of it except when needed.

5 Q. Dr. Boscia; how would you characterize his involvement
6 in his defense?

7 A. My recollection is Dr. Boscia was perhaps more active,
8 but not on the extreme active end.

9 Q. Dr. Feldman was not your client.

10 A. No.

11 Q. Did you have interactions with Dr. Feldman?

12 A. Yeah, I did.

13 Q. How would you view his involvement in the underlying
14 litigation?

15 A. Dr. Feldman was unusually active in participating in
16 the defense of the case. He was prone to use e-mail.
17 He was very aggressive about medical literature, about
18 the facts of the case. He gave us some legal citations
19 from time to time. He was -- he was quite active.

20 Q. And before I get deeper into that question, let me tie
21 in a couple things. I believe that when you're
22 providing a defense through an insurance carrier, you
23 have a point of contact with the insurance company?

24 A. Right, sure.

25 Q. During this litigation, that point of contact changed,

1 did it not?

2 A. Yeah, I was looking at the -- and I had forgotten this.
3 I think at the outset I was reporting primarily to a
4 claims representative whose name is Judy Wilbanks and
5 kept Judy abreast of what was going on and submitted my
6 invoices to her and that sort of stuff. And then at
7 some point Burns Davison become involved, and I can't
8 remember exact -- I don't know exactly when that was.
9 And maybe somebody else picked up a little work on it,
10 too. I can't remember. But I remember it was Judy and
11 then there was Burns.

12 Q. Do you know why there was a change?

13 A. No. No, I really don't. I have no idea.

14 Q. Do you find that the two of them operate differently?

15 A. Yeah. Burns -- Burns is a lawyer. So I think probably
16 pretty much, at least partially as a result of that, he
17 is more aggressive and more on top of exactly what's
18 going on, more -- more willing to insert himself into
19 the proceedings to give counsel assistance, to give
20 opinions on tactics, strategy, and so forth. Ms.
21 Wilbanks is a very competent claims person and was --
22 was a little less, a little more reluctant to do that,
23 but certainly very responsive.

24 Q. And did you and Mr. King, for lack of a better term,
25 share or work with the same claims adjuster in this

1 litigation?

2 A. I think -- I think so. I believe that's the case.

3 Q. And given that there was some commonality in the
4 defense, you and Mr. King would share information or
5 have dialogue --

6 A. Sure.

7 Q. -- with respect to the case?

8 A. Which is not unusual when there are co-defendants in a
9 case and particularly not unusual where you have the
10 group with both -- both individual practitioners being
11 part of the group named.

12 Q. Were you aware that Mr. Davison and Dr. Feldman knew
13 each other prior to this litigation or prior to his
14 involvement in this litigation?

15 A. I don't -- I don't know that that ever entered my mind
16 one way or the other. I did -- I did notice that they
17 had a rapport with each other and seemed like anything
18 but strangers.

19 Q. And I would have to check, but I believe it was through
20 I believe they played club hockey together or something
21 of that nature. So, therefore, I think Mr. Davison
22 came in with a certain knowledge as to who Dr. Feldman
23 was.

24 A. Okay.

25 Q. Would you think it was reasonable that the JUA may have

1 brought him in because of Dr. Feldman's involvement in
2 the case?

3 A. I don't know that, but it could be.

4 Q. Did you find that Mr. Davison was more effective
5 working with Dr. Feldman?

6 A. Let me say it this way. He was effective in dealing
7 with Dr. Feldman, but I had certainly seen no
8 ineffectiveness by anybody else.

9 Q. And I think that's a fair assessment. Thank you.

10 A. But they did seem to have a rapport.

11 Q. And forgive my sloppy question. There was no
12 implication intended. So thank you. Tell me your
13 impressions as to either benefits or detriments that
14 Dr. Feldman may have brought to his defense in the
15 underlying case.

16 A. Dr. Feldman -- and I don't -- I don't pretend to have
17 any expertise in this area, but Dr. Feldman certainly
18 appeared to me to have a very, very quick mind. He
19 appeared to be very knowledgeable and sure of himself
20 insofar as chest and lung medicine, critical care
21 medicine, the things that he does. He appeared to be
22 very helpful. He was aggressive in his defense, and
23 sometimes -- sometimes things would -- he would offer
24 things that didn't have a whole lot of benefit, but
25 that's okay. I felt like it was our job to kind of

1 sort that out and talk through it with him. But he was
2 -- he brought that. I was -- I was worried -- if you
3 ask about detriments, I was worried that because of his
4 sometimes excitable nature he might get off track, but
5 during the trial of the case he stayed on track quite
6 well, and I think he ended up as a very good witness.

7 Q. Do you think his opinions coincided with the expert
8 witness that was picked or selected for the defense of
9 the case?

10 A. Yeah, and I think -- I think Mr. King had already
11 contacted Dr. Bill Alleyne, who Mr. King and I both
12 knew from Rock Hill. I represent the hospital over
13 there, and Dr. Alleyne is a very good, well-respected
14 chest and lung physician, like the other physicians in
15 the area. He's triple boarded. I had seen him perform
16 as a witness, and I can't recall anything that didn't
17 dovetail as between what Dr. Alleyne said and what Dr.
18 Feldman had asserted to us and Dr. Boscia, for that
19 matter.

20 Q. We didn't talk about the conclusion of the case. In
21 your overview, I don't think we went that final
22 chapter.

23 A. Right.

24 Q. So what ultimately happened with this case, your
25 involvement and representation?

1 A. The case went on a particularly long time. It was
2 filed in 2006. I can't remember when in 2006. May?
3 Either May or March. But, anyway, it was filed in
4 early -- first half of 2006. The case was ultimately
5 tried, as I recall, end of May 2010. I think May 28,
6 something like that, of 2010. And the case was tried
7 for three weeks, and the jury wrote a verdict which
8 exonerated all defendants in the case. There was a lot
9 of discovery in the case, too.

10 Q. Yes, sir. Do you have any opinions as to why the case
11 took so long to bring to a resolution?

12 A. Well, there were -- there were a lot of motions. There
13 was a -- there was a lot of discovery. We went to --
14 we went to Boston or some suburb of Boston and took
15 depositions of a bunch of people that worked for a
16 disability carrier that Dr. -- or that Mr. Casey had
17 filed a claim against. We went to Florida to take the
18 deposition of Dr. Jantz. We went other places. We had
19 some discovery disputes probably. We -- it was just a
20 massive amount of discovery. I mean, the plaintiff's
21 attorney deposed just about every RN and nurse tech and
22 everyone that appeared on the hospital chart. There
23 were suspicions from plaintiff's counsel that records
24 had been altered at the hospital, and that all had to
25 be fleshed out. I can't remember the details of that.

1 I just remember that that went on. A couple of times
2 the case was continued. People had conflicts. Experts
3 had conflicts. It just took a long time, and all these
4 things contributed to it.

5 Q. were there any, you know, in your recollections, were
6 there anything unusual about the case?

7 A. well, it was a -- it was a very, very hard-fought case.
8 It really was. I mean, I've handled about as many of
9 these cases as most anybody, I would think, and it was
10 a particularly hard-fought case. There was one --
11 there may have been a number of unusual occurrences,
12 but one was at some point -- at some point co-counsel
13 Mr. King had received an anonymous letter to the effect
14 that Mr. Casey had been sent to Charlotte for a -- for
15 I guess an MRI without contrast of his brain, head and
16 brain, whatever, and that this was done -- was ordered
17 by Mr. Thompson's brother-in-law, a Dr. Godwin, who is
18 I think a general surgeon, and Mr. Casey went up there
19 and the name Mark Johnson was used and he got an MRI
20 which was not demonstrative of any anything, any
21 pathology that showed a brain injury, and they were
22 contending there were cognitive deficits and behavioral
23 deficits as a result of brain injury, that this
24 anonymous -- or this MRI under an assumed name did not
25 demonstrate that. Mr. Casey had been asked under oath

1 in his deposition whether he had had any diagnostic
2 studies, tests, procedures, et cetera, and he said no
3 under oath, and it was after that that Mr. King
4 received this anonymous letter. When that occurred, I
5 got a -- I got a young lawyer in North Carolina to get
6 me admitted pro hac vice, went through the court system
7 up there, served a subpoena and took the deposition of
8 Dr. Godwin to prove what happened. And on the trial
9 of the case, Judge Couch ruled that we could use that
10 testimony. And I've forgotten exactly how it came in,
11 but it came in right within a day or two before the
12 case went to the jury. So it was pretty injurious to
13 the plaintiff's claim because it didn't look good. It
14 looked dishonest.

15 Q. I'm going to flip in the notebook that we've discussed.
16 Mr. Gunn, if I could ask you to turn to Number 31.

17 MR. MANN:

18 And I'm going to ask that you mark this.

19 (Defendant's Exhibit Number 81 marked)

20 EXAMINATION RESUMED BY MR. MANN:

21 Q. And I've asked this to be marked Number 81. Have you
22 seen that document before?

23 A. I have. You know, it was not -- it was not directed to
24 me.

25 Q. Yes, sir.

1 A. Mr. King just called me and told me about it. When he
2 got it, he was kind of, you know, taken aback, and then
3 he showed it to me, and he said what do you think we
4 ought to do. And I'm not sure I even -- I probably did
5 make a copy of it to keep in our file. I don't know.
6 I think I would have.

7 Q. And Mr. Gunn, if I can reference to the Bates stamp
8 number.

9 A. Yeah, okay.

10 Q. This should be a copy that came out of your file, sir.

11 A. Okay, good.

12 Q. Now, the last page I'm not sure about, but the last
13 page, have you seen that before?

14 A. Well, I mean, it says up there Jantz cross. So maybe
15 that's -- maybe that's cross-examination from trial.

16 Q. Oh, I'm so sorry. I gave you too many pages. I'm
17 sorry about that. I will now refer to the correct last
18 page.

19 A. Bates 2449? The picture of the disk?

20 Q. Yes, sir. I'm sorry.

21 A. Yeah.

22 Q. My copies did not have a Bates number. So thank you.
23 You've cleared up my mystery. So thank you.

24 A. And I think that's the form in which Mr. King received
25 it, was 2448 and 449.

1 Q. I did not say this earlier, but you have previously
2 provided your file for the review of the attorneys
3 involved in this case.

4 A. Right.

5 Q. As well as, I believe, some of the clients, as well. I
6 did not bring your entire file, and I think your
7 assistant Donna helped me get that out of long-term
8 storage.

9 A. Right.

10 Q. But you would agree there's probably 11 boxes there or
11 so?

12 A. It's a lot of stuff.

13 Q. If any time during today that you feel you need
14 something out of that, if you'd let us know.

15 A. Okay.

16 Q. We'll make it happen. So I'm not sure how easily we
17 can do that, but we will if we need to. All right?
18 And you've not had your file returned to you, as a
19 matter of fact.

20 A. I don't know. I haven't seen it.

21 Q. Well, Mr. Gunn, I will represent to you and to Donna
22 that you have not received the file back, that we've
23 just maintained it, and I think it's been looked at a
24 couple of times. But that was an unusual event to
25 receive, for lack of a better term, a whistleblower

1 letter in the mail respecting a neurological test in
2 this case.

3 A. It was. You know, there were -- there was -- that's
4 the one unusual event that sticks out. There were a
5 lot of -- there were a lot of other things that were --
6 made the case interesting just from an academic or
7 professional standpoint for a lawyer, but that was the
8 -- that was the thing that was most -- stands out most
9 in my mind.

10 Q. The plaintiffs in the underlying case, they did not
11 retain any kind of physician, neurologist,
12 neurosurgeon. They did not present any kind of M.D.,
13 neurological testimony, experts or otherwise, did they?

14 A. I don't think so. I know that -- I know that Mr. Casey
15 had been seen for a long time, repeated visits, I
16 believe, by a psychologist or perhaps he's a
17 neuropsychologist by the name of Dr. Grace, and I know
18 that we had his chart, which was voluminous. I don't
19 believe he testified at trial. He had been seen by a
20 psychiatrist in Greenville by the name of Smith, and I
21 think we may have called him as an expert. I do not
22 recall a neurologist, a neuropsychiatrist,
23 neuropsychologist, anybody like that being involved as
24 an expert.

25 Q. Is that unusual in a brain injury case?

1 A. I don't know. You can't -- I don't -- the ones I've
2 actually tried, usually there is a neuropsychologist of
3 some type involved. I can remember trying one that
4 arose out of the Converse bus wreck that happened 30
5 years ago that I tried. One of those cases had a brain
6 injury, and there were a lot of -- this girl had right
7 serious injury and there were -- there were a lot of
8 them involved. I tried another couple for a trucking
9 company, and there were neuropsychologists, people like
10 that involved. So I think more often than not there is
11 somebody involved that is either a neurologist, a
12 neuropsychologist, some battery of tests presented,
13 something like that.

14 Q. And in speaking respecting the field or profession of
15 Dr. Smith and Dr. Grace, they typically would not order
16 a CT scan of the brain, would they?

17 A. I don't think so. Well, you know, a psychiatrist -- a
18 psychiatrist might. I don't know. Usually that would
19 be a neurologist. My thought process on how that would
20 usually probably unfold is a psychiatrist -- if a
21 psychiatrist suspected some pathology was giving rise
22 to whatever abnormality he or she was studying, they'd
23 send the patient to a neurologist who would in turn
24 order whatever diagnostic studies there would be. I
25 think that would be the same with a psychologist.

1 They'd get them in the hands of a neurologist and let
2 the neurologist make that call.

3 Q. And I'm going to say this very clumsily, so feel free
4 to modify my statement any way you need to.

5 A. I'll probably answer it clumsily, too.

6 Q. Yes, sir. But Dr. Smith and Dr. Grace, typically, they
7 would refer perceived organic physical damage to
8 another type of physician other than themselves for
9 analysis, treatment, and determination?

10 MS. CHEEK:

11 Objection.

12 EXAMINATION RESUMED BY MR. MANN:

13 A. You know, that would be my guess, but that's -- maybe
14 it's more than a guess. That would be my feeling,
15 although I don't think there would be any impediment to
16 their -- I don't think a -- I don't think psychologists
17 would be able to order any studies of any type. I
18 guess a psychiatrist could, but the way I see things
19 unfold in a hospital or even an outpatient setting is
20 that the practitioner will get somebody in the hands of
21 the person who normally orders those, because you don't
22 want to -- you don't want a patient -- you know, order
23 something, an expensive study that's not really called
24 for.

25 Q. And in this case, Dr. Smith nor Dr. Grace took that

1 step of referring him to any kind of neurologist?

2 A. Not that I recall.

3 Q. We had talked earlier about Dr. Feldman. Would it be
4 safe to say he wasn't very pleased being sued?

5 A. No, he was unhappy, which is -- which is not an unusual
6 phenomenon.

7 Q. He expressed some of his concerns as to why he was
8 being sued?

9 A. Yes, sir.

10 Q. Can you share with us what some of those expressed
11 concerns were?

12 A. Yeah, I think a lot of that -- a lot of that had
13 happened before I undertook representation of Dr.
14 Boscia and the group, but I think there was some
15 underlying hard feelings between at least that Dr.
16 Feldman had for Dr. Fogarty and maybe reciprocal hard
17 feelings from Dr. Fogarty, although I can't -- I've
18 never talked to Dr. Fogarty about this, so I don't want
19 to be unfair about it. But, you know, I will say that
20 after -- after I started dealing some with Dr. Feldman,
21 you know, not a whole lot of that came up. Dr. Feldman
22 -- I was able to get Dr. Feldman to stay on track about
23 the merits of the case and what can we do to defeat
24 this claim, what can we do to show that Mr. Casey did
25 not suffer the injury that he says that he suffered.

1 And so I didn't hear a whole lot of -- I didn't hear a
2 whole lot of complaining about Dr. Fogarty's testimony
3 just because it was Dr. Fogarty. It was just things
4 like that this is why this is incorrect, blah-blah-
5 blah. You know, he stayed on track about the medicine
6 with me.

7 Q. Mr. Gunn, I apologize that I'm jumping around.

8 A. It's okay.

9 Q. But can we go back for just a minute, because I forgot
10 to ask you a question on what was marked as Exhibit 81.
11 Can you tell me on the front page, that appears to be
12 an envelope.

13 A. Yeah.

14 Q. Can you tell me when the postal marking is on that
15 envelope?

16 A. When?

17 Q. Yes, sir.

18 A. 18 August 2008 is what it looks like.

19 Q. Yes, sir. And does that fit your recollections as to
20 when---

21 A. It doesn't fail to fit with it.

22 Q. And I appreciate that very much. Let me ask you to go
23 to what has previously been marked as Exhibit 3, and
24 that's going to be under tab number two in your
25 notebook.

1 A. Tab two?

2 Q. Yes, sir. And I will represent to you, and I don't
3 think there will be an objection, but that particular
4 document came out of the JUA file.

5 A. All right.

6 Q. I'm not saying it wasn't other places, but at least
7 this particular copy came from the JUA file. Have you
8 had an opportunity to see that before?

9 A. I don't think I have.

10 Q. Do you mind if we take five minutes and let me let you
11 read that? Because then I want to talk to you a little
12 bit about it.

13 A. You want me to read both pages?

14 Q. If you would, please.

15 A. Okay.

16 Q. Yes, sir. Quick break. We're off the record.

17 (Off the Record; 10:03 -- 10:09 a.m.)

18 EXAMINATION RESUMED BY MR. MANN:

19 A. Okay, I have looked at this document.

20 Q. And I may be directing my question to the wrong person,
21 Mr. Gunn. So have you seen this document before?

22 A. I don't believe I have.

23 Q. Did you have any kind of similar discussions with Dr.
24 Feldman? And before you answer that, let me take that
25 question off the table. Can you describe to me what

1 your impression is of these two pages?

2 A. Well, it looked to me like Dr. Feldman in January of
3 2010, which I think we can all judicially notice is
4 about four months or so before the case was tried, he
5 sent an e-mail to Burns Davison, or JUA essentially, I
6 would summarize it by saying contending that Chuck
7 Thompson and Dr. Fogarty cooked things up and that the
8 medical evidence wasn't -- made no sense and was not
9 valid and otherwise complaining, and Mr. Davison
10 responded simply by explaining, you know, we need to --
11 we need to hold that -- all of that now and concentrate
12 on focusing on the medical evidence and trying to win
13 the case, and it's not unusual to feel like there's
14 some extortion involved or something like that,
15 physicians often feel that way when they've been sued
16 and a settlement is sought and paid.

17 Q. And now that we've identified what it is, now I can
18 back up and ask the question that I asked first.

19 A. Right.

20 Q. You don't recall seeing this before?

21 A. No.

22 Q. And I believe you were saying that -- well, let me ask
23 the question. Have you had conversations of this same
24 tenor with Dr. Feldman?

25 A. Yeah. I don't know that they were -- I don't know that

1 they were -- you'd call them conversations. I just --
2 I just heard him complain once or twice in a similar
3 vein, but it was not something that permeated our
4 discussions. I know he felt that way. I know he
5 expressed it, but I and to a certain extent Mr. King
6 were able to get him to focus on the medicine and the
7 merits of the case. He's smart enough that he knew he
8 had to pay attention to that.

9 Q. Is it fair to say that you did not take an analysis as
10 to whether or not there was or was not an abuse of
11 process going on?

12 A. No. No, I did not. I didn't. You know, I just -- no.
13 I learned a long time ago not to do that, that my job
14 is the case at bar and try and conclude that in as
15 favorable a way as I can.

16 Q. And the JUA would not have entertained the thought
17 process of allowing you to advance a counterclaim of
18 some sort?

19 A. No.

20 Q. Do you feel that Dr. Feldman cooperated and complied
21 with his duty to cooperate with the JUA as his carrier?

22 A. Yes.

23 Q. He didn't see eye to eye with the JUA, though, did he,
24 on all things?

25 A. Well, probably not eye to eye, but he was not difficult

1 for JUA to deal with. Dr. Feldman felt all along that
2 nothing should be offered at any time, that---

3 Q. And by offered, can you clarify what---

4 A. By way of settlement. Nothing -- that a mediation
5 would be a waste of time, nothing should be offered,
6 that it should be more of a I use the term aggressive,
7 just, you know, nothing but defense, defense of the
8 case, period, and, if appropriate, assertion of a
9 counterclaim, but -- but we had -- we snuffed that out
10 pretty quickly as not part of the -- you know, we think
11 that would not be smart from a tactical standpoint.

12 Q. I haven't asked this, but I was involved in the case,
13 also.

14 A. Yes.

15 Q. What was your understanding of my involvement?

16 A. You were -- you were essentially personal counsel to
17 the group and Dr. Boscia and Dr. Feldman, and I don't
18 know if you -- I don't know if it was part of an
19 ongoing practice you had, whether it was exclusively
20 all you were doing, but I knew that you were spending
21 great amounts of time with them and counseling them.

22 Q. And if I represented to you that I actually at some
23 point in time put in a notice of appearance on behalf
24 of the group, would that refresh your memory?

25 A. Yeah. I think that's correct, yeah.

1 Q. And I, of course, did everything I could to assist in
2 ensuring that the clients cooperated with their duty to
3 cooperate with the JUA and fulfill those duties?

4 A. You did.

5 Q. Dr. Jantz's deposition was taken, and you have
6 mentioned his name before. Who is Dr. Jantz?

7 A. Dr. Jantz is a triple-boarded pulmonologist, critical
8 care medicine, and internal medicine board-certified
9 physician who has a faculty position, at least he did
10 at that time, at the Shands Medical Center in
11 Gainesville, Florida, University of Florida facility.
12 My impression is -- my recollection is he had maybe
13 spent some time at MUSC, also. And so he was -- he was
14 engaged by the plaintiff as an expert witness.

15 Q. Dr. Feldman didn't appreciate, for lack of a better
16 term, his professional opinions that he gave during his
17 deposition, did he?

18 A. He disagreed sharply with them.

19 Q. Is it fair to say he thought they were actually
20 perjurious?

21 A. Yeah, he may have used the term perjurious or whatever.
22 On those occasions when things like that would come
23 along, we tried to keep our eye on the ball and just
24 focus on the science and the medicine.

25 Q. And on his behalf, I did file a lawsuit down in Florida

1 against Dr. Jantz for perjury.

2 A. I didn't---

3 Q. Do you remember that?

4 A. Maybe I knew that; maybe I didn't. I'm not sure.

5 Q. Okay. Let's move on then. There was another expert
6 witness offered by the plaintiffs named Dr. Randy Waid.

7 A. A psychologist, yeah. I had forgotten about Dr. Waid.

8 Q. Have you dealt with Dr. Waid before in other cases?

9 A. I'm sure I -- I'm sure I have seen his name around,
10 maybe taken his deposition, maybe reviewed reports that
11 he did, but until you just mentioned it I had forgotten
12 that he had involvement in this case, and I can't even
13 remember what it was.

14 Q. So you don't have any present recollections respecting
15 what documents were in his file, what documents were
16 not within his file?

17 A. Not at all.

18 Q. And depositions and stuff are still in existence, so
19 whatever they reflect they reflect.

20 A. They are what they are.

21 Q. In Dr. Waid -- and I think we can kind of get to where
22 I want to get with this and see if you remember this,
23 but in Dr. Waid's report there was a quotation of a
24 medical record -- excuse me -- a direct quotation
25 attributed to Dr. Fogarty that Dr. Feldman at least

1 could not put his fingers on as to where that quotation
2 came from. Do you remember those questions by Dr.
3 Feldman?

4 A. You lost me there. There are many people involved. In
5 Dr. Waid's -- say that again?

6 Q. In Dr. Waid's reports there were quotations to Dr.
7 Fogarty.

8 A. Dr. Waid quoted Dr. Fogarty?

9 Q. Mm-hmm.

10 A. Right.

11 Q. And Dr. Feldman had questions as to where that quoted
12 language came from. Do you remember him asking those
13 questions?

14 A. No. I don't remember that topic.

15 Q. And that's fine, because I do think it was a pretty
16 ancillary topic. Going back to Exhibit 81, and I
17 believe you read the date as August of 2008.

18 A. Yes, sir, August 18.

19 Q. Did you have knowledge of this testing occurring on Mr.
20 Casey prior to that time?

21 A. No. No.

22 Q. So this was quite a surprise?

23 A. It was.

24 Q. Let me ask you to look at what has been marked as tab
25 number four in your notebook, Mr. Gunn.

1 A. Okay.

2 Q. And take a couple minutes and look at that for me, if
3 you would.

4 MS. CHEEK:

5 Do you know what the defense---

6 MR. MANN:

7 Oh, I'm sorry, 5. I'm so sorry. And for the
8 record, yes, I have asked Mr. Gunn to refer to
9 previously marked Exhibit Number 5.

10 EXAMINATION RESUMED BY MR. MANN:

11 A. Okay.

12 Q. You'll see up at the top it's marked Defendant's or
13 triangle apostrophe S number 5. That's my handwriting.

14 A. Mm-hmm.

15 Q. And you see that in the top right-hand corner. Do you
16 see in the middle of the page there's an Exhibit Number
17 20, Dr. Fogarty?

18 A. Right.

19 Q. And I assume that's a deposition sticker or it appears
20 to be?

21 A. It must be. It's dated December 22, 2008 it looks
22 like.

23 Q. Yes, sir. Did you participate in Dr. Fogarty's
24 deposition in the underlying case?

25 A. I'm sure I did.

1 Q. Do you remember seeing this note before?

2 A. No, I don't remember it, but I'd be shocked if I hadn't
3 seen it. I mean, I looked at the -- at the time, I
4 looked at all the medical evidence as closely as I
5 could.

6 Q. Yes, sir. Let me ask you to go to the last page of
7 that previously marked Exhibit 5 in this case.

8 A. Okay.

9 Q. And see the paragraph above Plan?

10 A. Okay.

11 Q. Would you read that paragraph? And I've got a few
12 questions to ask you about that, and I think you said
13 you've already read it. Correct?

14 A. Okay. You don't want me to read it into the record.

15 Q. No, sir.

16 A. You want me to just to focus on---

17 Q. Just read it, because I do have a couple of questions
18 to ask you about that.

19 A. Okay.

20 Q. Now, in that paragraph, the first sentence says that
21 with reference to plaintiff's difficulty concentrating,
22 "he undoubtedly had air emboli," and I'll stop reading
23 there. That's just the very first sentence of that.
24 Speaking earlier about causation, standard of care, and
25 things of that nature, would that statement have

1 relevance to the underlying lawsuit?

2 A. Well, I think if somebody with the appropriate
3 qualifications expressed an opinion based upon
4 reasonable medical certainty that Mr. Casey most
5 probably had air emboli as a result of the pneumothorax
6 as a result of the rigid bronchoscopy, yes, it would
7 have relevance. In other words, this statement would
8 have to be dressed up a little bit, but...

9 Q. Let me ask you to flip to the next tab, which I think
10 is tab number five, but it's the exhibit that's
11 previously been marked Number 6 within this litigation,
12 and then let me ask you to flip one more tab over,
13 which is tab number six, and it is an exhibit
14 previously from this case marked Number 7. Mr. Gunn,
15 I'd like you to look at the same paragraph in each
16 three of these notes and spend a couple of minutes
17 doing it. And I'd even like to go off the record just
18 to have you have an opportunity to look at these, and
19 then I'm going to ask you some questions about those
20 three paragraphs.

21 A. Let me make sure I know what my assignment is. You
22 want me to take the paragraph, the full paragraph above
23 the word Plan in each of these successive exhibits --

24 Q. Yes, sir.

25 A. -- and compare them?

1 Q. Uh-huh, that's exactly what I need you to do for me.

2 A. Okay.

3 (Off the Record; 10:26 -- 10:36 a.m.)

4 EXAMINATION RESUMED BY MR. MANN:

5 A. Okay, I've got those three pages out.

6 Q. Okay, thank you, Mr. Gunn. And let me represent this,
7 which I think everyone will agree with. Those three
8 notes labeled Exhibit 5, 6, and 7, are Bates stamped as
9 coming from Mr. Thompson's legal file. So I will tell
10 you that's where at least these three copies of these
11 notes originated from. Are those three paragraphs that
12 I directed your attention to the same?

13 A. No. There are some minor differences in them.

14 Q. Starting at the one contained in Number 5, I believe it
15 says he undoubtedly had an air emboli, and we talked
16 about that's relevant as far as being a piece of
17 evidence for the plaintiff to meet its burden of proof
18 in the underlying case. Keeping that in mind, the
19 other two notes, how would they interplay as being a
20 piece of evidence for the plaintiff to meet its burden
21 of proof in the underlying case that you defended?

22 A. Well, the -- in just looking at the introductory
23 sentence there, it looks like the one on page 438,
24 Bates stamp number -- well, let's call them by the
25 Thompson Bate number.

1 Q. Yes, sir.

2 A. 3172 Thompson. Thompson 3172. It looks like that
3 statement is a stronger statement than the one on
4 Thompson 59625 or Thompson 36485. By that I'm talking
5 about it says, "with reference to the patient's
6 difficulty concentrating, he undoubtedly had air emboli
7 given his lengthy duration of anesthesia and laser
8 perforation of the endotracheal tree," et cetera. The
9 second one, 59625, reads, "with reference to the
10 patient's difficulty concentrating, air emboli have
11 been reported as a common complication when there is
12 laser perforation of the endotracheal tree with
13 resultant leakage," et cetera. And then the third one,
14 third version of it looks like it has similar language
15 to the second one. So the first one appears to be a
16 stronger, more definitive and positive statement that
17 this patient without a doubt had air emboli and why.

18 Q. And Mr. Gunn, I think previously we said that Exhibit
19 Number 5 of this litigation was Exhibit Number 20
20 during Dr. Fogarty's deposition in the underlying case,
21 and of those three, for lack of a better way to put it,
22 the undoubtedly language comes from that particular
23 exhibit, which is also referenced as Thompson Number
24 003172.

25 A. Yeah. I mean, is that---

1 Q. It's going to be your tab number four.

2 A. Yes. Yeah, that language is found in the one that was
3 -- that was the deposition exhibit in the prior
4 litigation.

5 Q. And prior to today or prior to receiving the notebook
6 yesterday or whenever you may have looked at it, have
7 you seen three different versions of that note before?

8 A. I do not believe I have. I think that's something that
9 would probably have been fully explored and would have
10 been if we had -- if I had seen that and a lot of
11 questions asked about it, and it would -- it would
12 become a pivotal, if not important, part of the
13 defense.

14 Q. And to make sure I cover as many aspects of this as I
15 reasonably can, there may have been copies in your file
16 of the multiple notes; however, it was not brought to
17 your attention or your observation or, for lack of a
18 better term, it was never cognitively noted that there
19 were three different versions of this note?

20 MS. CHEEK:

21 Objection.

22 EXAMINATION RESUMED BY MR. MANN:

23 A. No, not that I recall. Not that I recall. If there
24 were three in my file, I guess you could say it got
25 right by me, but I don't know. I had plenty to work on

1 otherwise.

2 Q. And in fairness to Ms. Cheek's objection, let me try to
3 rephrase that. Prior to today you're unaware if there
4 were more than one copy of this note in your file?

5 A. I don't have any knowledge of that. I mean, I don't
6 have any recollection of that or any knowledge of it.

7 Q. And Mr. Gunn, previously you said that if you had
8 known, it would have been explored?

9 A. Well, sure. Sure. I would have wanted to ask Dr.
10 Fogarty about that on deposition if I had other, you
11 know, other drafts or other versions of the same note.
12 That would be something I would want to explore with
13 the witness. If I discovered it subsequent to the
14 deposition, I'd have to decide tactically how do I
15 handle it. Do I wait and see if Dr. Fogarty testifies
16 and use it? Do I have a fit about it now? What do I
17 do, you know.

18 Q. Do you recall if -- let me dig into my notebook here
19 for a minute. Hang on one second. Excuse me, Mr.
20 Gunn. Let me ask you to turn to tab number 17 in your
21 book, Mr. Gunn.

22 MS. CHEEK:

23 what's your underlying deposition exhibit number?

24 MR. MANN:

25 Number 33.

1 EXAMINATION RESUMED BY MR. MANN:

2 Q. And what you're looking at, if you could take a second
3 to look at that for me, that was previously in this
4 litigation in this case marked Exhibit Number 33.

5 A. Okay.

6 Q. Do you have any recollection of seeing this before?

7 A. No.

8 Q. However, I think we talked about depositions and
9 exhibits attached to the depositions, and the records
10 will speak for themselves. Is that a fair way to put
11 it?

12 A. Sure, yeah.

13 Q. This appears to be a transmittal or at least advising
14 you that certain medical records have been provided to
15 you.

16 A. Okay.

17 Q. And if you look down at number six where it says Lung
18 and Chest, Dr. Charles Fogarty?

19 A. Right.

20 Q. If we look in your file, it would show whether or not
21 all three of those notes had been provided?

22 A. I presume it would, you know, but I don't know whether
23 there was -- there were supplemental records provided
24 to me by counsel or whether we -- when we took Dr.
25 Fogarty's deposition we got additional records, but I

1 think my files should show what I had. You know, the
2 file obtained after the conclusion of that lawsuit
3 should show what I had.

4 Q. Going back to those three different notes, those do not
5 appear to be an addendum to a note, do they?

6 A. No. They just appear to me to be three different
7 versions. And there may be some explanation for that;
8 there may not be. I don't know.

9 Q. And looking back at them, and then I'll move on, but
10 let's go back to the front pages of each one of those
11 notes, Mr. Gunn, and it's going to be tab numbers four,
12 five, and six, and those are in this litigation
13 Exhibits 5, 6, 7.

14 A. Yes, sir.

15 Q. Would you take a minute and kind of look through them
16 and see if the only thing different is that one
17 paragraph?

18 A. You talking about you want me to look at the remainder
19 of each note?

20 Q. Yes, sir.

21 A. Okay. I think what I better do is -- this may be a
22 little bit tedious to do this. One difference that I
23 see between Exhibit 5 and Exhibit 6 on the first page
24 of each is that in Exhibit 5 it says he is not smoking,
25 where I don't see that on Exhibit 6 or Exhibit 7, that

1 notation about smoking, that I see. It may be in some
2 other paragraph, but I don't see it standing alone the
3 way this one is. It looks like the first paragraph on
4 all three versions is the same. Page -- I mean Exhibit
5 6, starting with the word "since" in the second
6 paragraph, that's separated out into a separate third
7 paragraph in 6; whereas, it had all been in one
8 paragraph in Exhibit 5. Exhibit 7, it's three
9 paragraphs instead of two starting with the word
10 "since" making up the third paragraph. In paragraph --
11 excuse me. In Exhibit 5, there is additional language,
12 I believe, saying that Mr. -- saying that the patient
13 has had continued difficulties concentrating, staying
14 focused, and general energy; whereas, that's not
15 contained in 6 or 7. Now, let me say -- let me say
16 this. In Exhibit 6, I indicated the "he is not
17 smoking" is not contained in the other -- in Exhibit 6
18 and Exhibit 7. Indeed, in Exhibit 6 under Social
19 History it says, on the plus side, he has quit smoking.
20 So that -- and it does that in Exhibit 7, too. So, you
21 know, in all three, all three versions the note is made
22 that the patient is not smoking. That's the
23 distinctions I see on page 1 unless there -- there
24 could be others. But on page 2, page 2 under Family
25 History, "as previously noted" is added in -- or is in

1 Exhibit 6 and 7, but is omitted in Exhibit 5. Under
2 Neurological, under Physical Examination, Neurological,
3 in Exhibit 6 and Exhibit 7 the Neurological reads, "The
4 patient had difficulty staying focused with answers to
5 questions and could not repeat five numbers backward on
6 a simple cognitive screen but could repeat four
7 numbers." That's -- I just read from Exhibit 6.
8 Exhibit 7 appears to read the same way. Under
9 Neurological on Exhibit 5, it just says, "The patient
10 had some readily apparent difficulties staying focused
11 with answers to questions and had difficulties
12 repeating numbers backward on a simple cognitive
13 screen." So it's not quite as detailed as 6 and 7
14 were. Lab data appears to read the same in all of
15 them. Under Impression, there are four numbers on 6
16 and 7, Exhibit 6 and 7 under Impression; whereas, on
17 Exhibit 5 there are just three, chest pain; nausea and
18 vomiting; persistent difficulty concentrating, staying
19 focused; status post pneumomediastinum/pneumothorax
20 complicating laser therapy in attempt for laser therapy
21 for metallic artifact, which ultimately proved to be
22 outside of chest." I don't -- I don't believe 6 and 7,
23 even though there -- even though there are four
24 separate sentences under Impression or four separate
25 impressions as opposed to three impressions in Exhibit

1 5, Exhibit 5 elaborates by saying pneumothorax
2 complicating laser therapy in attempt for laser therapy
3 for metal artifact, which ultimately proved to be
4 outside of chest. That's been -- that's different in
5 Exhibit 5 from Exhibit 6 and 7, the outside the chest
6 reference. Those are -- those are, you know, on
7 reasonable reading and first time I've gone through
8 this exercise, that's the distinctions I see.

9 Q. As well as the paragraph that we discussed above Plan?

10 A. Correct.

11 Q. Let me call your attention to the signatures and cc's
12 of the three documents. Would you go over that for me,
13 Mr. Gunn?

14 A. In Exhibit 5, the copy I have has got Charles M.
15 Fogarty, M.D. and then CMF/ns. I guess NS would be the
16 person who it was dictated to. With a copy to Dr.
17 Gonda. In the version that is Exhibit 6, Dr. Fogarty
18 has actually signed it. Otherwise, it's the same. And
19 in Exhibit 7, Dr. Fogarty has again signed over his --
20 over his name, and Dr. Gonda and Dr. Grace are shown as
21 carbon copy recipients.

22 Q. And I'm going to ask you some general questions, but
23 let me do one more reading test for you before we move
24 on. If you would look at the first page of what was
25 previously marked Exhibits 5, 6, and 7.

1 A. Yes, sir.

2 Q. Can you tell me the date that each of these notes
3 appear to have been generated?

4 A. Yes, sir. 7/21/05.

5 Q. And is that the same on all three?

6 A. Yes, sir.

7 Q. And there appears -- and, of course, there's a patient
8 name?

9 A. Right, Yes, William Casey, with a number 77168. I
10 don't know what that -- maybe -- maybe Dr. Fogarty's
11 chart number or something like that, I guess.

12 Q. But those are the same on all three?

13 A. Yeah.

14 Q. And I understand you said that you did not see this or
15 make this connection in the underlying case?

16 A. No. If I had -- if I had three different versions of a
17 note bearing the same date, I did not -- did not -- I
18 do not recall it, and I, thus, don't recall acting on
19 it.

20 Q. Is this the proper way to amend a medical record? I
21 mean, if you're advising one of your clients, a
22 physician as to how to amend a medical record, is this
23 the proper way to go about that?

24 MS. CHEEK:

25 Objection.

1 EXAMINATION RESUMED BY MR. MANN:

2 A. Well, everything I've seen in medical charting such as
3 late entries, changes, it's okay to do that. You know,
4 you can't -- you can't be perfect. I mean, you can't
5 expect a busy doctor or a busy surgeon or a busy nurse
6 even to not -- you can't expect perfection in note-
7 keeping and note-taking and charting. But anytime a
8 change is made, it's noted as a late entry or addendum,
9 something to point out to the reader that it wasn't all
10 done at the same time, just for the sake of
11 transparency. That's the way I've seen it done. I
12 don't -- I don't claim to have expertise in that area.
13 I've seen a lot of it, though.

14 Q. And your take today on seeing these three different
15 notes, does this appear appropriate?

16 MS. CHEEK:

17 Objection.

18 EXAMINATION RESUMED BY MR. MANN:

19 Q. As to the way to keep medical records?

20 MR. HENRIKSON:

21 Object to the form.

22 EXAMINATION RESUMED BY MR. MANN:

23 A. I don't -- I can't see any basis for it, but there may
24 be some, but it doesn't meet my -- I mean, I don't see
25 a basis for it. So I would -- if I had known about it,

1 I certainly would have asked questions about it, would
2 have tried to get to the bottom of why there were
3 different versions of a note done the same day, what
4 all went into that, who talked to who, what additional
5 information was supplied, why there wasn't a late entry
6 or an addendum or something to note that. On the other
7 hand, there may be some legitimate explanation for it
8 that I don't know about. I can't -- I just don't know.

9 Q. I think when we first started talking about these three
10 different notes, I referenced that they are Thompson
11 Bates stamped as coming from his legal file.

12 A. Right.

13 Q. If he would have had all three of those notes in his
14 possession, do you feel that he would have had an
15 obligation in the underlying litigation to produce
16 those to you and to Mr. King?

17 A. Yes. Yeah, I think so. I mean, yeah, unless -- unless
18 some privilege applies or unless there's some reason
19 that I don't know about.

20 Q. Do you remember in the underlying litigation a
21 privilege log or anything of that nature ever being
22 filed?

23 A. I don't remember one, but if -- you know, there very
24 well could be one, but I think if there had been one,
25 this litigation was so hard-fought, that I think if

1 there had been one there would have been some motion,
2 some something in the pleadings where that was pursued,
3 you know, an attempt to get behind the privilege log.

4 Q. You had mentioned earlier when we were talking about
5 Exhibit 81, which was when the -- 81, when that came to
6 light, you had mentioned that came to light after Mr.
7 Casey's deposition?

8 A. That's my recollection.

9 Q. I remember you saying that when you were testifying
10 earlier.

11 A. Yeah.

12 Q. Why is that important? What relevance does that have?

13 A. Well, I don't know -- I don't know that it would be a
14 question of relevance as much as strategy. All that --
15 all that says to me is that -- is that -- all that
16 demonstrates is that that was an important question
17 that we had, is, Mr. Casey, have you had an MRI, have
18 you had a CT scan, have you had any sort of diagnostic
19 impressions or diagnostic studies done of your brain
20 that will tell us, you know, what kind of brain injury,
21 if any, you had. I mean, that was -- that was a
22 fundamental question or an important question.

23 Q. Do you feel that you received a truthful answer during
24 his deposition as to that question?

25 A. If you read the words, if you read the words and take

1 them literally, no. Now, if Mr. Casey misunderstood or
2 didn't hear or something like that, there may be some
3 explanation, but in looking at the literal words, I
4 don't think it was -- I don't think it was consistent
5 with the truth.

6 Q. And it was presented to the jury during the trial of
7 this case, underlying case that he had spoken
8 untruthfully.

9 A. With vigor it was presented.

10 Q. Yes, sir. Attorneys are governed by sets of rules. Is
11 that correct?

12 A. Yes, sir.

13 Q. Our profession. And I believe they call them
14 Professional Code of Conduct?

15 A. Canons of Ethics, Code of Professional Conduct. It's a
16 -- it's written in about three or four -- probably
17 three versions so that, you know, if you read one and
18 miss it, you'll catch it in the next one. I mean, it's
19 pretty stringent.

20 Q. And I believe you'll agree, Mr. Thompson was at Mr.
21 Casey's deposition.

22 A. Yeah, he was there.

23 Q. Is there a rule against allowing your client to testify
24 untruthfully if you know he's testifying untruthfully?

25 A. Yeah, indeed, if you know something from a factual

1 standpoint to be untruth, you know, black as opposed to
2 white, yes, some action should be taken. On the other
3 hand, to use a simple example, if somebody is asked in
4 a deposition were you -- what speed were you driving at
5 and the witness says 45, the party says 45, and the
6 party's lawyer is sitting there and the party's lawyer
7 knows that all the circumstantial evidence, everything,
8 I mean, the guy had to be driving 80, then probably not
9 some obligation. But when something is clearly untrue,
10 one should in some way speak up. I don't know what you
11 could do. At this point perhaps recess the deposition
12 and -- and try to figure out what to do, but so
13 something, something so that a false impression -- not
14 a false impression, false knowledge wouldn't be left in
15 the -- in the mind of opposing counsel. Maybe, I don't
16 know, I think the better thing would be for that to be
17 handled in advance somehow, the better practice.

18 Q. Looking back again to Exhibit 81.

19 A. Yes, sir.

20 Q. Did that trigger certain concerns respecting Mr.
21 Thompson's conduct in the underlying case?

22 A. Well, it did, but I don't want to come across as self-
23 righteous. It made me feel like kind of what's going
24 on here. We better -- we better get to the bottom of
25 this and check it out. And I wanted to stay focused on

1 the merits of the case, and if -- and if there was some
2 shenanigans going on some, you know, unexplained piece
3 of diagnostic evidence favorable to us and we had not
4 received the truth about it, I wanted to get to the
5 bottom of it. My concern was not the -- so much the
6 ethical, moral, or whatever conduct of Mr. Thompson; my
7 concern was, to sound corny, to search for the truth.

8 Q. Mr. Gunn, let me ask you to turn to tab number 30 in
9 your notebook, and this has not been previously marked.
10 So we're going to ask that this be marked.

11 (Defendant's Exhibit Number 82 marked)

12 EXAMINATION RESUMED BY MR. MANN:

13 Q. Mr. Gunn, for your benefit, this has now been marked
14 Number 82, I believe. Is that correct?

15 A. Yeah.

16 Q. Would you look at that document and tell me if you have
17 recollection of it.

18 A. Yeah, I had forgotten all about this, and yeah, I think
19 we did make this motion. It looks like it was made
20 shortly before trial, April 2010. I don't -- I don't
21 remember arguing the motion, pursuing the motion or
22 anything, and I'm not sure if we really prepared it.

23 Q. If you look at -- if you want to go by the Bate
24 numbers, Gunn 00241 and 002413, does that potentially
25 refresh your memory at all?

1 A. As to who did it?

2 Q. Yes, sir.

3 A. Well, I mean, you know, obviously -- obviously Mr. King
4 and I both signed it, and I don't know -- I don't know
5 who is the -- I don't know which of us were the actual
6 author of it or in whose office it was prepared or
7 what, but I know that the -- what we were seeking there
8 was to get the case thrown out. We didn't -- we didn't
9 feel like we could rely upon the veracity of everything
10 we had before us and felt like we had been wronged and
11 that indeed our client had been wronged, also, clients.

12 Q. Looking back at page 2413 Bates number.

13 A. Sure.

14 Q. Where your signature is, Mr. Gunn.

15 A. Yes, sir.

16 Q. That appears to have an April 2010 date?

17 A. Right.

18 Q. And you have no reason to think that it was done other
19 than sometime in the month of April?

20 A. No. No, I don't.

21 Q. And I'm sure somewhere there's a clocked copy, but it
22 would speak for itself as to when it was actually filed
23 with the court.

24 A. Yes, it would be.

25 Q. If you want to you're welcome to read it, and we can

1 take a break, but if you signed it, would that indicate
2 that you had read it when you signed and that you
3 believed what was represented within it to be the
4 truth?

5 A. Right. Right. And, as a matter of fact, I would -- I
6 would think that if I was the principal author, that
7 Mr. King and I would probably have discussed it. I
8 would think that if he were the principal author, we
9 would have discussed it with each other. So yeah, I
10 mean, this isn't something -- this isn't a motion that
11 you file every day. So I'm sure we discussed it and I
12 looked it over.

13 Q. Yes, sir. And we were talking before about uniqueness
14 as to the underlying case. Would you consider this
15 another uniqueness to that underlying case?

16 A. Well, this is -- this is just another --

17 MR. HENRIKSON:

18 Object to the form.

19 EXAMINATION RESUMED BY MR. MANN:

20 A. -- sub-part of the same thing; that is, this -- this
21 alias or anonymous -- or alias would be a better term
22 CT scan or it was an MRI, I guess.

23 Q. And Mr. Gunn, I apologize profusely, because I really
24 haven't laid a proper foundation. Can you please tell
25 me what that is as to your understanding?

1 A. Exhibit 82?

2 Q. Yes, sir, Exhibit 82.

3 A. It's a motion. The defendants jointly made a motion to
4 dismiss the case based on -- pursuant to Rule 37, which
5 is the general sanctions rule in the South Carolina
6 Rules of Civil Procedure -- made a motion to dismiss
7 the case based upon misconduct, fraud on the court, and
8 general unfairness. I think the only prong of it was
9 this -- was this diagnostic study ordered by Dr.
10 Godwin.

11 Q. would you take a minute and -- let me ask you to do two
12 things. would you look at the attached exhibits of
13 Exhibit 82, and would you look through those and see if
14 any of that sparks any kind of recollection as to if
15 there may have been other issues being covered by this
16 motion?

17 A. Yeah, there may have been. I had not read this motion
18 and the supporting documents, but there may have been -
19 - there may have been some prong of this motion that
20 dealt with failure to disclose some of what went on
21 with Aetna Life and Casualty on Mr. Casey's claim for
22 long-term disability benefits, and there may have been
23 -- I don't know. Perhaps it was -- perhaps that it was
24 -- we weren't apprised of the Aetna claim, also, but I
25 can't be sure about that. I don't want to -- you know,

1 I know we -- I know we found out about it somehow, and
2 maybe Mr. Thompson disclosed it to us, maybe. I just -
3 - I don't want to be unfair about what I say about
4 that. And we found out about it and we went up and
5 took the depositions, spent a couple, three days up
6 there taking depositions up there of people we needed
7 to depose and got the evidence we needed.

8 Q. Whatever is contained, though, in 82, you will stand by
9 the assertions within it?

10 A. Yeah, sure.

11 Q. And the document will, of course, speak for itself.
12 You know, it's funny. The question I want to ask you
13 is the simple question of what have I asked you, but I
14 don't think that's necessarily a fair question, Mr.
15 Gunn. So anyway, let me take a quick break, and by
16 quick, it's going to be 10 or 15 minutes. I want to
17 call my client and have a brief conversation with him
18 before I conclude my questions, but I'm pretty sure
19 that I'm done.

20 A. Okay.

21 (Off the Record; 11:20 -- 11:27 a.m.)

22 EXAMINATION RESUMED BY MR. MANN:

23 Q. I've got a few little closing questions and thoughts.

24 A. All right.

25 Q. We had talked earlier that you kind of identify

1 yourself with the defense bar as far as the group of
2 lawyers that practice litigation?

3 A. Yeah. Yeah, I mean, I do -- I do significantly more of
4 that.

5 Q. And in that role wearing sort of two hats; you're
6 providing a defense that's being paid for by the
7 insurance carrier and you're protecting the interests
8 of your client, you have an obligation to report back
9 to both of those parties. Is that correct?

10 A. Yes.

11 Q. And in this particular case, in the underlying case,
12 you had to make reports back as far as what you
13 perceived were the exposure, risks. What other things
14 would you report back to your carrier and to your
15 client?

16 A. Well, you would report what the -- what the medicine
17 was and who was going to say what about that. You
18 would report on the credibility of witnesses, what type
19 impressions people make in depositions, who you think
20 might be believed and not be believed. And these are
21 all just impressions. You report on the numbers as far
22 as damages, what they are and so forth. You -- and
23 whether -- how legitimate they appear to be. You
24 report on the demeanor and station in life and
25 believability and all that of a plaintiff. That's very

1 important. You report on the propensities of a
2 particular trial judge. I mean, judges are all human
3 beings and have their prejudices and biases and so
4 forth. You report on what type of jury you're liable
5 to draw, everything that's going to affect the
6 likelihood of a good outcome or a poor outcome, and you
7 do it on a continuing basis. You don't want to tell
8 them two weeks before trial that you're liable to get
9 clobbered in this case.

10 Q. So it's a stream of information.

11 A. Sure.

12 Q. And sometimes that stream -- I think I've looked at
13 your file, and sometimes that stream of information is
14 in the form of letters?

15 A. Yeah.

16 Q. To either the adjuster or to the client?

17 A. Yes, sir.

18 Q. Is it fair to say that members of the defense bar are
19 typically pretty conservative as to their reporting?
20 And by conservative, I mean that -- let me give an
21 example and see if it kind of fleshes out what I'm
22 thinking. If you're reporting back to the carrier and
23 your client and you think that there is some legitimate
24 exposure, is it better to err to the side of making
25 sure your estimate covers any potential exposure, or

1 would it be more problematic if say, for example, you
2 said exposure of five dollars and it turned out to be a
3 million dollars' worth of actual exposure or
4 consequence. So with that understanding, how do you
5 find the defense bar in your reporting as far as that
6 level?

7 A. You want to -- you want to be sure and prepare your
8 client for the worst-case scenario, but then you don't
9 -- you know, but you don't want to -- you don't want to
10 sandbag them. You prepare them for the worst-case
11 scenario, but you tell them, however, there are some
12 good points. And, you know, when you try to summarize
13 all that for them, you know, based on this, my
14 recommendation is we make an attempt to settle it, or
15 we, you know, don't try to settle it. But you tell
16 them all the bad -- you tell them all the bad things
17 that can happen, and you try to express some realistic
18 thought on how possible it is that those really bad
19 things are going to happen and try to also be -- to
20 also give a realistic appraisal of mitigation of
21 damages and things that can go right for you and paint
22 an accurate picture for the client to make a
23 determination as to what they want to do. It's their
24 case; it's not my case.

25 Q. In this case that we're here that you represented Dr.

1 Boscia and Dr. Shantha.

2 A. Right.

3 Q. You made those reportings in this case.

4 A. Yeah.

5 Q. And did your thoughts about the case as we were just
6 discussing, did they stay the same from the first day
7 that you received a copy of the complaint versus the
8 eve of trial? Did you remain steady constant through
9 that period?

10 A. No. No, and I don't know that that happens in many
11 cases. I never -- I never really thought there was
12 much as far as Dr. Shantha, and there wasn't. The
13 court agreed. With regard to Dr. Feldman and Dr.
14 Boscia, as the case developed, I thought that there was
15 going to be a plausible argument that a jury could
16 accept that an unnecessary rigid bronchoscopy took
17 place, a jury could believe that and that that question
18 was probably going to a jury. On the other hand, I
19 thought that there was a lack of plausible evidence as
20 to any cognitive deficit, any real injury, any real
21 brain injury. Mr. Casey had some discomfort, but --
22 and stayed an extra day or two in the hospital and some
23 things like that, but I did not, in my view, think that
24 they could carry the day on cognitive deficit, brain
25 injury, any of that kind of stuff, and I thought -- I

1 thought the attempt to do all that could be detrimental
2 to the plaintiff, because it really got blown out of
3 proportion. And then I saw Dr. Grace's medical -- I
4 mean, I saw Dr. Grace's notes and read through them,
5 and Mr. Casey was complaining about such things as his
6 -- the quality of his short game diminishing on the
7 golf course, and I think I argued to the jury on that.
8 And, also, it -- we subpoenaed the records from Three
9 Pines Country Club, and his handicap had remained the
10 same or maybe gone down, and, you know, I just don't
11 find that a Spartanburg County jury is particularly
12 sympathetic when somebody contends their golf game has
13 gone sour on them. I mean, and so then this diagnostic
14 study came along, and it looked -- it did not look
15 good. It looked -- it looked kind of sleazy for the
16 plaintiff. And all those things rolled into one made
17 me feel more confident about perhaps winning the case
18 outright at trial. I just thought it was going -- it
19 was going to be harder for the plaintiff to persuade a
20 jury unanimously that all three things existed; that
21 is, negligence, proximate cause, and damages. I think
22 the case had been overdone.

23 Q. Mr. Gunn, let me ask you -- and I think this will be
24 pretty close to all I've got. Let me ask you to
25 recall---

1 A. And let me say, that's just my assessment. Somebody
2 else might disagree, but I have looked at a lot of
3 lawsuits and handled a lot of lawsuits.

4 Q. And I believe we said it earlier, but the jury
5 ultimately -- would you say their verdict kind of
6 reinforced your thought process?

7 A. Yeah.

8 Q. You didn't find it shocking.

9 A. No.

10 Q. Okay. Going back to what was previously marked as
11 Exhibit Number 5, and that was the 7/21/05 note, in
12 particular the one that was marked as an exhibit to Dr.
13 Fogarty's deposition that has the language "he
14 undoubtedly had an air embolism" and the comment that
15 it formed a "permanent neurological deficit." Did you
16 find that unusual that a pulmonologist was making that
17 comment that is contained in that note?

18 MS. CHEEK:

19 Objection.

20 EXAMINATION RESUMED BY MR. MANN:

21 A. This is the paragraph on the third page above Plan?

22 Q. Yes, sir, and it's the one from the one that was
23 previously marked 5.

24 A. Well, I mean, I've seen -- you know, I don't know that
25 -- I don't know if "unusual" would be the word. Maybe

1 it would be. That's not -- if you saw -- if you saw a
2 statement like that, you would think that the
3 pulmonologist would in the normal course of events send
4 the patient for evaluation by somebody with more
5 expertise in this area, but when an -- when an
6 experienced pulmonologist says, you know, the theory
7 about air emboli and stuff, I mean, that -- you know,
8 pulmonologists do deal with blood flow and, you know,
9 what's in that blood and, you know, things like that.
10 So I would think -- I would think, though, that a
11 pulmonologist who saw that would send the patient on
12 for further evaluation, especially by someone who deals
13 with brain injury and cognitive deficit and so forth.
14 Mr. Casey had, as I recall, had good insurance. He
15 worked at Michelin, and, you know, it wasn't a question
16 of a Medicaid patient or something, and not that -- not
17 that that would make any difference with Dr. Fogarty or
18 any other doctor, but it's a real consideration in
19 today's world.

20 Q. After the discovery which I believe we marked as 81,
21 which was the disclosure---

22 A. Of the MRI?

23 Q. Of the MRI. Did that cause you to question that
24 language in Exhibit 5 more?

25 MS. CHEEK:

1 Objection.

2 EXAMINATION RESUMED BY MR. MANN:

3 A. You talking about the undoubtedly having air emboli?

4 Q. Yes, sir.

5 A. Well, we -- I think we questioned that anyway. I mean,
6 you know, Dr. Feldman was all over us about that and
7 said there's no way. You know, we could -- we could
8 find nothing in the literature that was -- I didn't do
9 some formal literature search, but there was nothing
10 that anybody brought to anybody's attention from the
11 medical literature that supported this. So we were --
12 we were very doubtful of that from the get-go. What
13 this -- the thing about this -- the thing about this
14 MRI was it cast a whole -- it cast a -- it just cast a
15 bad light on the plaintiff's case from the standpoint
16 of credibility of anything the plaintiff said. I mean,
17 it really did.

18 Q. And are you limiting it to just the plaintiff himself,
19 or does that extend to his legal team?

20 MS. CHEEK:

21 Objection.

22 EXAMINATION RESUMED BY MR. MANN:

23 A. The case. Everything. It gave -- it gave it what I
24 have always just called a sleaze factor. You know, it
25 just didn't look good. It led -- it was -- there was a

1 lot of drama in the courtroom about it.

2 Q. Mr. Gunn, I have no further questions. I appreciate
3 it. I think the defense team may have some questions.

4 MS. CHEEK:

5 I do, and I appreciate it. Mr. Gunn, I'm Ellen
6 Cheek. Let me ask about this. I've got a number of
7 questions for you. It's quarter till 12:00, and do we
8 want to break for lunch now? Let's go off the record.

9 (Off the Record; 11:44 a.m. -- 12:35 p.m.)

10 EXAMINATION RESUMED BY MS. CHEEK:

11 Q. Mr. Gunn, before we had a break I introduced myself.

12 A. Yeah, sure.

13 Q. Ellen Cheek. I represent Dr. Fogarty, and we really
14 appreciate your time here today. As to the exhibit
15 that's been marked earlier today as 81, the anonymous
16 letter --

17 A. Right.

18 Q. -- did you ever learn who sent that letter to Mr. King?

19 A. No.

20 Q. Did anybody ever tell you that they knew?

21 A. Nobody -- no, and I don't think anybody did.

22 Q. Did Attorney Mann ever tell you that he knew?

23 A. No.

24 Q. Did Attorney Mann --

25 A. Not that I recall.

1 Q. -- ever tell you that he knew that Noel Turner, Sr.
2 sent the letter?

3 A. There was some suspicion that's who might have sent it,
4 but -- and I don't know that that came from Milton or
5 whether it came from Spencer or what, but I know that
6 Noel as opposed to Noel, the Third, was very fond of
7 Dr. Feldman. He had treated him during a pretty tough
8 bout of cancer, I think, and that -- maybe it was just
9 speculation. I don't know, but I was not involved in
10 that. I just received the information, received it and
11 didn't act on it, just heard it.

12 Q. When you were retained by the JUA to represent Dr.
13 Shantha, you received a copy of the complaint in the
14 underlying action. Correct?

15 A. In the underlying action, yes.

16 Q. And we've referred to that as the medical malpractice
17 action, so if I shorten it to MMA inadvertently --

18 A. Yeah.

19 Q. -- that's what I'm referring to.

20 A. Okay.

21 Q. You reviewed the complaint when you received it.
22 Correct?

23 A. Right.

24 Q. You saw that the complaint was based on the theory of
25 causation that air emboli had caused -- suffered during

1 the pneumothorax had caused brain injury and other
2 damages. Correct?

3 A. I don't -- I don't remember. Can I look at the
4 complaint?

5 Q. Absolutely.

6 A. Because I don't remember whether -- whether that was
7 actually spelled out or not.

8 Q. If you take a look at that exhibit that was Number 1,
9 if I could refer you, for example, to paragraph seven
10 of it and see whether that states the air emboli theory
11 of damage.

12 A. Yeah, it -- right. Correct, it's in there, and so that
13 would have been in there from the get-go, at least
14 according to Exhibit 1.

15 Q. Now, we have seen earlier today in an exhibit that Mr.
16 Thompson sent a number of medical records to your firm
17 and to Mr. King of Mr. Casey. Correct?

18 A. Right.

19 Q. And when you received those medical records, you and/or
20 your staff reviewed them. Correct?

21 A. I think -- I didn't sit down right then in one sitting,
22 but I think over the course of the next -- certainly
23 the next few weeks or prior to anything happening that
24 I needed to have reviewed them I would have. I didn't
25 -- I didn't ignore them. I got through them

1 eventually.

2 Q. And we've seen also earlier today Defense Exhibit 5,
3 Dr. Fogarty's July 21, 2005 note, the one that was
4 marked in his deposition, that in that note -- or that
5 was one of the documents that was produced by Mr.
6 Thompson in the medical records?

7 A. I presume so. I'm not sure. What tab is that letter
8 from?

9 MR. MANN:

10 Mr. Gunn, I believe it's going to be after tab
11 number 17, previously marked Exhibit 33 up at the top.

12 EXAMINATION RESUMED BY MS. CHEEK:

13 A. The letter is June 20, 2006, and item six in there is
14 Lung and Chest Medical, Dr. Charles Fogarty. They're
15 not itemized, but presumably, since this letter is
16 almost a year after that, Dr. Fogarty's note would have
17 been in there.

18 Q. And understanding that this doesn't contain a Bates
19 range that pairs up, I do understand that, but after
20 reviewing the medical records you were able to
21 determine that Dr. Fogarty's notes contained an air
22 embolism theory of injury to Mr. Casey. Correct?

23 A. After reviewing that and I'm sure by then being in a
24 session or two with -- or getting e-mail or something
25 from Dr. Feldman and Dr. Boscia, I became aware that

1 that was the theory pretty quickly.

2 Q. Now, I understand that at the onset of the medical
3 malpractice action you were representing Dr. Shantha
4 and Mr. King was representing Upstate Lung, Dr.
5 Feldman, and Dr. Boscia. Did you have a joint defense
6 agreement with those -- well, Mr. King's clients, or
7 was there a formal or informal joint defense agreement?

8 A. I don't -- I don't think so. There might have been an
9 informal one, but I think it was just sort of -- I
10 don't think anything was signed.

11 Q. From the onset of the litigation, did you have
12 communications with Dr. Boscia and Dr. Feldman, or was
13 your communication with Dr. Shantha only?

14 A. I can't -- I cannot remember. I know that -- I know
15 that I had -- was privy to some conversations with Dr.
16 Feldman and Dr. Boscia, because the damages were
17 germane to Dr. Shantha, too, and I don't know if it was
18 secondhand through Mr. King or what, and I can't
19 remember the exact date that I got Dr. Shantha out of
20 the case, but it seems like -- it seems like certainly
21 the bulk of my work was done after I came into
22 representing Dr. Boscia.

23 Q. When the suit was filed, did you learn either through
24 Mr. King or from Dr. Feldman that Feldman believed that
25 Dr. Fogarty was engineering or was masterminding this

1 lawsuit?

2 A. I found that out maybe initially through Mr. King, and
3 it was -- I don't think it became very important at
4 that time. And then, you know, it might have been one
5 of those things, seems like maybe it was one of those
6 things that Spencer said Greg, you know, feels like
7 this all has to do with Dr. Fogarty and that sort of
8 stuff. I said, well, okay, and proceeded to the
9 merits, and at first the merits, of course, dealt with
10 Dr. Shantha and any -- and the damages issue, and I
11 really did my best to stay on that issue. And then
12 later on when I dealt more firsthand with Dr. Boscia
13 and Dr. Feldman, then there was more talk about perhaps
14 this or that this had to do with Dr. Fogarty's dislike
15 of Dr. Feldman and -- not perhaps. I mean, you know,
16 Dr. Feldman was pretty definite about it, but my
17 efforts were trying to steer it back to the merits of
18 the case, and I think I was successful for the most
19 part.

20 Q. I'm going to hand you what was marked previously in
21 this case as Exhibit 49. This is a September 4, 2007
22 letter that Spencer wrote to Judy Wilbanks, who was the
23 JUA claims representative at that time. If you'd like
24 to read the entire thing, I will certainly allow you
25 to, but there's a paragraph on the second page that I'd

1 like to refer your attention to.

2 A. Go ahead and just refer me.

3 Q. It's about two-thirds of the way down the page
4 beginning, "when he and his sister." Do you see the
5 last sentence of that paragraph? It says, "Dr. Feldman
6 in this case believes Dr. Fogarty is supporting Casey
7 in this litigation." Do you see that?

8 A. Yes.

9 Q. Is that statement consistent with what your
10 understanding was of Dr. Feldman's thoughts at that
11 stage in the litigation?

12 A. Actually -- actually, I think the -- based on what Dr.
13 Feldman had said -- and, again, it wasn't something
14 every time we got together he mentioned, but my --
15 certainly, my impression was that Dr. Feldman felt like
16 -- Dr. Feldman felt Dr. Fogarty was supporting the
17 plaintiff in the litigation, yeah, Dr. Casey -- I mean
18 Mr. Casey. Excuse me.

19 Q. Did Dr. Feldman, either directly or through Spencer
20 King, also state that he believed that the medical
21 malpractice action was somehow related to an ongoing S.
22 Carolina lawsuit that his pharmaceutical research
23 company filed against Dr. Fogarty?

24 A. At some point -- at some point, and I can't -- I can't
25 even say what year it was, but at some point, I learned

1 that there was keen competition between a company that
2 each of these physicians had; that is, Dr. Feldman and
3 Dr. Fogarty, doing drug trials and drug studies for
4 pharmaceutical companies. I'm not sure I knew that
5 there was litigation between the two. Maybe there had
6 been litigation in the past, but I knew that there was
7 sharp, harsh almost cutthroat competition between the
8 two.

9 Q. And did Dr. Feldman, either directly or through Mr.
10 King, state his belief or opinion that Dr. Fogarty's
11 involvement in the medical malpractice case was somehow
12 related to that S. Carolina litigation?

13 A. I don't know that -- that I got any of the specifics on
14 that other than at some point, and I cannot say exactly
15 when it was, at some point I became aware that Dr.
16 Feldman thought that Dr. Fogarty was somewhat behind
17 and perhaps stirred up the lawsuit, the Casey lawsuit.

18 Q. That was Dr. Feldman's opinion from the beginning of
19 the medical malpractice suit. Correct?

20 A. It may have been. I don't know that I -- I don't know
21 that I talked about it with Dr. Feldman or even
22 overheard anything that he said early on. I don't --
23 that may not have even come up until after I had gotten
24 Dr. Shantha out of the case. I cannot get my arms
25 around the exact time that, you know, that that

1 happened.

2 Q. I'm going to hand you what was previously marked in
3 this case as Exhibit 28 and ask you if -- well, this is
4 a Spartanburg Herald-Journal article from May 31, 2006,
5 Man Sues Lung Specialist. Do you see that article?

6 A. Right.

7 Q. Did you ever discuss this article with Dr. Feldman?

8 A. I don't think so, not that I recall.

9 Q. After you had received your case assignment, made your
10 way through the medical records, in terms of a defense
11 of the case, one of your next steps would have been to
12 determine what experts you needed to counter
13 plaintiff's theory of causation. Correct?

14 A. Well, I wasn't -- I was more interested at that point
15 in the liability situation before we even got to the
16 causation thing. I had talked to Spencer enough and
17 received enough information from Spencer to know that -
18 - and maybe even some from Dr. Feldman in a get-
19 together at some point or Dr. Boscia, that Dr. Feldman
20 felt like the air emboli theory was not plausible, not
21 supported by any medical literature or evidence. So I
22 sort of -- I kind of laid that aside from the
23 standpoint of experts knowing that Spencer and Dr.
24 Feldman would be working hard on that, and I worried
25 about getting myself lined up -- I worried about

1 getting Dr. Shantha out on the liability point, because
2 I can't remember the exact theory that they asserted,
3 but it was -- it was, I thought, flimsy as against Dr.
4 Shantha, and Judge Cole ultimately agreed.

5 MS. CHEEK:

6 Can we mark this, please, as our next exhibit?
7 (Defendant's Exhibit Number 83 marked)

8 EXAMINATION RESUMED BY MS. CHEEK:

9 Q. I've handed you a document that's been marked as
10 Exhibit 83 and ask if you've seen that document before
11 and whether you can identify what it is.

12 A. I don't know. It's got -- it's got a Bates stamp as if
13 it came out of our file. I don't remember -- I don't
14 remember us doing anything this detailed, and it
15 doesn't look like our work product.

16 Q. And in terms of the Bates number for the record, this
17 is a document entitled Spartanburg Regional Healthcare
18 System Admission 5/28/04 through 5/29/04 with Bates
19 range Gunn 4415 through 4430.

20 A. It looks awfully nicely done to be mine.

21 Q. I'm kind of going to believe that answer, Mr. Gunn.

22 A. I carry a lot of this around in my head.

23 Q. Make sure the transcript notes attorney laughing as she
24 says that. If you could take a minute just to flip
25 through that. I don't want you to read all of it, but

1 I would ask that you look under the Questions/Notes/
2 Conflicts column, which is the last one of the three,
3 and let me know when you've just scanned through that,
4 please.

5 A. On every page?

6 Q. Yes. If you could just take a look generally at that
7 column and the types of comments that are noted there.

8 A. Okay. I mean, it looks like -- it looks like exactly
9 that. Some of these are questions, some of them are
10 just observations, and some are conflicts, i.e., how do
11 you square this up with what's going on here or what
12 went on there.

13 Q. And it appears to me that this could be described as a
14 -- I don't want to say liability analysis, but a type
15 of document that is noting strong points and weak
16 points as to the medical admission records in relation
17 to the defendants' actions. Would you agree generally?

18 A. Well, let me -- yeah, I don't want to say that's not
19 what it is. Let me kind of see if I can give it a
20 description. I would just say it's a -- it's a chart
21 of points that need to be addressed and need to be
22 taken into consideration in the case.

23 Q. And Mr. Gunn, in defending your clients and reporting
24 to your clients during the course of the medical
25 practice action, you had described before that's what

1 you try to do on a rolling basis. Correct?

2 A. Sure.

3 Q. And would you agree that in your reports throughout the
4 medical malpractice action that you expressed to your
5 clients your belief that the physicians did have
6 liability exposure in the case?

7 A. I thought -- I thought that a good argument could be
8 made from the plaintiff's standpoint that there was an
9 unnecessary procedure done; that is to say, the rigid
10 bronchoscopy, and that necessarily it would follow if
11 there were an unnecessary procedure done, even if it
12 was an expected complication -- not an expected
13 complication, but a complication that can occur even in
14 the exercise of good care, that the proximate cause
15 could be deemed to be the unnecessary procedure and
16 that they were going to get to the jury with that
17 theory and a jury could accept that, because the -- and
18 I don't remember the exact sequence. It was pretty --
19 pretty -- could be found convincing that initially
20 there was -- initially there was something that
21 appeared to be a foreign object seen maybe on a plain
22 film, a flexible bronchoscopy was then done, and there
23 was no foreign body detected, a CT scan, no foreign
24 body detected, and one could have made an argument that
25 there was -- the foreign body was something in the

1 patient's pocket and that there never was a foreign
2 body. But then Dr. Feldman, as I recall, made a case
3 for there being some irritation or something that very
4 well -- and maybe he said most probably, I can't
5 remember, very well could have been a foreign body that
6 was actually embedded in the patient. So...

7 Q. Dr. Feldman disagreed that the case had any merit.
8 Correct?

9 A. He did. well, factual merit. I mean, he didn't -- Dr.
10 Feldman just in a general sense did not think that
11 there was a case, and he, you know, felt like there
12 were no damages, that there simply was not a case. He
13 expressed it a lot of different ways, but he was quick
14 to recognize under his policy of insurance the insurer
15 controlled the litigation as far as decisions on
16 settlement and so forth, and, to his credit, he, as
17 much as he wanted to help us and as much as he wanted
18 the case defended, stepped aside when it came time to
19 make those decisions. He didn't step aside, but he
20 deferred the way he should have.

21 Q. And under the umbrella of Dr. Feldman's legal case
22 lacking factual merit --

23 A. Right.

24 Q. -- it's true that Dr. Feldman believed that an air
25 embolism could not have occurred as a result of a

1 pneumothorax. Correct?

2 A. I don't -- I don't know whether he believed -- I can't
3 remember whether he actually believed that an air
4 embolism could not have occurred, but I know that he
5 did not believe that an air embolism could travel to
6 the patient's brain and cause injury.

7 Q. In other words -- and I believe I've seen it said by
8 Dr. Feldman in places -- he believed it was physically
9 impossible for a patient to have suffered an air
10 embolism to the brain as a result of the pneumothorax.
11 Correct?

12 A. Correct, I think that -- I think that's a fair
13 statement. It's been 10 years ago, and I'm rusty on a
14 little bit of that and have not had a similar case.

15 Q. And competing with Dr. Feldman's opinion in that regard
16 was Dr. Fogarty's opinion that an air embolism, in his
17 opinion, did occur as a result of the pneumothorax.
18 Correct?

19 A. That's correct.

20 Q. In defending the case, at some point I know you said
21 you were focusing on Dr. Shantha, as you should have,
22 and well did as shown by the results you got for him.
23 There was a point where you did turn to trying to find
24 an expert to defend the air embolism and brain injury
25 case theory. Correct?

1 A. Yeah, there was a -- there was a time when that
2 occurred, and I think -- I think that probably was done
3 even while I was -- while suit was still -- while Dr.
4 Shantha was still named in the case, and I believe the
5 sequence -- and, again, the passage of time is painful,
6 but I believe the sequence was that Mr. King knew that
7 I knew Dr. Alleyne and have a lot of respect for him,
8 and Spencer was talking with Dr. Alleyne, and I think
9 Dr. Alleyne -- you know, it might have been -- I think
10 it was probably one of these things where I said,
11 Spencer, what is Bill Alleyne going to say. He said,
12 he's going to say it's -- ain't no way.

13 Q. Now, Dr. Alleyne is currently practicing with Dr.
14 Feldman. Correct?

15 A. No, no. Dr. Alleyne is a -- is a gentleman in Rock
16 Hill who is triple boarded. He's -- he's a guy that
17 maybe Spencer had represented or been in a York County
18 case where Dr. Alleyne was a -- was maybe a fact
19 witness. He is an African-American gentleman who is
20 Harvard educated and went to Columbia School of
21 Medicine and then went and was trained at Presbyterian
22 Hospital in New York, and he came to South Carolina
23 because his grandfather grew up in Orangeburg and he
24 wanted to raise his family here. It's a pretty --
25 pretty compelling thing.

1 Q. Do you know whether after the medical malpractice suit
2 ended Dr. Alleyne formed a business relationship of
3 some sort with Dr. Feldman?

4 A. I don't know. Don't know anything about that.

5 A. Dr. Alleyne ended up being a defense trial expert. Is
6 that right?

7 A. Yeah.

8 Q. In seeking a neurology expert, that was another type of
9 expert you were seeking in the case. Correct?

10 A. Yeah. We may have -- we may have used Dr. Kistler. I
11 can't remember. Kent Kistler in Greenville. I just --
12 I know Dr. Kistler. He's been an expert for me, been
13 an expert for Spencer, and we may have used him.

14 Q. So in addition to the pulmonology expert, you were
15 seeking a neurology expert. Correct?

16 A. I think so.

17 Q. Do you recall contacting a Charlie Wallace in relation
18 to a search for a neurology expert?

19 A. No, no. Charlie Wallace -- Charlie Wallace is a former
20 chairman of the County Council in Charleston and an
21 anesthesiologist that when I was a junior private at
22 The Citadel, a rank to which I never -- a rank I never
23 exceeded, Dr. Wallace was my battalion commander, and
24 so I decided he was an expert. He's an
25 anesthesiologist at MUSC, and I engaged him for that.

1 He gave me an affidavit, I think, that I used.

2 Q. You are correct, obviously, and I was incorrect. What
3 I meant to ask you was whether you had consulted a Bill
4 Brannon in your search for a neurology expert. Do you
5 recall that?

6 A. Yeah, and I think -- I think Dr. Brannon -- I think
7 maybe what Dr. Brannon told me was I'm through
8 testifying, I'm not fooling with it anymore. He may
9 not have even looked at it for me. I can't remember.
10 He's a retired naval officer.

11 (Defendant's Exhibit Number 84 marked)

12 EXAMINATION RESUMED BY MS. CHEEK:

13 Q. I'm handing you what's been marked as Exhibit 84. This
14 is an e-mail chain, but the one that I am going to ask
15 you to look at is a January 23, 2008 e-mail from you to
16 Mr. King and ask if that -- I think you had a good
17 recollection, but does that refresh your memory as to
18 who you might have consulted?

19 A. Yeah. Then I must have met with Dr. Brannon, and, I
20 don't know, maybe he told me it was outside of his
21 expertise, maybe he told me he wasn't going to testify
22 anymore, and I may have even contacted this Dr. Dutka,
23 who, if I'm not incorrect, might have been up in --
24 maybe at -- maybe at some government hospital. You
25 know, it may be that Dr. Brannon knew him from

1 government service or military service.

2 Q. In this e-mail it says this Bill Brannon is contacting
3 Hallenbeck and Dutka or Dutka -- I'm not sure how it's
4 pronounced -- and getting blind opinions on the case.
5 Do you know whether Dr. Brannon contacted a Dr.
6 Hallenbeck?

7 A. I don't know. I don't know.

8 Q. Do you recall contacting Mr. Dutka?

9 A. Dr. Dutka? Yeah.

10 Q. Dr. Dutka and getting a blind opinion?

11 A. I did, and I can't remember what it was. I know that
12 nobody -- none of these -- none of these folks were
13 eager to get involved one way or the other, I don't
14 believe, but if you've got -- like I say, that's been
15 nine years ago, and if you've got something in my file
16 that reflects something on it, I stand to be corrected.

17 (Defendant's Exhibit Number 85 marked)

18 EXAMINATION RESUMED BY MS. CHEEK:

19 Q. That exhibit that's been marked as Exhibit 85 appears
20 to be a January 28, 2008 e-mail report from you to Judy
21 Wilbanks at it says Marsh.com, but she's with JUA.
22 Could you read that to yourself, please --

23 A. Yeah.

24 Q. -- quickly and then let me know when you're finished?

25 A. Okay.

1 Q. I believe this e-mail fills in the blanks of who --

2 A. Sure.

3 Q. -- Mr. Hallenbeck and Dutka are and why you were --

4 A. Right.

5 Q. -- seeking to contact them. And you agree that your
6 contact, I think as you said, with Dr. Brannon was in
7 the search of an expert to rebut plaintiff's theory
8 that Mr. Casey had suffered positive pressure to his
9 lung and subjected him to the possibility of air
10 emboli. Correct?

11 A. Yeah. When I -- when I put it to -- and this refreshes
12 my memory to a certain extent. When I put the case to
13 Dr. Brannon, Dr. Brannon said, you know -- Dr. Brannon,
14 who is a neurologist and a -- I don't know if he's
15 board certified in psychiatry, too, or whether -- I
16 guess that's the same -- it may be even the same board,
17 psychiatry and neurology. But he kind of deals in
18 behavior, too, Dr. Brannon does, and I've always found
19 him to be a good source, resource in any kind of head
20 injury or, you know, behavioral issues and stuff like
21 that. And he said -- he said you need somebody that
22 knows something about air emboli, which led him to
23 remember Dr. Dutka from working with divers in the
24 Navy, and -- and I apparently had this conversation
25 with Dr. Dutka, and -- and that's what caused me to e-

1 mail Judy. And I think -- and I don't know whether I
2 actually sent him any materials or not. I know it
3 certainly seems from the tone of this that he was a
4 busy guy, and, you know, work as an expert in medical
5 malpractice cases is not always the most attractive
6 arena.

7 Q. So Dutka is somebody that Bill Brannon says this guy is
8 one of the best. Correct?

9 A. Yeah. Yeah.

10 Q. And you wanted to send him materials, and you had
11 stated in here that you believed there was a good
12 probability he could strongly refute the plaintiff's
13 claim in this case. Correct?

14 A. Yes. And I don't know whether I followed up with him
15 or not. I don't know if he was -- I don't know if
16 money was an object. I don't know.

17 (Defendant's Exhibit Number 86 marked)

18 EXAMINATION RESUMED BY MR. MANN:

19 Q. That's Exhibit 86 that you've been handed there. It's,
20 again, an e-mail chain. I'll direct you to the
21 February 20 e-mail you sent to Spencer King first,
22 please, and if you could read that and let me know when
23 you are finished.

24 A. Okay.

25 Q. This e-mail you would agree indicates that you did send

1 Casey's medical records to Mr. Dutka. Correct?

2 A. Yeah, Doctor. He's a neurologist.

3 Q. Excuse me.

4 A. And it appears that I did send him the medical chart
5 and depositions and so forth.

6 Q. It also reflects that his opinion is that the
7 possibility of air emboli causing injury is, quote,
8 decent and pointed to a number of factors that he had
9 then referenced in the medical records. Correct?

10 A. Correct.

11 Q. Looking at those factors that you summarized to
12 Spencer, one was that the patient's blood pressure went
13 up, and he had relayed to you that it's recognized that
14 air emboli to the brain stem will raise blood pressure.
15 Correct?

16 A. Let me see where you're---

17 Q. I'm reading about -- let me just indicate to you.

18 A. You can just point to it.

19 Q. About midway down, he says, "He points to a number of
20 factors," and then it says, "One is that during the
21 acute event, the patient's BP went up."

22 A. Right.

23 Q. And he explained, as related here, that air emboli to
24 the brain could cause a rise in blood pressure.

25 A. Increase in blood pressure, right.

1 Q. He also had assessed from the medical records -- and I
2 believe that would be the hospital's records -- that
3 the patients T waves were large and peaked, which also
4 could be a -- also can come from air emboli or other
5 brain injury?

6 A. Mm-hmm.

7 Q. And that there were three main things that supported
8 the air emboli -- that supported the air emboli theory
9 with one, the patient's immediate agitation from the
10 acute event, the rise in blood pressure, and the T
11 waves. Did I correctly state what he had summarized
12 for you?

13 A. Right, yes.

14 Q. Also under the enumeration there, the e-mail reads,
15 "Everything points to something happening to the
16 patient's brain." Do you see that?

17 A. Yes.

18 Q. He also tells you all that all the claims Mr. Casey
19 makes and the test changes, "all they are trying to lay
20 off on the event is arguable either way." Do you
21 agree?

22 A. Yeah. Yes.

23 Q. On the second page you summarize, "None of this is good
24 for us, but it does let us know the direction they may
25 go with their expert in Gainesville or with tying in

1 brain damage from air emboli." You see that. Correct?

2 A. Yeah.

3 Q. And if you would turn back to the first page, if you
4 could read me what Spencer wrote you in return?

5 A. "Damn."

6 Q. I do not see that you retained Dr. Dutka.

7 A. No. No. He was -- this was an informal consultation
8 as contemplated by the rules. I received his
9 information. I'm sure I used it in dealing with Dr.
10 Jantz, I suspect.

11 Q. After not pursuing Dr. Dutka as a neurology expert, you
12 sought an informal opinion from another neurologist to
13 see whether another person would give you an opinion
14 that was favorable to the defense?

15 A. I don't -- I can't remember. Is there something in my
16 file that reflects that? I was working like a little
17 beaver.

18 Q. Your file shows it. Ultimately, Dr. Kistler?

19 A. Kistler. Kent Kistler.

20 Q. He is a neurologist? Kent Kistler did serve as your
21 defense neurology expert. Correct?

22 A. Yeah, I think -- I think Spencer was more familiar with
23 Dr. Kistler than me, but I may have supplied him
24 information and dealt with him. I don't know. I think
25 he's retired now. I'm not.

1 Q. As I fumble with my records, let's go off the record
2 for just a second.

3 (Off the Record; 1:25 -- 1:35 p.m.)

4 (Defendant's Exhibit Number 87 marked)

5 EXAMINATION RESUMED BY MS. CHEEK:

6 Q. Mr. Gunn, the information that you learned from Dr.
7 Dutka, you shared that with Spencer we saw. Correct?

8 A. Yeah.

9 Q. Did you share that with Dr. Shantha?

10 A. With who?

11 Q. Did you share that information with Dr. Shantha?

12 A. I don't know. I don't remember if Dr. Shantha was
13 still a party at that point even.

14 Q. Did you share that information with Dr. Feldman?

15 A. No. I probably just assumed that Spencer would get it
16 back to him unless -- unless he's shown as being copied
17 on that.

18 Q. We had started to talk before our brief break about Dr.
19 Kistler, and I'm going to hand you what's been marked
20 as Exhibit 87. This is a June 29, 2009 report or
21 letter from Spencer to Theron Cochran. It's a pre-
22 mediation report. Do you agree that's what the
23 document is?

24 A. Yeah, I would -- I usually call them -- when I send one
25 I call it a mediation -- confidential mediation

1 submission or something like that, but it looks like
2 Theron Cochran was the mediator and this is what
3 Spencer was doing privately to brief him on the case.

4 Q. If I could direct you to the page with the Bates stamp
5 JUA 300 on it, there's a subsection Defendants'
6 Experts?

7 A. Right.

8 Q. The third paragraph under that subheading talks about
9 Kent Kistler. M.D. is a neurologist in Greenville,
10 South Carolina?

11 A. Mm-hmm. Yes.

12 Q. The last sentence in that paragraph says, "He
13 acknowledges that microbubbles may be introduced into
14 the system but not likely the source of an injury." Do
15 you see that?

16 A. Yes.

17 Q. Does that accurately state what Dr. Kistler's testimony
18 was? Do you recall?

19 A. I can't remember for sure, but I certainly know nothing
20 inconsistent with that.

21 Q. I'm not going to stop the process again, but I actually
22 got the wrong document.

23 A. Okay.

24 Q. I'm going to have this marked as Exhibit 88.

25 (Defendant's Exhibit Number 88 marked)

1 EXAMINATION RESUMED BY MS. CHEEK:

2 Q. This is Exhibit 88, JUA 276 through 280. It is an
3 August 31, 2009 pretrial report.

4 A. Okay.

5 Q. Let me just make sure where I can direct you before I
6 hand it to you. I'm going to hand that to you and ask
7 if that appears to be a pretrial report submitted by
8 Mr. King to Judy Wilbanks.

9 A. It does. You know, now, the case was not tried until
10 nine or ten months after that. So I don't -- I don't
11 know what -- I don't know that this was the final
12 pretrial report, but it is a pretrial report.

13 Q. Understood. And on page 278, there is a subheading
14 Defendants' Experts, if I could direct your attention
15 to that. It may be identical, but if not, a similar
16 paragraph about Kent Kistler and his testimony.

17 A. Right.

18 Q. Again, but reporting to the client that this doctor
19 acknowledges that microbubbles may be introduced into
20 the system but are not likely the source of the injury.
21 Do you see that?

22 A. Yes.

23 Q. Dr. Kistler did not say, in other words, that it was
24 impossible for an air embolism to have occurred.
25 Correct?

1 A. I don't know -- I don't know whether he ever said that
2 or not. I don't recall him saying that, and I don't
3 recall him -- I don't recall exactly what he said
4 either consulting with us or on the witness stand.

5 Q. But you agree that a fair reading of Spencer's report
6 is that Dr. Kistler says that it could happen; he just
7 doesn't think it did?

8 A. "Microbubbles may be introduced into the system but not
9 likely the source of an injury." I can't -- that's
10 what it says. I just can't---

11 Q. So you'd defer to Dr. Kistler's deposition?

12 A. Yeah. I mean, I can't be any more plain than what
13 Spencer was in what he says Dr. Kistler says.

14 Q. Let's turn now to those three July 21 notes. It should
15 be in your stack over there.

16 A. Yeah, but I've got -- you want 5, 6, or 7?

17 Q. I want all of them, please.

18 A. All right.

19 Q. Earlier you had told us that you would defer to the
20 records themselves as to the question of whether your
21 file had all three of these notes in it in the
22 underlying litigation. Correct?

23 A. Right.

24 Q. And would you say the same thing about Spencer's file,
25 that the records would -- I'm not going to ask you to

1 opine on Spencer's file.

2 A. Spencer's more prone to lose things than I am. Bless
3 his heart.

4 Q. Did Dr. Feldman, either directly or through Spencer,
5 advise that he understood there were multiple versions
6 of Dr. Fogarty's air embolism theory?

7 A. No. No, I do not -- I have really no recollection of
8 the issue coming up as to how many versions there were
9 of the July 21, 2005 progress note of Dr. Fogarty.

10 Q. Did Spencer King ever tell you that Dr. Feldman had
11 determined that there were differences in this document
12 that he had questions about?

13 A. I just do not remember that coming up at all.

14 Q. Did you ever have a conversation with Mr. King about
15 questioning Dr. Fogarty or any other witness about
16 multiple versions of the July 21 note?

17 A. Not that I remember.

18 Q. Mr. King and you worked closely together on this case.
19 Correct?

20 A. We worked -- yeah. Yeah, we did.

21 Q. If Dr. Feldman had raised an issue to Mr. King that Mr.
22 King thought was important, he likely would have shared
23 that with you. Correct?

24 A. Yeah, more likely than not, but neither of us were
25 foolproof on that. I mean, you know, we both had a lot

1 of other stuff going on, too, and there was so much
2 going on in this case that it would be easy for
3 something to slip through the cracks.

4 Q. If you would look at the note that is marked in this
5 case Exhibit 5.

6 A. Right.

7 Q. It also has the Bates stamp Dr. Fogarty on it.

8 A. That's the one that was Exhibit 20 to Dr. Fogarty's
9 deposition?

10 Q. Correct. I'm going to hand you what's been marked in
11 this case as Exhibit 12, and let me indicate, because I
12 covered myself in paper over there, this is an e-mail
13 Dr. Feldman sent Mr. King and Attorney Mann on May 1,
14 2010. Do you see that?

15 A. Mm-hmm.

16 Q. After the first paragraph there is a smaller font that
17 says Fogarty July 21, '05 progress note. Do you see
18 that?

19 A. Right.

20 Q. And under it there is in bold print an excerpt, and I
21 would ask you to turn on your Exhibit 5 to the
22 paragraph right above --

23 A. Right, above Plan?

24 Q. -- Plan.

25 A. The one that we've been talking about?

1 Q. And ask if you would agree that that is a quotation
2 from that note, that document. Excuse me.

3 A. Yes, it looks to me like it's exactly that language
4 from Exhibit 5, from that paragraph in Exhibit 5.

5 Q. If you would look now at the same e-mail.

6 A. Okay.

7 Q. It says, "Compared to waidd note, probably minor but
8 curious, waidd writes." Do you see that language there
9 in the middle of the page?

10 A. Right.

11 Q. Under it, it says, "Dr. Fogarty stated with regard to
12 Mr. Casey's difficulty concentrating," and waidd puts it
13 in quote/unquote, then there's a paragraph underneath
14 that. If you could please compare that language with
15 the Exhibit 7.

16 A. Exhibit 7?

17 Q. Yes, please.

18 A. Okay.

19 Q. Would you agree that that language is quoted from the
20 document that's been marked in this case as Exhibit 7?

21 A. It appears to be language pulled right out of the
22 paragraph above the word Plan on page 3 of Exhibit 7.

23 Q. If you'll keep out that Exhibit 7.

24 A. Okay.

25 Q. I'm going to hand you what's been marked as Exhibit 8

1 in this case. And in the exhibit, if I can just read
2 it upside-down for just a minute, I'm going to direct
3 you in this Exhibit 8 to an e-mail that Greg Feldman
4 sent to Greg Feldman on September 30, 2007.

5 A. Okay.

6 Q. And ask if you would please compare the language in
7 that e-mail to the note version that you have before
8 you as Exhibit 7 and let me know if that is the same
9 language.

10 A. This would be -- yeah, the only difference I see is Dr.
11 Fogarty says mediastinal spaces, plural, where in this
12 one it says mediastinal space, singular, but otherwise
13 I don't see any difference between the quoted language.

14 Q. So you would agree that, based on this document, Dr.
15 Feldman is quoting from the Exhibit 7?

16 A. With that minor alteration that I indicated.

17 Q. And that he was doing so on September 30, 2007?

18 A. Whatever the date. Yeah.

19 Q. Let's do one more Exhibit 7 comparison, please. This
20 is an exhibit that was marked as 9 in this case. Could
21 you read the date of that e-mail and from whom and to
22 it was sent?

23 A. Yeah. It's February 16, 2008 from Dr. Feldman to
24 Spencer King with a copy -- and to Milton Mann. Do you
25 want me to compare it---

1 Q. If you would, please, compare that and advise whether
2 the language stated in there is the same as in Exhibit
3 7.

4 A. Exhibit 7, okay. It's not -- it's not exactly the
5 same. In Defendant's Exhibit Number 9, the word
6 "common" is used. "Air emboli have been reported as a
7 common complication with laser bronchoscopy." In Dr.
8 Fogarty's progress note it says, "Air emboli have been
9 reported as a complication of laser bronchoscopy." So
10 the word "common" appears in Dr. Feldman's. And then
11 the other -- the other difference is the word
12 "indication." There's another small difference down
13 here with the word "indication," and I think there the
14 word "indicates" as a verb, I think, is used as opposed
15 to "indication," the noun. But otherwise they appear
16 to be the same.

17 Q. Okay. So the version that you're looking at right
18 there is which exhibit?

19 A. I think that's page 3 of Exhibit 7.

20 Q. Exhibit 7, okay. Can you humor me by turning to page 3
21 of Exhibit 6?

22 A. Sure.

23 Q. And letting me know whether the language on Exhibit 9
24 corresponds to Exhibit 6. It may have been my error
25 there, Billy. I apologize.

1 A. Okay. Let me see. Yeah, the word "common" appears in
2 Dr. Fogarty's note, which is Exhibit 6. The word
3 "common" appears just as it does in Dr. Feldman's e-
4 mail. The "indicates" versus "indication" distinction
5 is still there, and Dr. Fogarty uses extra pleural as
6 two words while Dr. Feldman differs sharply and has it
7 one word.

8 Q. In looking at the two, it would appear that Dr. Feldman
9 has typed into that e-mail an excerpt from the Exhibit
10 6. Correct?

11 A. Well, it doesn't appear to be cut and pasted. So I
12 would think---

13 Q. So the breaking of the extra pleural --

14 A. Oh, yeah.

15 Q. -- could be -- I mean, other than the extra pleural
16 having a space in it, it appears to be a scrivener's
17 error or a typist's error there, but it appears that he
18 is quoting from Exhibit 6. Correct?

19 A. He is certainly attempting to, and -- and, also, the
20 distinction between "indication" and "indicates," but
21 the word "common" is in this one, in both of them.

22 Q. And we're almost at the end of this procedure, and I
23 appreciate your patience of it. On October 14, 2008,
24 Dr. Gonda was deposed in the medical malpractice
25 lawsuit?

1 A. Right.

2 Q. Do you recall a copy of Dr. Gonda's file being attached
3 as an Exhibit 1 to that deposition?

4 A. I'm probably presuming it was.

5 Q. I don't want to make you guess.

6 MR. MANN:

7 It's tab 23.

8 EXAMINATION RESUMED BY MS. CHEEK:

9 A. It was a healthy size chart.

10 Q. If you can take a look -- and, again, we'll take the
11 guesswork out of this. I'm going to ask you to flip in
12 that document that was previously marked as Exhibit 43,
13 which is a minuscrypt of Dr. Gonda's deposition from
14 August 2008. Let's just piece this together. Can I
15 refer you to page 5 of the minuscrypt? On page 5 and
16 6, I'll give you a chance to scan it, but my question
17 to you is, does this indicate that Dr. Gonda brought a
18 copy of his chart on Mr. Casey to the deposition?

19 A. Well, it just says, "You are free to refer back to your
20 notes and records at any point in time." And yeah, it
21 does on page 6 just below that, it says yes. "I'm
22 going to ask you if this is Mr. Casey's chart." "Yes."

23 Q. Okay. And then if I could have you flip to page 95.

24 A. On the traveling transcript?

25 Q. On the transcript, yes.

1 A. Okay.

2 Q. Would you agree that the transcript indicates that you
3 marked Dr. Gonda's chart as Exhibit 1?

4 A. Yes. Somebody did. I don't -- that might have been---

5 Q. It was marked.

6 A. Yeah, that was me. It was me.

7 Q. And then if you will flip back in the minuscrypt to
8 page 84, would you agree that from 84 to page 86 --
9 I'll let you scan it, but the question is, was Dr.
10 Gonda questioned during his deposition on the July 24,
11 2005 note that was in his chart?

12 A. You mean July 21?

13 Q. Oh, yes. Pardon my error.

14 A. Well, yeah, yeah. Yeah, I see on page 85 where it's
15 identified. Yes, he was questioned about that.

16 Q. And behind the minuscrypt is a copy of Dr. Gonda's file
17 that was marked in his deposition as 1 and was marked
18 in this case as Exhibit 44. I don't believe you've got
19 the Exhibit 44 sticker on it, but if I could direct you
20 to within that exhibit the document Bates labeled
21 Thompson 36483, please.

22 A. Okay.

23 Q. If you could pull your Exhibit 7 that we were looking
24 at earlier and advise whether this Exhibit 7 is the
25 same version of the note that appears in the Gonda

1 deposition.

2 A. Let me say this. It's got the same little marking down
3 there, 9/6/05 perhaps T, and then Thompson 036483, same
4 Bates stamp number. I haven't read all the way through
5 it, but...

6 Q. Could you flip to that third page and let's just look
7 at the paragraph right above the plan?

8 A. You want me to see if they're the same?

9 Q. And see if they're the same, please, yes.

10 A. Yes, they're the same.

11 Q. This is the last one of these, I promise. I'm going to
12 hand you what's been marked in this case as Exhibit 11
13 and ask if you've seen that before or recall seeing
14 that before.

15 A. I don't -- I don't really recall seeing this, and I
16 don't -- I don't believe it's my work product.

17 Q. If I represented to you that this came from Spencer
18 King's files indicated by the Bates number and is a
19 medical chronology his office prepared, would you agree
20 with that or have any reason to dispute it?

21 A. That makes good sense. My summaries are much more --
22 much more summary than this.

23 Q. And here is the last flipping exercise. This one is
24 actually tabbed for you. There's a little purple tab
25 on that document, and if you could tell us the Bates

1 number of that page.

2 A. 001616.

3 Q. And if I could please ask you to -- I believe that's
4 the one that has the "with reference to the patient's
5 difficulty concentrating." Do you see that in the
6 third column there?

7 A. Mm-hmm.

8 Q. Could you please compare that to the Exhibit 6 that
9 we've been looking at today?

10 A. 6 or 7?

11 Q. Exhibit 6.

12 A. And is that in the same paragraph?

13 Q. Yes, sir.

14 A. Yeah, I see it.

15 Q. And the question is whether that's the same language
16 that appears in the paragraph above the plan in the
17 version of the July 21 note marked Exhibit 6.

18 A. Yeah, that looks like the same language. The language
19 on page 001616 of this exhibit looks to be the same as
20 the language pulled from the third full paragraph on
21 page 3 of Exhibit 6 to this deposition.

22 Q. Thank you. We've seen a lot of documents from the
23 underlying case in which excerpts from Exhibits 5, 6,
24 and 7 are quoted. Would you agree?

25 A. Yes. Yeah, there are a lot of -- there's a lot of

1 language from all versions floating around.

2 Q. And with a point of reference being Dr. Gonda's
3 deposition, would you agree that -- well, Gonda's
4 deposition was in 2008. would you agree that the
5 information we've seen quoted in those documents all
6 predate Dr. Fogarty's deposition that occurred in
7 December of 2008?

8 A. I didn't -- I didn't pay attention to the date of Dr.
9 Gonda's deposition. Just whatever it is, I mean, I
10 believe you. If you just show me the date he was
11 deposed, then---

12 Q. Dr. Gonda was deposed August 14, 2008.

13 A. My birthday. August 14, 2008?

14 Q. Correct.

15 A. My 64th birthday. Yeah, that was before December of
16 2008 when Dr. Fogarty was deposed.

17 Q. When Dr. Fogarty was deposed, then he could have been
18 questioned on differing versions of this July 21 note
19 that are contained within the defense file. Correct?

20 A. Well, I don't -- I don't know that different versions
21 were in the defense file. I mean, I'm not sure I can
22 make that leap. I think we saw language, quoted
23 language from all three, and we've seen quoted language
24 from all three in different places. So if we assume
25 that defense counsel had -- if we assume that this

1 means that we had copies of all three versions, yes, of
2 course, he could have been questioned. I can't make
3 the leap that that means we had all three versions.

4 Q. I understand, but you would agree with me that the
5 theory of air emboli is contained in each one of those
6 versions?

7 A. Oh, yeah. That theory was floating around and floating
8 around on the plaintiff's side of the case, and you saw
9 it floating around on our side of the case, too.

10 Q. Not only was it floating on the plaintiff's side of the
11 case, but it also formed the basis of the complaint we
12 looked at before. Correct?

13 A. Yeah.

14 Q. And Dr. Fogarty, when he was deposed, was deposed fully
15 on his theory of air embolism. Correct?

16 A. I'm sure. He was deposed fully unless -- unless there
17 was a version of that 7/21/05 progress note that we
18 didn't have, and I don't know whether that's the case
19 or not.

20 Q. But all the progress notes contained Dr. Fogarty's
21 theory that an air embolism occurred or could have
22 occurred. correct?

23 A. Right.

24 Q. And so the theory is the same regardless of minor
25 differences or differences in the language. Dr.

1 Fogarty was deposed on his theory, on the same theory.
2 Correct?

3 A. Yeah. Well, we knew -- we knew that was his theory,
4 and we had an opportunity to ask Dr. Fogarty anything
5 we wanted to about that theory. My only thing was you
6 used -- you used the word "fully," and if there was --
7 if there were different versions of what he said that
8 were not available to us, I think I would quibble a
9 little bit with the word "fully," but I don't know
10 whether we had different versions or not, but we had --
11 sure, he was sitting there in the deposition. We knew
12 that he had the air emboli theory, and we had a chance
13 to ask him questions about that theory.

14 Q. Gonda's deposition exhibit, you would have received a
15 copy of that with your copy of the transcript.
16 Correct?

17 A. A copy of his chart you mean?

18 Q. Correct.

19 A. Yes. We may have even had it before that, but, I mean,
20 certainly we had -- we had -- you know, we either made
21 a copy of it that day when he was there and didn't buy
22 it from the court reporter or we had a copy supplied to
23 us, one of the two. We got it, you know, at the latest
24 about the time of the deposition.

25 Q. When we were looking earlier at your e-mail to Spencer

1 king about the Dutka conversation, I believe in it you
2 had referenced Mr. Thompson's believing he had a barn-
3 burner on his hands?

4 A. Yeah, I don't know if that was the word. It was -- it
5 was the case he was going to retire on.

6 Q. I've seen that in numerous places in your file. That
7 was your opinion of Chuck Thompson's opinion of his
8 case, and could you -- I love the word barn-burner, but
9 could you explain what you meant?

10 A. It was very clear that Mr. Thompson thought that this
11 was a humongous case from the standpoint of damages and
12 recovery potential with a jury and that he was going to
13 effect a handsome recovery at the hands of a jury. We
14 had either -- I think we had two mediations, and I
15 don't want to get into those, because I don't think
16 that's -- that may not have been waived or anything.
17 We've got -- there are different considerations there
18 from what the court's rules are. But suffice it to say
19 that Mr. Thompson's settlement demands were immense.
20 He poured a lot of money into this case with experts,
21 et cetera, I think, it looked to me like, travel, et
22 cetera, et cetera, deposition transcripts. And he -- I
23 just think he really thought it was a big case. I've
24 gotten to where I can tell most of the time what
25 another lawyer thinks of his case or her case.

1 Q. Did you ever receive from Mr. Thompson or anybody else
2 associated with the plaintiff's side of the case a
3 demand to settle or resolve the case for anything other
4 than a payment of money?

5 A. No, not that I remember. That would be unusual, too.

6 Q. You would remember something like that, wouldn't you?

7 A. I think so. I think so. I mean, I hear the statement
8 often in many, many, many cases it's not really about
9 the money.

10 Q. Let's do this. Let's break for five minutes, and
11 hopefully I can pass the torch to Matt here who's been
12 waiting patiently.

13 (Off the Record; 2:18 -- 2:26 p.m.)

14 (Defendant's Exhibit Number 89 marked)

15 EXAMINATION RESUMED BY MS. CHEEK:

16 Q. Mr. Gunn, Exhibit 89 has been handed to you. It is an
17 April 29, 2005 letter from Rob Barrett --

18 A. Yeah.

19 Q. -- to Attorney Mann Bates labeled Mann 830 to 831.
20 Would you agree?

21 A. Yeah.

22 Q. Would you agree with me that this is a letter advising
23 Attorney Mann that Holcombe Bomar has been retained by
24 Dr. Fogarty to represent him in the referenced action
25 of S. Carolina Pharmaceutical Research versus Charles

1 M. Fogarty, M.D.?

2 A. Right. Correct.

3 Q. And at the time or when the medical malpractice action
4 was filed in or around May of 2006, Dr. Fogarty was a
5 client of your firm. Correct?

6 A. Yeah. Yeah. And I think Koger Bradford may have said
7 something about it somehow, and I don't know how he
8 even knew, because a conflict check would not have
9 listed witnesses. Dr. Fogarty was simply a witness.
10 He was not a party to this -- to the medical
11 malpractice action.

12 Q. And we had talked before about whether the medical
13 malpractice action and this reference to S. Carolina
14 Pharmaceutical Research case were related cases.
15 Correct?

16 A. Yeah. I mean, yes, that came up early in the
17 deposition, I think, early in your questioning, and I
18 knew that they didn't like each other and that it arose
19 out of their pharmaceutical business, and apparently
20 that was the subject of this lawsuit.

21 Q. And, in contrast, the medical malpractice action was a
22 medical malpractice action --

23 A. Correct.

24 Q. -- filed by Mr. Thompson to obtain recovery for his
25 client Mr. Casey. Correct?

1 A. Right.

2 Q. And during that medical malpractice action, we've
3 talked a little bit today about your representing Dr.
4 Boscia after you secured Dr. Shantha's dismissal.
5 Correct?

6 A. Mm-hmm.

7 Q. And at that time, did you perform a conflicts check as
8 to whether you could represent Dr. Boscia in relation
9 to the firm's existing or past clients?

10 A. I'm sure I sent out an e-mail. I don't know whether I
11 entitled it "conflict check" or what, but Dr. Fogarty
12 still was simply a witness, an expert witness. I have
13 I can't tell you how many times -- I mean, I've been
14 doing this a long time and bump up on a lot of people,
15 a lot of doctors, a lot of doctors that are adverse to
16 our positions as witnesses. I just have to try to be
17 polite and be a gentleman about it and not share any
18 confidences I might have.

19 Q. And at that point when you took over Dr. Boscia's
20 representation, the fact hadn't changed that the case
21 being litigated was a medical malpractice action that
22 was filed by Mr. Thompson to secure a recovery for Mr.
23 Casey. Correct?

24 A. Correct.

25 Q. And Dr. Fogarty was a witness in that case only.

1 Correct?

2 A. Correct.

3 (Defendant's Exhibit Number 90 marked)

4 EXAMINATION RESUMED BY MS. CHEEK:

5 Q. I'm going to hand you what's been marked as Exhibit 90.
6 would you agree this is an e-mail dated March 16, 2008
7 from you to it says shareholders? Would that be your
8 partners here in the firm?

9 A. Mm-hmm.

10 Q. And it is Bates labeled Gunn E-mails 355 through 358.
11 would you agree?

12 A. It is what, now?

13 Q. That the Bates label is Gunn E-mails 355 through 358.

14 A. Yeah.

15 Q. Do you recall sending or composing and sending that e-
16 mail to your shareholders or fellow shareholders?

17 A. I don't recall, but yeah, I sent that out.

18 Q. I am through with my questioning.

19 A. Okay.

20 Q. I appreciate your time and also your indulgence for
21 allowing me to call in.

22 (Off the Record; 2:33 -- 2:35 p.m.)

23 EXAMINATION BY MR. HENRIKSON:

24 Q. Mr. Gunn, I've got to call you Mr. Gunn because we're
25 on the record, but---

1 A. You can call me Billy on the record. I'm fine with
2 that.

3 Q. Fair enough. You can call me Matt. I've had the
4 pleasure of working with you on a couple cases and I
5 have enjoyed it, and I'm going to ask you a few
6 questions. The MRI that I guess came to y'all from
7 some anonymous source, it came to Spencer. Is that my
8 understanding? Is that correct?

9 A. Yes, sir.

10 Q. And then you learned about it from Spencer, and then
11 there was -- if I recall the record, that was in August
12 of 2008, and it seems like there was a motion filed
13 maybe three or four months later. And so I was just
14 curious as to who the -- I guess the time, the time
15 between the time that Spencer received the information
16 regarding the MRI and when the defendants filed a
17 motion or acted on it in any way, what was the reason
18 for that delay?

19 A. I think it might have even been a longer delay than
20 that. I thought the motion to dismiss the case as a
21 sanction was not until right before trial, which was in
22 the spring of 2010, which would have been, you know,
23 close to two years after the -- after the MRI was
24 discovered. And I think -- I think what went on during
25 that period of time was nailing down everything that

1 took place; that is to say, becoming admitted pro hac
2 vice in North Carolina, serving a subpoena and subpoena
3 duces tecum on Dr. Godwin, deposing Dr. Godwin, other -
4 - other stuff around, you know, surrounding
5 circumstances to get everything together to file the
6 motion, I think. And I'm not -- I'm not sure I was the
7 principal author of the motion, but there was a lot of
8 stuff going on like that.

9 Q. Right. And the issue came before Judge Couch, and my
10 understanding is that he ruled that the MRI would have
11 been considered work product, but, since it was not
12 identified on a privilege log, that he allowed it to be
13 disclosed. Well, it had already been disclosed, I
14 guess. He allowed y'all to use it at trial. Isn't
15 that fair? Isn't that what happened?

16 A. I don't know. I don't -- I have not looked at the
17 order and do not remember. I just know we could use it
18 at trial. And I think -- I think what he did at trial
19 was allowed us to use the MRI and all the circumstances
20 surrounding it, but that we could not use the anonymous
21 letter that Spencer got. And I don't -- if you've got
22 a copy of the order, you know, it will speak for
23 itself.

24 Q. It's somewhere, and that's my recollection. There are
25 like 30,000 documents in this file. That's my

1 recollection --

2 A. Okay.

3 Q. -- of sort of what we've been working under. I just
4 wanted to know what your recollection was.

5 A. I don't have one.

6 Q. Is that you were allowed to use that MRI, and I think
7 that you said that that allowed y'all to introduce some
8 element of sleaze factor into the case. Is that the
9 case?

10 A. Precisely.

11 Q. Right. And really the reality of it is is that the MRI
12 aided and benefited your defense and, more probably
13 than not, contributed to the defense verdict. Is that
14 correct?

15 A. I think -- I think that contributed greatly to the
16 defense verdict. I think -- I think the massive amount
17 of complaining about his golf game that Mr. Casey had
18 done in the chart of Dr. Grace was not helpful, and
19 when Mr. Casey's daughter got on the witness stand and
20 told the jury insofar as amplifying on his damages that
21 golf was his life, I think it was difficult for a jury
22 to believe at that point that his life had been
23 destroyed. There are too many people who have really,
24 really serious injuries, and I saw jurors looking at
25 each other and felt like maybe the case was in bad

1 shape at that point for the plaintiff.

2 Q. And so along with maybe some other deficiencies in Mr.
3 Casey's damages claim, you would agree that the MRI
4 situation was a significant factor and one that the
5 record, the trial record would reflect that defense
6 counsel argued strongly as there being no evidence of
7 damages. Is that right?

8 A. We argued it both -- we argued both that it supported
9 our claim or supported our defense that there was no
10 organic or pathological injury to the plaintiff, and it
11 supported our argument that you couldn't believe what
12 the plaintiff was saying.

13 Q. Right. Had there been any discussion at any point
14 prior to getting the anonymous letter? I guess the
15 case had been going on for about two years and three
16 months. Had there been any discussion between defense
17 counsel about getting an IME, an MRI of the brain since
18 the case was obviously claimed to be worth greater than
19 \$100,000?

20 A. I don't think there was any discussion from me about
21 it. I use those only in the most rare of cases.

22 Q. And there was expert testimony on both sides regarding
23 whether or not there was a brain injury despite the
24 fact of there being a normal MRI. Correct?

25 A. Yes.

1 Q. And from the plaintiff's side there was some argument
2 from expert witnesses that a person can still have a
3 brain injury even if it doesn't show up on radiographic
4 or magnetic studies, because there can be damage at the
5 cellular level that's not readily discernible on a
6 study like that. Isn't that correct?

7 A. I'm not sure it was exactly like that, and I'm not sure
8 I follow your anatomy there, but suffice it to say that
9 there was expert testimony that there can be cognitive
10 deficits suffered by a patient without evidence of
11 physical injury.

12 Q. Right, and I probably inartfully phrased that question.
13 Let me just try it one more time so that hopefully this
14 will be better. My understanding is -- because I do
15 some brain injury cases, as well, and I'm always
16 running up against plaintiff's experts who say, oh, it
17 doesn't matter that there's nothing on CT and nothing
18 on MRI, because you can have damage at the cellular
19 level that's not available to be seen in a study like
20 that. Have you ever run into that type of testimony
21 before from a plaintiff's brain injury expert?

22 A. I don't know. Probably have. I've run into every kind
23 of testimony you can run into.

24 Q. Fair enough. In any event, the defendants made motions
25 for a directed verdict as to those issues. Correct?

1 A. I don't know. I can't remember. I suspect we made,
2 you know, a wheelbarrow full of motions.

3 Q. Right. But ultimately all of the issues, including the
4 issue of whether the plaintiff had injuries, including
5 the issue of whether the defendants breached the
6 standard of care, including whether or not there was
7 gross negligence which would provide a basis for
8 punitive damages, all of the issues were allowed to go
9 to the jury. Is that correct?

10 A. I think so. I don't remember any directed verdict
11 motions being granted or motions to strike.

12 Q. Now, the three different, I guess, versions of the note
13 that you have discussed today, as far as you know, this
14 is the first time that you have been made aware that
15 there was more than one?

16 A. Yeah. If there -- if I knew before, it does not come
17 to mind, but, like I say, bear in mind, it's been 13
18 years since the lawsuit arose and 11 years since the
19 lawsuit was filed. Much has happened both in my
20 professional life and personal life since then, and
21 it's just impossible to remember it all.

22 Q. Right. So if we were to look at some other indicators,
23 we would know that since Dr. Fogarty was not questioned
24 about that issue in his deposition, then it's more
25 likely than not that you and Mr. King did not

1 appreciate the fact that there was different wording
2 for that office note. Is that fair to say?

3 A. No. I can't -- I can't even follow your question.

4 Q. All right. Well, I understood you to testify before
5 that if you had any inkling that there was different
6 language in notes that purported to be of the same
7 office visit -- are you with me now?

8 A. Yes.

9 Q. Okay. And so if you had an inkling of that, that when
10 you deposed that physician, Dr. Fogarty in this case,
11 that you certainly would have questioned him on that.
12 Is that correct?

13 A. Probably would have, yeah.

14 Q. Okay. And so from that can we deduce if there was no
15 questioning of Dr. Fogarty on that issue, that you and
16 Mr. King were not aware that there were differing
17 notes, differing language in notes of the same office
18 visit?

19 A. No, I can't. I can't definitely make that connection.
20 It might be that there was some tactical reason that we
21 didn't want to go into that, or maybe we ran out of
22 time. It was two days before Christmas. You know, I
23 don't know.

24 Q. In any event, let me ask you this. If you'll accept
25 for the purposes of the question that all three

1 versions appear in the records between you and Mr. King
2 and Mr. Mann, who was the personal lawyer for much of
3 that case, that if all three versions did appear or did
4 exist and were produced and did exist in those records,
5 that at least you just didn't notice it?

6 A. I can only -- if you've got evidence -- if you've got a
7 witness or some evidence that they were in my file,
8 then I didn't see it or overlooked it or something like
9 that. I don't know -- I don't know everything that was
10 in Spencer's file. I don't know everything that was in
11 Milton's file. I can only speak for how I handle my
12 file.

13 Q. Okay.

14 A. Is there evidence that it was in my file?

15 Q. You know, I believe that -- I think that two of them
16 were, but I know that all of them -- I mean, I can just
17 tell you that all of them have been found in the MMA
18 files Bates stamped from the three files that were
19 produced. They were all -- they're all in there. And
20 then, of course, you and Ms. Cheek, I think, talked
21 about the reference of one of the notes in an e-mail
22 between Spencer King and Dr. Feldman that I believe was
23 associated with a version of the note that Dr. Waid had
24 in his records. Do you recall that?

25 A. Not really, but, I mean.

1 Q. Okay. Well, let me just get to the point. If somehow
2 between you and Milton Mann and Mr. King, if the three
3 of y'all, if the records were there in your files and
4 y'all didn't perceive any differences, would it be fair
5 and reasonable for another lawyer, Mr. Thompson, to
6 perhaps not appreciate the differences either?

7 A. I really don't know. You know, I just don't. I mean,
8 you know, each lawyer's attention level is different.
9 Each lawyer's competence level is different. Lawyers
10 proceed with different levels of thoroughness. So I
11 really cannot speak to Mr. Thompson's -- you know, what
12 he would appreciate or not appreciate.

13 Q. But what you can speak to, I guess, is that if the
14 records existed in your file, the three versions, that
15 you just didn't notice it or perceive any differences
16 in those records. Is that fair to say?

17 A. If, if all three existed in a place where I could see
18 them together and had had a reason to compare them and
19 a reason to suspect that there were different versions,
20 then yes, I overlooked it. On the other hand, if they
21 were in different places, they were about the same
22 length, and normally you don't -- I mean, I don't think
23 I've ever had a situation where I had a progress note
24 prepared by a physician where there were different
25 versions of it. I don't think you'd be looking for

1 that, the more I think about it. I just don't think
2 you would be looking for that.

3 Q. Nobody would. Right?

4 A. I don't think so.

5 Q. Okay. Let me ask you a little bit about your
6 evaluation of the case. When you were representing Dr.
7 Shantha, as I recall the correspondence and e-mails
8 between you and the carrier, that you felt confident
9 that Dr. Shantha's case or the case against him was
10 weak and you felt good about ultimately getting him
11 out. Is that right?

12 A. Yeah. Yeah, I did.

13 Q. Did you share Mr. King's belief, as he reported to Ms.
14 Wilbanks, that there were problems with Dr. Feldman and
15 Dr. Boscia's case and that the plaintiff's case had
16 merit and that there was some exposure?

17 A. I felt like the plaintiff would get to the jury and
18 that the argument that an unnecessary procedure was --
19 that the jury could accept that an unnecessary
20 procedure was performed. I felt like that was a
21 plausible theory and that the plaintiff was going to
22 get to the jury on that.

23 Q. And there were some other potential problems with the
24 case regarding Dr. Feldman's conduct before and after
25 the procedure. Is that correct?

1 A. Refresh my memory on that. I don't -- I don't recall.
2 I think -- I think Dr. Feldman, his note was not the
3 most thorough in the world. You know, all of the chest
4 doctors, pulmonologists that I've known are really,
5 really busy physicians. They see a lot of really sick
6 patients. They spend a lot of time in the ICU and, I
7 mean, they're quite busy. And Dr. Feldman's note was
8 not a real thorough note, but he -- you know, he's so
9 experienced, he can tell you kind of what was done.
10 But I don't recall any other real problems. You know,
11 Dr. Feldman can be excitable. So we had to make sure
12 we kept him calm as a witness. We had to make sure
13 that he remained sympathetic toward the patient,
14 compassionate toward the patient, didn't attack the
15 patient. So I don't recall any other things about his
16 conduct.

17 Q. Did you share Mr. King's concern that there was
18 evidence that Dr. Feldman failed to get informed
19 consent prior to what could have been seen by the jury
20 as an unnecessary procedure?

21 A. You know, I don't -- I don't remember. I don't -- that
22 doesn't stick out in my mind as a big concern I had,
23 although I can't -- you know, I can't deny that, but it
24 sure doesn't stick out in my mind.

25 Q. Let me -- I'm sorry. Go ahead.

1 A. It doesn't stick out in my mind, Matt. It's been a
2 long, long time.

3 Q. I understand, and I appreciate you remembering what you
4 can remember. So let me just sort of rephrase the
5 question into kind of a hypothetical. If you were
6 representing a doctor and there was evidence that your
7 doctor did not get informed consent prior to a
8 procedure, as a defense lawyer, that would concern you,
9 wouldn't it?

10 A. Under most circumstances it would.

11 Q. And, in particular, if the lack of informed consent was
12 in connection with what could easily be seen as an
13 unnecessary procedure, would that concern you?

14 A. It would concern me, but there isn't much in a lawsuit
15 that doesn't concern me. So, I mean, that's kind of a
16 level of -- you know, when you're -- when you're
17 representing somebody and a guy's claiming he's totally
18 and permanently disabled in his early fifties and made
19 pretty good money, you're concerned with everything.

20 Q. Right, and I understand that, but some things are more
21 concerning than others. And if your doctor is -- if
22 there's evidence that your doctor didn't get informed
23 consent prior to a procedure which may have resulted in
24 some permanent injury to the patient, then if Spencer
25 King was worried about that and communicated that to

1 Judy Wilbanks, he was prudent to do so. Wouldn't you
2 agree?

3 A. I can't pass upon Spencer, but I would -- that would
4 concern me, and that would cause me to -- that would be
5 a negative factor.

6 Q. Would it concern you if a physician you represented
7 proceeded with a rigid bronch in the face of a normal
8 CT of the chest?

9 A. Well, it depends on what the other circumstances were.

10 Q. Well, let's talk about the circumstances in this case.
11 There was a normal CT that did not show any foreign
12 material in or near the lungs or bronchioles, and with
13 that knowledge the procedure went forward. You recall
14 that from the underlying case?

15 A. I remember that there was that element. I also seem to
16 vaguely remember that there was some evidence that when
17 the flexible bronchoscopy was done or at some point
18 there was some evidence of some lesion of some type in
19 the bronchia that could have been very well consistent
20 with a foreign object. I remember something about
21 that, but yes, the absence of CT evidence of a foreign
22 body would be something that would -- would worry me
23 from the standpoint of defensibility of the case.

24 Q. Do you recall there being any concern expressed either
25 by you or by Mr. King that there was evidence that Dr.

1 Feldman failed to do a history and physical prior to
2 the procedure but wrote one in and added it to the
3 record after there was a problem with the procedure?

4 A. I don't recall that. I just don't -- I just don't
5 recall it. Well, vaguely I do. I recall something
6 very vague about that, and I remember that the patient
7 is not supposed to go in for a procedure like that
8 unless there is an H&P on the chart, some discussion
9 about how closely that's followed, some discussion
10 about it happens all the time that physicians put that
11 on there subsequently. There was also some discussion
12 about wasn't there already a history and physical on
13 this patient in the chart. So, but you're correct,
14 that was a topic.

15 Q. If there was already one, do you know why Dr. Feldman
16 would have added another one afterwards?

17 A. No. I don't have any recollection of any of the
18 specifics of that.

19 Q. Okay. And would you agree that if a physician were to
20 add a history and physical after a procedure, that it
21 should be noted that it was a late entry as I think you
22 discussed before regarding the medical records of
23 Exhibit 5, 6, and 7? Do you think that the physician
24 should have noted that it was entered into the record
25 after the procedure?

1 A. Yes. In a perfect world, sure.

2 Q. Right. And so if you start to put all these things
3 together, that there is potentially a lack of consent
4 for an elective procedure, it's not an emergency, that
5 there is a clear CT scan which did not show anything to
6 get out of the lung, and there is a late entry history
7 and physical which was not noted as being a late entry,
8 the combination of all those things, would that give
9 you some grave concern about the doctor's conduct in
10 the case?

11 A. Not grave concern, no.

12 Q. How about serious concern?

13 A. I can't -- I can't quantify it. It would give me -- it
14 would give me -- just like I said before, Matt, it
15 would give me the impression that the plaintiff could
16 make a plausible argument to get to a jury that there
17 was an unnecessary procedure and that the plaintiff
18 suffered some injury as a result of that unnecessary
19 procedure. I don't---

20 Q. At the time that there was the mediation --

21 A. Let me say this.

22 Q. -- with Theron Cochran---

23 A. When the testimony -- when the testimony developed as
24 it did with regard to the hidden CT scan, the hidden
25 MRI or anonymous or alias MRI and the -- and the fact

1 that Mr. Casey was probably more worried about his golf
2 swing than anything, you know, that really -- that
3 really sort of diminished much of the concern about the
4 case, just as I think it would with any defense lawyer.

5 Q. I forgot what I was going to say.

6 MR. MANN:

7 Hey, Matt. This is Milton for one second. We
8 have lost Ellen, but I do believe she had a 3 o'clock
9 appointment. What are your thoughts? Keep on keeping
10 on?

11 MR. HENRIKSON:

12 I'm not far from being over. Can we just take
13 like two or three minutes?

14 MR. MANN:

15 Absolutely.

16 (Off the Record; 3:03 -- 3:05 p.m.)

17 EXAMINATION RESUMED BY MR. HENRIKSON:

18 Q. Billy, we were talking and I want to go back to
19 something you spoke with Ms. Cheek about early on. Dr.
20 Feldman, I think you said he was unusually active for a
21 physician defendant. Is that correct?

22 A. Yeah. Yeah, he really followed the case and the
23 medicine and everything about it very closely.

24 Q. And he seemed to have an interest in the legal aspect
25 of it. Wasn't he sending you all case citations and

1 that sort of thing?

2 A. Yes.

3 Q. He would send you medical literature. Right?

4 A. Yes.

5 Q. Is that right?

6 A. Yes.

7 Q. He would send you medical literature, as well?

8 MR. MANN:

9 Matt, he answered in the affirmative.

10 EXAMINATION RESUMED BY MR. HENRIKSON:

11 Q. I'm sorry. I just did not hear the answer. I
12 apologize. And he was a prolific e-mailer. Is that
13 correct?

14 A. That would be a fair statement.

15 Q. And all that started about the time the lawsuit was
16 filed. Isn't that right?

17 A. I can't remember when I started receiving it. I don't
18 think I received much while I was in representation of
19 Dr. Shantha. I could be mistaken, but---

20 Q. If the e-mails indicated that you wouldn't have gotten
21 them, Mr. King would have shared some of Dr. Feldman's
22 e-mails with you. Is that correct?

23 A. He may well have, yeah.

24 Q. Okay. Do you recall there being a time when Mr. King
25 requested JUA to contact Dr. Feldman and ask him to

1 stop being so prolific with e-mails?

2 A. I wasn't privy to that. I read them. I was pretty
3 good about reading through them, because, as many as
4 there were, many of them contained some very helpful
5 information. Some didn't, but -- but I -- I don't
6 know. I wanted to -- I wanted to do a good job in the
7 case.

8 Q. Right. And so let me ask you this. When the mediation
9 with Theron Cochran was undertaken, were you still
10 representing Dr. Shantha then, or had Dr. Shantha been
11 dismissed and you were over with Dr. Boscia?

12 A. You know, I can't remember. That would be easy to
13 figure out from looking at the date on the summary
14 judgment order and the date of the mediation, but I
15 just do not remember.

16 Q. Do you recall that mediation at all or any of the
17 details of that mediation?

18 A. Not much.

19 Q. Do you recall that as a result of that mediation there
20 was a declaratory judgment action filed by JUA to
21 determine what the policy rights and responsibilities
22 were between the parties because Dr. Feldman refused to
23 authorize any kind of payment to settle this case and
24 he wanted to, I guess, waive his insurance?

25 A. I remember something about that, but I don't remember

1 any -- having any real involvement in it other than
2 knowing it was going on, now that you mention it. I
3 had forgotten all about that.

4 Q. And then there was a second mediation with Judge Hayes.
5 Do you recall that?

6 A. Yes.

7 Q. And at that time, do you remember whether or not you
8 were representing Dr. Boscia or Dr. Shantha?

9 A. I think at that time I was representing Dr. Boscia, I
10 believe. I'm pretty sure.

11 Q. Do you remember there being kind of a similar situation
12 where JUA wanted to offer some money or begin
13 negotiating and Dr. Feldman refused?

14 A. Yeah, but I think by then Dr. Feldman -- I don't know
15 that he refused them. I think he just didn't want that
16 to happen, but maybe he did refuse, but, you know, I
17 don't think -- I don't think any real refusal by Dr.
18 Feldman was valid, because my impression is that JUA
19 controlled the litigation.

20 Q. Right. I mean, not to make statements, but it's my
21 understanding -- tell me if you think this is correct
22 or not -- that Dr. Feldman, what promoted the DJ action
23 was Dr. Feldman wanted to, I guess, you know, waive any
24 coverage that he had and would take the risk of a trial
25 and that, of course, the plaintiffs didn't want there

1 to be no coverage, but does that refresh your
2 recollection about the necessity of the DJ action?

3 A. I think that's correct, Matt. I think that's right.

4 Q. Okay. With respect to Mr. Thompson, when you were
5 representing Dr. Shantha and when you were representing
6 Dr. Boscia, you and Spencer King and Milton Mann, your
7 object was you wanted to successfully defend your
8 clients in this lawsuit. Is that correct?

9 A. Correct.

10 Q. And, similarly, isn't it the case that Mr. Thompson was
11 at all times trying to get a verdict, a favorable
12 verdict for his client?

13 A. I'm sure that was his goal.

14 Q. And at all times he was acting in his professional
15 capacity as Mr. Casey's attorney. Correct?

16 A. Yeah. Yeah, that's what he was doing.

17 Q. All right. Thank you, sir. I don't have any other
18 questions, and I really do appreciate your time. If
19 somebody took six hours from me on a workday, I'd be
20 frowning, but I appreciate your doing this for us.

21 A. Okay.

22 MR. MANN:

23 Matt, I've got a couple of follow-up questions,
24 and I promise I'm going to be very, very brief.

25 RE-EXAMINATION BY MR. MANN:

1 Q. Mr. Gunn, if you would do me the favor of getting out
2 Exhibit Number 5. I think it's one of the loose July
3 notes. And I need you to go back again. I know Ellen
4 just finished this up with you, but I wanted to finish
5 a question about the document. Going to tab number
6 eight in your book, we're going to do a real quick
7 comparison.

8 A. Okay.

9 Q. Now, looking at Exhibit Number 5, that is the one that
10 has the prior exhibit sticker showing that it was
11 attached to Dr. Fogarty's deposition.

12 A. Right.

13 Q. So would you agree with me, more likely than not, Dr.
14 Feldman was working with that particular version of the
15 note?

16 A. Yes. I mean, something brought it -- something brought
17 this one to the forefront with us.

18 Q. And looking at Number 9, would you agree with me that
19 paragraph that we've talked about on the page 3 above
20 Plan that paragraph in Number 5 that we've been doing
21 the comparisons with, and you agreed, and I believe you
22 testified to Ellen earlier that it did not match that
23 language that is quoted in Exhibit Number 9. So
24 comparing on page 3 the paragraph above Plan, comparing
25 that language contained in Exhibit Number 5 to the

1 language contained in Exhibit Number 9, you would agree
2 that those two do not match?

3 A. Exhibit 9? Where is Exhibit 9?

4 Q. It's the one you were turned to in your book.

5 A. Oh. The one behind tab eight?

6 Q. Behind tab eight, yes, sir. That's Exhibit Number 9
7 for us.

8 A. Oh, okay. It says -- Exhibit 9 says, "Air emboli had
9 been reported as a common complication of laser
10 bronchoscopy." And I don't see anything about that in
11 Defendant's Exhibit Number 5.

12 Q. So you would agree that that language is different
13 between those two exhibits?

14 A. Yeah. Yes. Yes, sir.

15 Q. And what is the date on Exhibit 9?

16 A. February 16, 2008.

17 Q. And that is, of course, an e-mail?

18 A. Yeah.

19 Q. From Dr. Feldman to Mr. King and myself?

20 A. Right.

21 Q. Now, let's look down below that quoted paragraph.

22 A. Okay.

23 Q. Please read me the rest of that e-mail, if you would.

24 A. "Spencer, you have quoted from Fogarty record. I
25 cannot find this in the Lung and Chest record that your

1 paralegal has provided. We are meeting on Tuesday and
2 I have found series of astonishing statements, but not
3 this one. Did you give me all Fogarty records? Please
4 locate the source of the above statement."

5 Q. Now, earlier when you were talking with Ms. Cheek, that
6 language does match one of the other versions of the 7-

7 --

8 A. Are you talking about --

9 Q. Yes.

10 A. -- language in Exhibit 9?

11 Q. Language in Exhibit 9 does match either 6 or 7.

12 A. Yeah. I think -- I think it was 7. She thought it was
13 7 first, and then -- and then it was -- in actuality,
14 it was 6. It appears to match 7. It may match both of
15 them. Let me -- I'm going to have to read it out loud
16 to be -- "Air emboli have been reported as a common
17 complication when there is laser perforation of the
18 endotracheal tree with resultant leakage of air into
19 the extrapleural vascular and mediastinal space." So
20 it does match Number 7.

21 Q. Before you leave Number 7, Mr. Gunn, let's look at it
22 for one more second here. In that paragraph that we're
23 talking about, it says air emboli have been reported as
24 a complication; whereas, Number 9, I believe, says air
25 embolism have been reported as a common complication.

1 So I would suggest that 9 and 7 do not contain the same
2 language.

3 MR. HENRIKSON:

4 Object to the form.

5 RE-EXAMINATION RESUMED BY MR. MANN:

6 A. That's correct.

7 Q. So let me rephrase that. So in looking at the language
8 that Dr. Feldman has quoted in Exhibit 9, you have
9 reviewed that pertinent paragraph that we've been
10 speaking about above Plan in Exhibit 7, and those two
11 do not match, do they?

12 A. That's correct. Now, it may match -- Exhibit 9 may
13 match the language in Exhibit 6. Exhibit 6 certainly
14 has "common complication," and that's in Exhibit 9.
15 And I think that's what happened, is Ms. Cheek first
16 asked me about Exhibit 7 and then said, wait, it's
17 Exhibit 6.

18 Q. So I believe, if I'm following what you're telling me,
19 is that we believe Exhibit 5 is the note that yourself,
20 Mr. King, myself, and Dr. Feldman were working from in
21 consideration that that was the July 21, 2005 Dr.
22 Fogarty note?

23 A. That's what one would conclude.

24 Q. And looking at Number 9, Dr. Feldman is saying that
25 language does not match the Fogarty records that he

1 has?

2 A. Right.

3 Q. And he is looking for that record even as of February
4 16, 2008?

5 A. Yeah, he says he can't -- he says he can't find it and-
6 --

7 Q. And that he wants an explanation?

8 A. Yeah.

9 Q. And he's not resting on his laurels. I mean, he is
10 actively trying to figure out what is going on with
11 this. Correct?

12 A. Yes. "Did you give me all the Fogarty records? Please
13 locate the source of the above statement."

14 Q. Now, if Dr. Feldman, based upon our discussion in this
15 line of questioning and looking at these documents that
16 we've previously --

17 A. Right.

18 Q. -- 5, 6, 7 and 9, would that not strongly indicate to
19 you that Dr. Feldman does not know that there are two
20 versions of that July 21, '05 note?

21 MR. HENRIKSON:

22 Object to the form.

23 RE-EXAMINATION RESUMED BY MR. MANN:

24 A. Yeah. I mean, I think that would be a fair inference
25 to draw.

1 Q. Yes, sir. And let's go over to Number 12 for a second,
2 which is tab number 11 in your book.

3 A. Okay.

4 Q. And I'll tell you why the numbers don't line up. We
5 left one or two out that didn't have any relevance to
6 your deposition. Again, we've got a quote that I
7 believe you identified as being consistent with Exhibit
8 5. And it says right above it -- and, again, can you
9 tell me what this document is, yes, Number 12?

10 A. Exhibit 12?

11 Q. Yes, sir.

12 A. Well, it's a -- it's an e-mail from Dr. Feldman to you
13 and Spencer just a couple of weeks before, couple,
14 three weeks before trial.

15 Q. 2010?

16 A. Yeah. And it must have -- must have had to do with the
17 motion to dismiss the case, because it refers to Dr.
18 Waid's evaluation and the Aetna -- and the Aetna
19 documents.

20 Q. And I believe Ellen previously had you go through that
21 the first language where it says Fogarty July 21, '05
22 progress note and it's bolded, I think there may have
23 been a typo or two, but that language matches the
24 language contained in Exhibit 5?

25 A. You want me to compare this language?

1 Q. Yes, sir, to Exhibit 5.

2 A. Okay.

3 Q. And, again, it's the plan, page 3, the paragraph above
4 Plan.

5 A. That seems to -- that seems to be what is being quoted;
6 that is, Exhibit 5.

7 Q. And, again, we said that more likely than not, that
8 note, Exhibit 5 that was attached to Dr. Fogarty's
9 deposition, is the one that the defense was working off
10 of?

11 A. It looks -- it looks like as late as the month of trial
12 that's what -- that's what was being used by you and
13 Mr. King and Dr. Feldman.

14 Q. Now, looking at the other language that he quotes from
15 the Waid note, I believe you compared that to Exhibit
16 6, which is one of the other versions of the July note?

17 A. Well, it can't be Exhibit 6.

18 Q. It may be---

19 A. Because Exhibit 6 has "common" in it, and this does not
20 have common in it.

21 Q. Then it's 7. I apologize.

22 A. It must be 7. Yeah. Yeah, this is -- this comes from
23 Exhibit 7, it looks like.

24 Q. And that is the language that Dr. Feldman is
25 attributing to Dr. Waid's report?

1 A. Correct.

2 Q. Look down below. There's a number one and number two
3 below the quotation. Could you read those two for us?

4 A. One, period. First he quotes Fogarty, parentheses,
5 different quote, closed parentheses. Two, period. No
6 such record was found at Waid's office, neither Fogarty
7 note not above, quote, parentheses, removed, closed
8 parentheses.

9 Q. Now, would that indicate to you that Dr. Feldman is not
10 aware of Exhibit 6?

11 A. Dr. -- yeah. I mean, it looks like Dr. Feldman doesn't
12 know where this language came from.

13 Q. And he was still seeking out where that came from as
14 late as, as you said, a month---

15 A. The month of trial.

16 Q. The month of trial.

17 A. Seemed like we started trial May 28 or thereabouts.

18 Q. I appreciate you answering those questions on those.

19 A. Sure.

20 Q. I'm finished with those, but I do have one final
21 question for you.

22 A. Yeah.

23 Q. Mr. Gunn, I believe Ms. Cheek was talking to you about
24 -- and Matt may have mentioned this, also. Had
25 anything else been sought in relationship other than

1 money from the plaintiff's side of this case?

2 A. I don't remember that, and that's a rarity in cases of
3 this type.

4 Q. Do you remember if there was a request for a mutual
5 release in addition to any money payment?

6 A. Mutual whereby Dr. Feldman released the plaintiff?

7 Q. Attorneys, agents, others.

8 A. Maybe that was the case. I mean, it doesn't stick out.
9 I think by the time -- I don't know. I really do not
10 know, because the -- I thought the monetary demands
11 were so large that I continued to focus on trial. I
12 really did.

13 Q. Mr. Gunn, as Matt said, I appreciate --

14 A. Sure.

15 Q. -- your time, and thank you for taking time out of your
16 very busy schedule, and I have no further questions.

17 RE-EXAMINATION BY MR. HENRIKSON:

18 Q. Billy, I just have a couple follow-ups.

19 A. Okay.

20 Q. Isn't it the case in every settlement that every party
21 wants to walk away and not have any concern that
22 anything arising out of the matter is going to come
23 back?

24 A. Yeah, but -- I mean, sure. Sure, everybody wants to
25 end it once and for all. I think it's -- I think it's

1 unusual for a plaintiff to ask a defendant for the
2 defendant to also execute a release, though. I think
3 usually the plaintiff simply executes a release of all
4 claims, and if it's a minor or somebody non-compos
5 mentis, court approval is required, and that ends it.
6 I don't think I can remember many cases where -- many
7 malpractice cases or personal injury cases where the
8 plaintiff and plaintiff's attorney have requested a
9 release by the -- by the defendant, and I don't -- I
10 can't swear that happened in this case. If somebody
11 else recalls it, I couldn't disagree with that.

12 Q. Are you aware that in this case Dr. Shantha has
13 recently signed a mutual reciprocal release that he
14 wanted to dismiss the defendants, but also wanted a
15 release back from the defendants?

16 A. No, I didn't. I am not -- I have not discussed this
17 litigation in the least with Dr. Shantha. I don't -- I
18 haven't represented him in anything subsequent to his
19 departure from the malpractice case. I've seen him at
20 the Athletic Club on repeated occasions and simply
21 passed the time of day with him. Haven't talked about
22 any of it.

23 Q. And, finally, regarding the testimony you've given
24 today about the three notes, Exhibit 5, 6, and 7,
25 whatever they say and whatever differences there may

1 be, isn't it fair to say that you and Mr. King had a
2 full and fair opportunity to depose Dr. Fogarty, ask
3 him any question you wanted, explore all of his
4 opinions and all of the bases for his opinions and
5 everything else that he could possibly testify about at
6 trial? Isn't that correct?

7 A. Well, not everything else.

8 Q. Well, you had an opportunity to ask him about all of
9 his opinions, didn't you?

10 A. Yeah. Yeah, we did.

11 Q. Okay. And his opinions were -- in the deposition were
12 consistent with there being air emboli that caused the
13 damage to Mr. Casey. Isn't that what he testified to?

14 A. Generally speaking, that's correct, but it's been a
15 long -- it's been, you know, almost nine years since
16 his deposition was taken in December of -- well, it's
17 been slightly more than eight years since his
18 deposition was taken, and I cannot -- and I have not
19 looked at it since trial. I don't know -- I don't
20 think he testified at trial.

21 Q. Right. That was my next question. Regardless of what
22 his note said, regardless of what his testimony in his
23 deposition was, he never testified at trial?

24 A. For some reason, we never heard from him at trial.

25 Q. So whatever he had to say, whatever his opinions were,

1 it did not get to the jury. The jury was not
2 influenced by them in any way whatsoever. Isn't that
3 correct?

4 A. I think -- I think they probably did, because I suspect
5 other experts, pursuant to the rule on expert
6 testimony, had his letter or had his progress report or
7 progress reports, and---

8 Q. Did you question those experts --

9 A. May I finish, please, sir?

10 Q. -- on the bases for their opinions?

11 A. May I finish?

12 Q. Oh, I'm sorry. I thought you were. I apologize.

13 A. No. I think -- I think the substance of them got
14 before the jury, because, as you well know, other
15 experts can refer freely to matters normally relied
16 upon by experts. And so I don't remember what the
17 record in the case says, but I strongly suspect that if
18 we went back and looked at a transcript of the record
19 in the case, Dr. Jantz and perhaps others referred to
20 the notes of Dr. Fogarty, and if I had to speculate,
21 I'd say that probably Mr. Thompson made a considered
22 tactical judgment that Dr. Fogarty would not testify.
23 Q. And you had an opportunity to ask those other experts
24 the bases for their opinion and whether they were
25 relying solely on Dr. Fogarty or whether they had

1 developed their own opinion. Isn't that correct?

2 A. I had a -- I had a full and fair chance. I had a full
3 chance to explore whatever I needed to explore with
4 those experts, you know, using whatever information I
5 had in my file.

6 Q. And Billy, we've had a full and fair chance to explore
7 everything with you, and I appreciate, again, your
8 time, and I have no more questions, I promise.

9 A. Okay. Thank you, sir.

10 MR. MANN:

11 And I do have one. Matt, you've triggered a
12 thought. Thank you, sir.

13 RE-EXAMINATION RESUMED BY MR. MANN:

14 Q. Mr. Gunn, if the Lung and Chest chart that was provided
15 through Mr. Thompson's office only contained Exhibit 5
16 and not the other two versions of the note into the
17 records that had been attributed as being produced of
18 the Lung and Chest chart, would you still agree that
19 that gave you a fair opportunity to question Dr.
20 Fogarty about the differences in those notes?

21 MR. HENRIKSON:

22 Object to the form.

23 RE-EXAMINATION RESUMED BY MR. MANN:

24 A. Well, let me say this. If, if it were represented to
25 me that this is Dr. -- if it were represented to me

1 that this is the medical chart from Lung and Chest
2 Medical Associates, I don't think that I had an
3 obligation to scour the record looking for other
4 versions of that note. I think I had a right to rely
5 upon what opposing counsel represented a medical chart
6 to be.

7 Q. I have nothing else.

8 MR. HENRIKSON:

9 Thank you.

10 (There being no further questions, this deposition concluded
11 at 3:35 p.m.)

CERTIFICATE OF REPORTER

I, ROSALIND POOLE WALTERS, a Notary Public in and for the State of South Carolina, do hereby certify that the foregoing 150 pages represents a true and accurate transcript of the deposition of WILLIAM U. GUNN, ESQUIRE, which was taken by me on the 2nd day of February, 2017.

That the witness was first duly sworn to tell the truth, the whole truth and nothing but the truth of his own knowledge concerning this matter.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Rosalind Poole Walters, CVR-M
Notary Public for South Carolina
Commission Expires: 4/29/26

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., Joseph A.
Boscia, III, M.D., Upstate Lung and
Critical Care Specialists, P.C., and
Devendra T. Shantha, M.D.,

Plaintiffs,

v.

William Mark Casey, Ray E. "Chuck"
Thompson, and Charles M. Fogarty, M.D.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

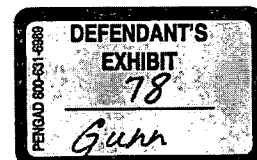
) C.A. NO.: 2010-CP-42-05743

) PLAINTIFFS' NOTICE OF DEPOSITION TO
) WILLIAM U. GUNN, ESQUIRE

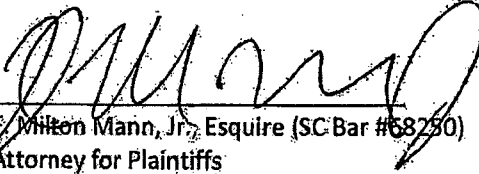
TO: WILLIAM U. GUNN, ESQUIRE:

YOU WILL TAKE NOTICE that the undersigned attorney for the Plaintiffs, pursuant to Rules 30 and 45 of the South Carolina Rules of Civil Procedure, will take, or cause to be taken, the deposition as indicated below:

<u>Name of Deponent</u>	<u>Place of Deposition</u>	<u>Date and Time</u>
William U. Gunn, Esquire	Holcombe Bomar, PA 100 Dunbar Street Suite 200 Spartanburg, SC 29306 Phone: 864-594-5300	Thursday, February 2, 2017 at 9 a.m.



The deposition will be taken before a notary public or some other person authorized by law to take depositions. The deposition will continue from day to day until concluded.

By: 
F. Wilton Mann, Jr., Esquire (SC Bar #68250)
Attorney for Plaintiffs
151 Harold Fleming Court
Spartanburg, SC 29303
864/680-5079 - Cell
866/452-2276 - Fax

January 30, 2017

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., et al., Plaintiffs,

v.

William Mark Casey, et al., Defendants.

SUBPOENA IN A CIVIL CASE

Case Number: 2010-CP-42-05743

Pending in Spartanburg County

TO: William U. Gunn, Esquire, Holcomb Bomar, PA, 100 Dunbar Street, Suite 200, Spartanburg, SC 29306

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION Holcomb Bomar, PA, 100 Dunbar Street, Suite 200, Spartanburg, SC 29306	DATE AND TIME February 2, 2017, 9:00 AM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

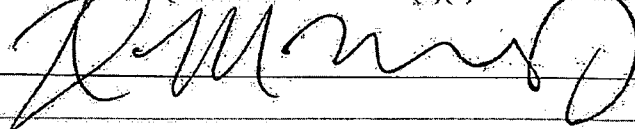
PLACE:	DATE AND TIME	AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

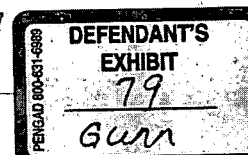
PREMISES	DATE AND TIME	AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.



DATE January 30, 2017



ATTORNEY ISSUING OFFICER'S SIGNATURE, ATTORNEY FOR DEFENDANTS

[Signature]

01/30/17

F. Milton Mann, Jr., Esquire

CLERK OF COURT/ISSUING OFFICER SIGNATURE

DATE

PRINT NAME

PROOF OF SERVICE

SERVED	DATE <u>1/30/2017</u>	FEES AND MILEAGE TENDERED TO WITNESS ☐ YES ☐ NO AMOUNT \$
	PLACE <u>100 Dunbar St, Suite 200, Spthg</u>	
SERVED ON	<u>Receptionist</u>	MANNER OF SERVICE <u>Hand Delivery</u>
SERVED BY	<u>F. Milton Mann, Jr.</u>	TITLE <u>Esq</u>

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.
Executed on 28 Jan 2017

SIGNATURE OF SERVER

151 Harold Fleming Rd, Spthg SC
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- i. fails to allow reasonable time for compliance; or
- ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or
- iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- iv. subjects a person to undue burden.

(B) If a subpoena:

- i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or
- iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., Joseph A.
Boscia, III, M.D., Upstate Lung and
Critical Care Specialists, P.C., and
Devendra T. Shantha, M.D.,

Plaintiffs,

v.

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Thompson, and Charles M. Fogarty, M.D.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

) C.A. NO.: 2010-CP-42-05743

CONSENT ORDER

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC 11 AM 9:59
M. HOFFELACKLEY

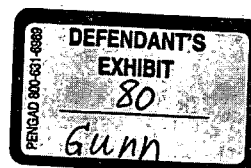
CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER

The parties to this action (the "Parties") may produce and testify about certain confidential, proprietary, and/or otherwise sensitive information, and have agreed that such confidential, proprietary, and/or otherwise sensitive information shall not be used for any purpose other than the present litigation involving the Defendants. For the purposes of protecting such confidential information and facilitating discovery, Plaintiffs Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Upstate Lung and Critical Care Specialists, P.C., and Devendra T. Shantha, M.D., ("Plaintiffs") and Defendants William Mark Casey, Ray E. "Chuck" Thompson, and Charles M. Fogarty, M.D., ("Defendants") agree to the terms of this Confidentiality Agreement and Consent Protective Order ("Protective Order") as follows:

1. The agreement contained herein shall be applicable both during the pendency of and following the resolution of this action styled *Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Upstate Lung and Critical Care Specialists, P.C., and Devendra T. Shantha, M.D. v.*

1

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me

William Mark Casey, Ray E. "Chuck" Thompson, and Charles M. Fogarty, M.D., Civil Action File No. 2010-CP-42-5743, in the Court of Common Pleas of Spartanburg County, South Carolina, including any appeal thereof (the "Lawsuit").

2. For the all-inclusive purposes of document production, written discovery, deposition testimony, all other discovery, and trial testimony in the Lawsuit, each party hereby expressly waives all attorney-client privileges and attorney work product privileges that were formed as part of and exist in relation to the medical malpractice lawsuit styled, *William Mark Casey v. Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Devendra Shantha, M.D. and Upstate Lung and Critical Care Specialists, PC*, filed in the Court of Common Pleas for Spartanburg County, Civil Action No. 2006-CP-42-1728 (the "Medical Malpractice Action"). Any Medical Malpractice Action documents that are produced in response to written discovery requests or obtained by subpoena and that contain attorney-client privileged information or work product shall be considered Confidential Information under this Protective Order. This waiver shall not extend to attorney-client and work product privileges that were or are formed as part of and exist in relation to the Lawsuit.

3. Subject to the terms and restrictions of this Protective Order, the Parties may disclose in discovery purportedly confidential, proprietary and/or otherwise sensitive information. However, and expressly subject to the waiver provided in Paragraph 2 of this Protective Order, no provision in this Protective Order shall be construed as a requirement that any Party disclose privileged information or as a waiver of any privilege by any Party or non-parties. Nor shall any provision in this Protective Order be construed to require the disclosure of information the confidentiality of which is otherwise protected by state or federal law.

4. "Confidential Information" means documents, writings, things, testimony, discovery responses, affidavits, or any other form of information, tangible or intangible, that contains confidential information, proprietary information, trade secrets, and employment records and files, which may be produced or disclosed during discovery or at a hearing in the Lawsuit.

5. Any Party may designate as "confidential" any material that is produced in this Lawsuit, including without limitation, information contained in answers to interrogatories or depositions, or any information contained in the exhibits, documents or things produced in the Lawsuit, provided the Party in good faith believes said information or documents contain confidential and/or proprietary information, and the Party expressly affirms that the information is not publicly available or has been produced in other litigation without designating it as confidential.

6. A Party shall identify Confidential Information with the following designation: "CONFIDENTIAL". Placement of the "CONFIDENTIAL" designation on the first page of a document shall designate the entire document as Confidential Information.

7. Any Party objecting to the designation of any particular information as Confidential Information or to the specified level of confidentiality or believing that any such designation is not made in good faith (collectively referred to as "objections") shall attempt to resolve the matter by setting forth in writing to counsel for the other Party the objection(s) and the reason(s) therefore. Any objection which is unable to be resolved by the Parties within ten (10) working days of the receipt of the objection shall be raised with the Court by the Party asserting confidentiality. If the Party asserting confidentiality fails to file the appropriate Motion, then that Party has waived confidentiality. Pending the determination by the Court, the document or information subject to an objection shall retain its protected status.

8. Depositions or portions thereof upon oral or written questions that contain or make reference to Confidential Information may be designated as Confidential by either Party or in writing within ten (10) days of the conclusion of the deposition.

9. Confidential Information that is designated as "CONFIDENTIAL" shall not be disclosed to or discussed with any person except the Party receiving the Confidential Information, attorneys of record and employees of such attorneys assigned to and necessary to assist in the conduct of this action, consultants or designated experts, witnesses (but only to the extent such Confidential Information is reasonably related to the witnesses' testimony), court reporters employed in connection with this Lawsuit, and the Court. If any documents produced pursuant to this Protective Order are shared in violation of this agreement, any violating Party will be subject to penalties as a court of law may find appropriate.

10. Disclosure of Confidential Information to those persons identified in paragraph nine(9) may be made only in connection with the litigation of this Lawsuit, and specifically shall not be used or referred to, directly or indirectly, (a) for any business or competitive purpose, (b) for publicity, (c) in any material disseminated to any person not authorized to receive Confidential Information under the terms hereof, or (d) in any other legal proceeding, lawsuit, administrative action, or claim between or among Plaintiffs or Defendants, or any combination thereof. Each person to whom the disclosure of any Confidential Information is made shall not, directly or indirectly, use, disclose, or disseminate, or attempt to use, disclose, or disseminate, any of the same except as expressly provided herein.

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11. Before any Party disclosing Confidential Information to any person identified in paragraph (9), that Party shall redact from the Confidential Information any and all Social Security Numbers contained therein.

12. Each document that is filed with the Court that contains any Confidential Information shall be filed in a sealed envelope or other appropriate sealed container on which shall be set forth the title and number of this Lawsuit, a general description or title of the contents of the envelope, and a statement that the contents are confidential and subject to a Protective Order for confidentiality and that the envelope is not to be opened nor the contents thereof revealed except to counsel of record in the case or court personnel, or pursuant to order of the Court. Copies of such documents served on counsel for other parties shall be marked as "CONFIDENTIAL".

13. Nothing herein shall preclude the Parties from raising any available objection, or seeking any available protection with respect to any Confidential Information, including but not limited to, the grounds of the admissibility of the evidence, materiality, trial preparation materials, and privilege.

14. The Parties hereby stipulate and agree that, to the extent that information or material is protected by the South Carolina Trade Secret Act or any other applicable law regarding trade secrets, such information or material shall not lose its status as a trade secret by virtue of its production in the Lawsuit pursuant this Protective Order.

15. This Protective Order has no effect upon, and its scope shall not extend to, any Party's own use of its own Confidential Information.

16. In the event that a confidential document or thing is or has been produced without having been previously marked CONFIDENTIAL, a Party shall notify the other Party within ten days of

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the appropriate designation as Confidential Information. Upon such notice, the Party in receipt of that document or thing shall stamp the document or thing "CONFIDENTIAL" and thereafter preserve such document or thing in accordance with this Order.

17. Once this Protective Order is executed by the Parties, it may only be modified through an order or written agreement of the Parties. This Protective Order is entered without prejudice to the right of any Party or person from whom discovery is sought to seek modification of this Order from the Court with respect to any specific information.

18. Counsel for each party shall take reasonable precautions to prevent the unauthorized or inadvertent disclosure of any confidential material.

19. The termination of proceedings in this Lawsuit shall not thereafter relieve any person to whom Confidential Information was disclosed, including counsel for the Parties, from the obligation of maintaining the confidentiality of all such materials received pursuant to this Protective Order. Neither the termination of this action nor the termination of the employment, engagement, or agency of any person who had access to any Confidential Information shall relieve any person from the obligation of maintaining both the confidentiality and the restrictions on use of any confidential material disclosed pursuant to this Protective Order.

20. Counsel for the Parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as CONFIDENTIAL pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who in the course of this litigation have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Protective Order. Upon written request and an explanation of good cause, counsel shall provide this list and the

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original executed forms to opposing counsel at any time during and/or after the conclusion of this Lawsuit.

21. All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies") of documents designated as Confidential Information under this Protective Order, or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Protective Order.

22. At the ultimate conclusion of the Lawsuit (settlement, trial, and/or appeal), the Parties shall, within 30 days of the end date, return all originals and copies of all produced Confidential Information back to the producing Party. As an alternative to receiving back all originals and copies of all produced Confidential Information, the producing Party may instruct and authorize any or all other Parties to destroy all such materials in their possession, and to provide the producing Party a written certification of such destruction.

23. In the event that any Party hereto desires to make a substitution of attorneys, the proposed new counsel for such Party shall, prior to being substituted as counsel in this action, be provided with a copy of this Protective Order and shall agree, in writing, to the terms set forth therein.

24. This Protective Order is presented to the Court for entry in the above-captioned matter. This Protective Order also shall serve as a stipulation and agreement between the Parties, and shall be effective immediately upon signature by the Court.

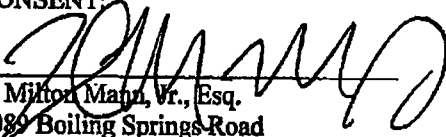
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AND IT IS SO ORDERED.


R. Keith Kelly
Judge, Seventh Judicial Circuit

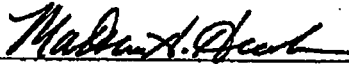
December 11, 2015
Spartanburg, South Carolina

CONSENT:

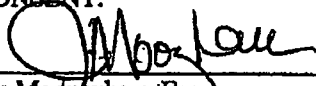

F. Milton Mann, Jr., Esq.
1089 Boiling Springs Road
Spartanburg, SC 29303
Attorney for Plaintiffs

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SPARTANBURG COUNTY
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H. HOPKINS BLACKLEY

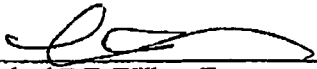
CONSENT:


Matthew H. Henrikson, Esq.
Henrikson Law Firm, LLC
Post Office Box 26554
Greenville, South Carolina 29616
Attorney for Defendant Ray E. "Chuck" Thompson

CONSENT:


Joe Mooneyham, Esq.
Mooneyham Berry LLC
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Greenville, SC 29605
Attorney for Defendant William Mark Casey

CONSENT:



Michael B.T. Wilkes, Esq.

Ellen S. Cheek, Esq.

Wilkes Law Firm, P.A.

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Spartanburg, SC 29306

Attorneys for Defendant Charles M. Fogarty, M.D.

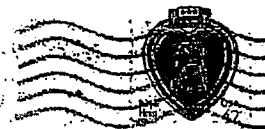
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SPARTANBURG COUNTY
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M: HOPE-BLACKEY



Extremely Confidential

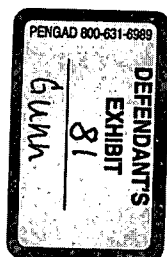
GREENVILLE SC 296

18 AUG 2008 PM 3 L



H. Spencer King
Attorney At Law
The Ward Law Firm
P.O. Box 5663
Spartanburg, SC 29304

29304+5663



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THIS PHOTOCOPY IS OF A DISK AND IS BEING SENT TO YOU SO THAT THE PLAYING FIELD IS LEVEL. CHUCK THOMPSON ARRANGED FOR HIS CLIENT TO HAVE AN MRI/HEAD AT PRESBYTERIAN HOSPITAL IN CHARLOTTE, NC, AND FAILED TO PROVIDE IT IN DISCOVERY. HE ARRANGED FOR THE MRI TO BE CARRIED OUT USING THE ALIAS "MARK JOHNSON" THROUGH DR. GODWIN, HIS BROTHER IN LAW, AT PRESBYTERIAN HOSPITAL. AND, IT APPEARS THE TEST WAS PAID FOR IN CASH BY CHUCK. OBVIOUSLY, CHUCK'S CLIENT'S SIGNING AN AUTHORIZATION WOULD NOT HELP YOU IN GETTING A COPY OF SAME. PLEASE USE WHATEVER MEANS NECESSARY TO OBTAIN THE TEST RESULTS AND THE MANNER IN WHICH THE TEST WAS SCHEDULED, PERFORMED AND WHY CHUCK WENT TO SUCH LENGTHS TO HIDE IT FROM YOU.

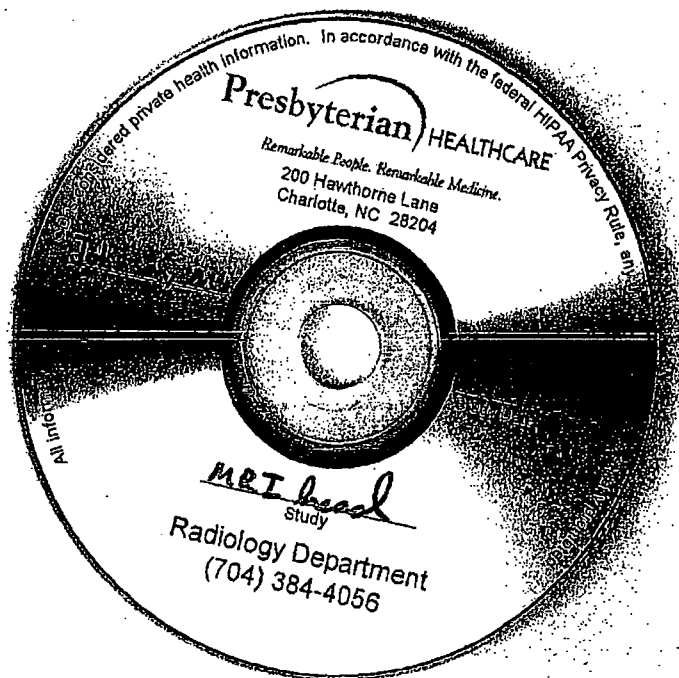
GUNN 002448

In CL Click on Patient List.
 Double click on Study to display.
 Use Vertical scroll bar or arrow keys to scroll through images.
 Click & drag to adjust contrast & density.
 There are several tools that you can use to optimize viewing located under
 TOOLS 1,2 & LAYOUT tabs.

Record # 53305541

Mark Johnson
 date: 10-18-58

date: 8-24-07



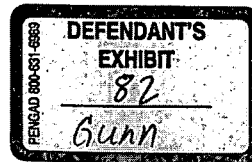
GUNN 002449

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
William Mark Casey,	)	
	)	
Plaintiff,	)	
	)	C.A. No.: 2006-CP-42-1728
v.	)	
	)	
Gregory J. Feldman, MD, Joseph A.	)	DEFENDANTS' MEMORANDUM IN
Boscia, III, MD, and Upstate Lung	)	SUPPORT OF DEFENDANTS'
and Critical Care Specialists, PC	)	MOTION TO DISMISS
	)	
Defendants.	)	

Defendants move to dismiss Plaintiff's Complaint with prejudice, pursuant to Rules 37(b)(2)(C) and 41(b) of the South Carolina Rules of Civil Procedure, due to Plaintiff's blatant abuses of the discovery and Plaintiff's actions that constitute a fraud upon the Court in this case. The fraudulent conduct of Plaintiff and Plaintiff's attorney in obtaining an MRI study of the brain under a false name and then seeking to conceal both the MRI study, and its interpretation by a radiologist as "normal," for nearly two years during the discovery process in this case warrants the remedy of dismissal of Plaintiff's Complaint, with prejudice.

FACTS

A. On Friday, May 28, 2004 (Friday before Memorial Day weekend), Plaintiff presented to the emergency room at Spartanburg Regional Medical Center with chest pain. A plain film x-ray suggested that a metallic object was in the left bronchial tree. Defendant Boscia was consulted, and performed a flexible bronchoscopy which did not locate an object; but did identify abnormal tissue. A CT scan was subsequently ordered.



GUNN 002401

- B. On June 3, 2004, a rigid bronchoscopy with laser was performed by Dr. Feldman on Plaintiff. Unfortunately Plaintiff suffered the complication of a pneumothorax (collapsed lung); for which the Plaintiff was treated and released.
- C. Soon thereafter Plaintiff sought and obtained short term disability from his employer which evolved into a long-term disability claim with Aetna under a policy issued to him through his employment. On November 15, 2004, that long term disability claim was granted. The basis for that long term disability claim was "major depressive disorder (single episode, severe)" and "panic disorder with agoraphobia." Benefits were paid for a 24 month limitation provided in the Aetna policy for disabilities "caused to any extent by a mental condition...," which 24 months "expired" in May 2006. See Aetna Benefits Determination Letters, dated November 15, 2004 and October 13, 2006, attached as exhibit A.
- D. On or about May 24, 2006 this medical malpractice case was filed by Ray E. (Chuck) Thompson, Jr. of Spartanburg, South Carolina, on behalf of William Mark Casey against Gregory Feldman, MD and Joseph Boscia, MD, pulmonologists; and others who were subsequently dismissed. It is alleged, *inter alia*, that the rigid bronchoscopy performed by Dr. Feldman was unnecessary and resulted in an air embolism to the brain, brain damage and subsequent cognitive dysfunction. Liability, causation and the extent of Plaintiff's damages are all denied. Sharply at issue in this case is the question of whether or not Plaintiff suffered a brain injury of any type.
- E. On July 12, 2006, shortly after Plaintiff filed this lawsuit, Plaintiff also appealed the Aetna benefits determination alleging that "... he has been physically and

mentally disabled from gainful employment..." since the 2004 procedure at issue in this case. The Plaintiff submitted medical documentation from Drs. Joseph G. Grace, PhD (psychologist), Dr. Jeffrey Smith, MD (psychiatrist), L. Randolph Waid, PhD (neuropsychologist) and Wilson P. Smith, MD (pulmonologist). Curiously, none of these doctors provided any objective basis for the claims of a physical injury; but rather, based their assessment upon anecdotal information provided by the Plaintiff. See Letter to Aetna dated July 12, 2006, attached as exhibit B.

- F. On September 19, 2006, Plaintiff replied to discovery posed in this lawsuit asking him to identify treatment and medical studies, and any documents related to the injury alleged in this lawsuit; in response to which, the Plaintiff made reference to medical records which had been produced. Neither Plaintiff nor his attorney provided any of the documents or correspondence with Aetna at that time. This discovery is continuing in nature pursuant to the rules of civil procedure. No supplemental responses or production was made until a Motion to Compel was filed in January 2009 (see below).
- G. On October 13, 2006, Aetna denied Plaintiff's appeal of its termination of benefits citing two of their own independent experts who indicated the Plaintiff failed to have provided adequate "objective evidence to substantiate that [Plaintiff's] cognitive symptomatology are on a physical neurological basis...". Accordingly, these experts characterized the Plaintiff's submission as being "speculation;" and that Plaintiff's "cognitive weakness and cognitive complaints resulted from this man's abnormal mood condition." Their letter included the full

consulting reports from these two doctors.¹ See Aetna Benefits Determination Letter, dated October 13, 2006, attached as exhibit A.

- H. On **February 4, 2007**, the Plaintiff had an MRI of his brain performed at Presbyterian Hospital in Charlotte, North Carolina, **using a false identity and birth date**. The results of this MRI were read as normal.
- I. The Plaintiff's deposition was taken on **August 29, 2007**. He was questioned regarding diagnostic studies to the brain, which would have included the MRI performed under an alias; **to which he responded under oath, with Plaintiff Counsel present, that he knew of none**. Exhibit C, Deposition of Mark Casey -- page 120, line 23.
- J. On **April 2, 2008**, one of Plaintiff's primary experts, Joseph Glace, Ph.D, was deposed wherein no mention was made of any MRI having been provided; or more importantly as to this Psychologist, that the MRI performed indicated that his patient, the Plaintiff, did not suffer a brain injury.
- K. On **August 18, 2008**, postmarked in Greenville, SC, Defendant's counsel received a letter from an anonymous sender with knowledge of this fraudulent scheme stating that an MRI had been performed on Mr. Casey's brain under false identity in North Carolina, and facilitated by Plaintiff Counsel's brother-in-law, a physician in Charlotte.
- L. On **January 8, 2009**, another of Plaintiff's primary experts, Michael Jantz, MD, was deposed and indicated that to his knowledge, no MRI of Plaintiff been

¹ Despite this information having been received by Plaintiff Counsel within a month of so of their initial response to Defendant's discovery requests; Plaintiff Counsel never provided it directly; but rather, provided defense counsel with an authorization to request this information in May 2008; 19 months later and after protracted discovery.

performed; and none had been provided to him.

M. On **January 28, 2009**, Defense co-counsel William U. Gunn prepared a Motion to Compel seeking these MRI results.

N. In response to this Motion to Compel, on **February 13, 2009**, Plaintiff signed an affidavit attesting that, in fact, an MRI had been performed on his brain using a false identity at Presbyterian Hospital in Charlotte, North Carolina on February 4, 2007. A subsequent subpoena resulted in Presbyterian Hospital delivering a copy of the MRI film and the radiology report. A copy of the report is attached as exhibit D.

O. On **February 24, 2009**, another of Plaintiff's primary experts, Jeffrey Smith, MD (psychiatrist), was deposed and indicated that to his knowledge, no MRI of Plaintiff been performed; and none had been provided to him.

P. Curiously, another Plaintiff expert was deposed on **May 15, 2009**, and he testified that he had been provided a copy of the MRI report by Plaintiff Counsel for consideration; the same report that Plaintiff counsel now claims as work product.

Q. The negative MRI is evidence which objectively and categorically refutes the Plaintiff's claim(s) of physical brain damage.

R. This matter was originally scheduled for trial to begin **October 19, 2009**; but the trial was continued to **May 2010**.

S. Neither Plaintiff nor his counsel submitted a privilege log or otherwise indicated the brain MRI had been conducted under a false identity in North Carolina.

LAW AND ARGUMENT

Pursuant to Rules 37(b)(2)(C) and 41(b) of the South Carolina Rules of Civil

Procedure, when a party fails to provide or permit discovery, the Court may make such orders in regard to the failure as are just, including an Order dismissing the action or proceeding, or any part thereof. *Barnett v. Adams Brothers Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003); *Brandt v. Gooding, et al*, 368 S.C. 618; 630 S.E.2d 259; (2006). Severe sanctions such as dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing parties' rights. *McNair v. Fairfield County*, 379 S.C. 462, 465, 665 S.E.2d 830, 832 (Ct. App. 2008); *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); *Baughman v. American Telephone and Telegraph Company*, 306 S.C. 101, 108-109, 410 S.E.2d 537, 541-542 (1991). The most egregious conduct may well be characterized as a "fraud upon the court," which is defined as "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Chewning v. Ford Motor Company*, 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003) citing *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988) (*emphasis added*)

Given the actions of both the Plaintiff and his attorney, the defendants submit that this case falls into this most egregious category and that this suit should be dismissed with prejudice.

In *Chewning*, the South Carolina Supreme Court examined a lawsuit alleging fraud brought against Ford Motor Company and its attorney. The Plaintiff had previously brought a products liability action against Ford Motor Company alleging that defects in his Ford Bronco II caused a rollover accident in which he sustained personal injuries.

After a trial in 1993, the jury returned a verdict in Ford's favor. In 1998, Chewning filed an action in State Court against Ford and Ford's expert witness asserting various causes of action including, fraud upon the court, alleging that Ford's expert committed perjury during the original 1993 trial and Ford concealed documents and fostered Ford's expert's perjury during the course of discovery. The court held that, while perjury alone may not constitute a fraud upon the court, in concert with the intentional concealment of documents by an attorney, that constellation of actions do. The Court further found that, involvement of an attorney as an officer of the court in a scheme to suborn perjury, would certainly be considered fraud upon the Court, stating:

Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to suborn perjury or intentionally conceals documents, extrinsic fraud constituting a fraud upon the court occurs."

. *Chewning v. Ford Motor Company*, 354 S.C. 72, 83-84, 579 S.E.2d 605, 611 (2003).

The Court noted that because fraud upon the court is an affront to the administration of justice, a litigant who has been defrauded need not establish prejudice.

Fraud on the court requires a showing that one has acted with intent to deceive or defraud the court. Tampering with the administration of justice involves far more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Id. at 78-79, 608-609, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 88 L. Ed. 1250, 64 S. Ct. 997 (1944).

Such a harsh sanction in this circumstance is also support by federal case law and the law of other jurisdictions. In *Aoude v. Mobile Oil Company*, 892 F.2d 1115 (1989 U.S. App., 1st Cir.) the court of appeals affirmed the dismissal of the Plaintiff's two lawsuits, with prejudice, based upon a completely fabricated purchase agreement that had been appended to the initial Complaint filed. Upon discovery of this counterfeit, Aoude apparently obtained new counsel and filed a second suit alleging a different cause of action precipitating from same transaction. In dismissing both suits, with prejudice, the court states:

A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, [**8] that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. See, e.g., *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989); *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976); *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960); *United Business Communications, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1186-87 (D.Kan. 1984); *United States v. ITT Corp.*, 349 F. Supp. 22, 29 (D.Conn. 1972), *aff'd mem.*, 410 U.S. 919, 35 L. Ed. 2d 582, 93 S. Ct. 1363 (1973).

Id. at 1118.

Importantly, in the Southeast, Florida has accumulated a wealth of law regarding the dismissal of actions where fraudulent conduct has been demonstrated. The guiding principle is that an action shall be dismissed with prejudice where it is illustrated that the plaintiff has committed fraud on the court, and the fraud permeates to the heart of the proceedings. Like South Carolina, Florida courts have long recognized an obligation to deter fraudulent claims from proceeding in court, by dismissing an entire action with prejudice, when a plaintiff lies about matters which go to the heart of the claim, or where fabrications undermine the integrity of the entire action. *Savino v. Florida Drive In*

Theatre Management, Inc., 697 So. 2d 1011 (Fla. 4th DCA 1997)

In *Savino*, the Fourth District Court of Appeals upheld the trial court's dismissal of an action with prejudice based upon the plaintiff's fraud. It was found that the plaintiff, seeking recovery for brain damage and lost wages due to injuries sustained while an invitee on the premises owned by the defendant, lied in deposition about obtaining a master's degree from New York University, produced a fake master's degree diploma, and lied to his treating physician about his educational background and above-average intelligence. This caused the physician to improperly relate the plaintiff's average level of intelligence to his alleged injury.

In *Tramel v. Bass*, 672 So.2d 78 (Fla. 1st DCA 1996), the First District Court of Appeals affirmed the trial court's entering of a default judgment against the defendant where the trial court found that the defendant, by omitting a prejudicial portion of a videotaped pursuit, committed fraud on the court. The court, it should be noted, stressed that said sanction was warranted due to the fact that the actions complained of were found to be willful, and that they were found to undermine the integrity of the judicial process.

In *Hogan v. Dollar Rent-A-Car Systems*, 783 So. 2d 1211 (Fla. 4th DCA 2001), the Court of Appeals affirmed the dismissal of an action, with prejudice, based upon fraud upon the court regarding Plaintiff's medical history. The Court of Appeals held that dismissal was warranted because the plaintiffs lied in order to intentionally thwart defendants from conducting discovery and permeated the entire proceeding.

In this case, by secreting the MRI study performed under an alias, and its results which exonerate the Defendants for nearly 2 years during the discovery phase of this

lawsuit, the Plaintiff and his attorney promoted a scheme intended to hamper the influence the eventual trier of fact and hamper the defense. In this case, Plaintiff and Plaintiff's attorney admittedly presented at Presbyterian Hospital in Charlotte, North Carolina for an MRI of Plaintiff's brain in an effort to procure evidence to prove that Plaintiff had suffered a brain injury as alleged in this litigation. Plaintiff admittedly used a fake identity, Mark Johnson, and a fake birth date, when procuring the MRI.

Plaintiff did not want to share the MRI film(s) or the interpretation of the MRI film(s) with Defendants if the results of the MRI study were unfavorable to Plaintiff. The MRI studies were unfavorable to Plaintiff's claims in this case, so Plaintiff and Plaintiff's counsel attempted to conceal the MRI film(s) and MRI interpretation. Further, Plaintiff's counsel traveled to Charlotte, North Carolina and utilized the services of Plaintiff's counsel's brother, a physician in the area, to aid with the perpetrating of this fraud. Plaintiff counsel even admits in his Motion for Protective Order that he received a facsimile of the report interpreting the MRI study (para. B), yet he apparently destroyed it since it was no longer available to him after this fraudulent scheme was discovered by Defendants (para. E).

If it had not been for an anonymous letter to Defendant's counsel regarding the fraudulent conduct of Plaintiff and Plaintiff's attorney, Defendants would never have discovered the information relating to the brain MRI showing normal findings relating to Plaintiff's MRI brain study. Plaintiff and Plaintiff's attorney intended to conceal this very important evidence from Defendants and Defendants' counsel in an effort to fraudulently bolster Plaintiff's case.

The key issue in this case regarding damages and causation revolves around

whether Plaintiff suffered a brain injury and/or neurological disorder as a result of the alleged unnecessary medical procedure. The MRI study of Plaintiff's brain that was conducted under a fake identity and birth date, clearly shows that Plaintiff did not suffer a brain injury and/or neurological disorder as alleged. This evidence is key in this case and Plaintiff acted with intent to deceive Defendants and the Court attempting to conceal this key evidence.

Plaintiff and Plaintiff's counsel's conduct in this case amounts tampering with the administration of justice in a manner that involved more than an injury to a single litigant. Plaintiff's conduct and Plaintiff's attorney's conduct involved a wrong against the judicial system, the institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated consistently with the good order of society. The conduct of Plaintiff and Plaintiff's counsel shows that they acted with intent to deceive and/or defraud both Defendants and the Court.

The conduct of Plaintiff and Plaintiff's counsel regarding procuring and hiding the MRI film(s) and MRI interpretation amounts to a fraud upon the Court in that the conduct subverts the integrity of the Court itself and/or was a fraud perpetrated by an officer of the court, so that the judicial machinery could not perform in the usual manner of its impartial task of adjudicating cases. Had it not been for an anonymous letter to Defendant's attorney leading to the discovery of the fraud perpetrated by Plaintiff and Plaintiff's counsel, it is likely that the fraudulent conduct would have significantly impacted the outcome of this litigation.

The intentional concealment of the MRI interpretation and MRI film(s) of Plaintiff procured under a false identity amounts to the intentional concealment of

documents by an attorney, which constitutes a fraud upon the Court. Attorney fraud such as this calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, since Plaintiff's attorney and Plaintiff embarked on a scheme to commit perjury, suborn perjury and to intentionally conceal documents, a fraud upon the Court has been perpetrated and the significant sanction of dismissal of Plaintiff's Complaint with prejudice should be levied.

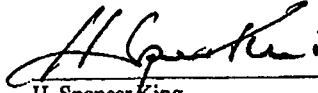
South Carolina case law dictates that fraud upon the Court is an affront to the administration of justice and a litigant who has been defrauded as Defendant in this case, need not establish prejudice. *Chewning* at 83-84 and 611.

CONCLUSION

Due to the discovery abuses of Plaintiff and Plaintiff's counsel, a fraud upon the Court has been committed as described hereinabove and this Court should dismiss Plaintiff's Complaint with prejudice to protect the integrity, respect and proper functioning of the judicial system.

Defendants should also be awarded their costs and attorney fees associated with defending this case.

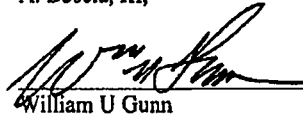
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April ____, 2010

EXHIBIT A

GUNN 002414



Aetna Life Insurance Company
Maine Disability Service Center
PO Box 14554
Lexington, KY 40512-4554

Debi Harrison
Long Term Disability Analyst

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November 15, 2004

William M. Casey
240 Lightwood Farm Road
Woodruff, SC 29388

Long Term Disability

Group Control No: 607472
Employer: Mitchell Noah America, Inc.
Employee: William M. Casey
SS-Cert No: [REDACTED]

Dear William M. Casey:

To be eligible for monthly disability benefits you must be unable to perform the material duties of your own occupation solely due to injury or illness. We have reviewed your application for long term disability benefits and have determined that, according to your plan, you are now totally disabled from your own occupation. You are eligible to receive monthly benefits effective November 27, 2004, and continuing for up to 24 months from the date you became disabled (May 29, 2004), as long as you remain disabled from your own occupation.

Criteria for Continuation of Benefits

Aetna has determined that you presently meet the "own occupation" definition of disability. Your plan requires that we periodically re-evaluate your eligibility by requesting updated medical information from your physician or an independent physician of our choice. Also, you may be contacted by an Aetna Vocational Rehabilitation Consultant and asked to participate in a vocational assessment interview. If we determine that you are capable of performing the material duties of your own occupation, your monthly benefits will cease.

If you are still disabled from your own occupation and eligible for disability benefits on May 29, 2005, your plan requires that you meet a more strict "any occupation" definition of disability. To qualify for monthly benefits, you must provide objective medical evidence that you are unable to perform any reasonable occupation for which you are qualified or could become qualified as a result of your education, training or experience. If you do qualify for continuation of benefits, we will periodically review your eligibility by requesting updated medical information from your medical providers, independent physicians of our choice, or vocational specialists.

While you are eligible and are receiving benefits, you may be contacted by an Aetna representative regarding our rehabilitation program. This assistance program is voluntary and is of no cost to you. As this service may be highly beneficial, we encourage you to participate when requested.

GUNN 002415

2

November 15, 2004
William Casey

In accordance with contractual provisions, your maximum period of benefit entitlement will end at the end of the month in which age 65 is attained. Your final monthly benefit eligibility date is November 30, 2023.

If your disability is due, to any extent, to a mental condition, unless you are hospital confined, coverage is limited to 24 months from the date of your disability.

Computation of Monthly Benefit

LTD benefits supplement certain other income described in the enclosed Notice Concerning Benefits. The total amount from all applicable sources will not be less than 50.00% of your Monthly Rate of Basic Earnings (MRBE) of \$3,688.53, at the time your disability began. Your monthly benefit is described below:

November 27, 2004 - November 30, 2004

Gross Benefit Amount	\$235.90
Minus Other Income	-0.00
Net Benefit Amount	\$235.90
Minus FICA	-18.81
Minus Federal Income Tax	-24.59
Net Payment Amount	\$202.50

December 1, 2004 - November 30, 2023

Gross Benefit Amount	\$1,844.27
Minus Other Income	-0.00
Net Benefit Amount	\$1,844.27
Minus Federal Income Tax	-184.43
Net Payment Amount	\$1,659.84

Social Security (FICA) withholding is required during the first six full months of disability. FICA withholding will cease if you continue to remain totally disabled beyond six full calendar months.

According to your Tax Form, we are deducting 10% for Federal Income Tax.

Under the terms of your plan there is a minimum monthly benefit equal to 10.00% of your gross benefit amount or \$100.00, whichever is greater.

Please carefully read the instructions on the enclosed Notice Concerning Benefits. Failure to comply with each applicable provision may jeopardize your future eligibility.

On or before November 30, 2004, you will receive your initial payment for \$202.50, representing benefits due at the end of the month in which your eligibility began. All future benefits are due at the end of each month.

You are entitled to a review of this decision if you do not agree.

To obtain a review, you or your authorized representative should submit a written request. Your request should include your group's name (e.g. employer), your name, social security number,

3
November 15, 2004
William Casey

other pertinent identifying information, comments, documents, records and other information you would like to have considered. You may also ask for copies of documents relevant to your request. Please mail or fax your request for appeal to:

Actim Life Insurance Company
P.O. Box 14557
Lexington, KY 40512-4557

Fax #: 866-275-2174

Your written request for review must be mailed or delivered to the address above within 180 days following receipt of this notice, or a longer period if specified in your plan brochure or Summary Plan Description. You will receive notification of the final determination within 45 days following receipt of your request. This period may be extended up to an additional 45 days if special circumstances require such an extension, in which case you will be notified prior to the end of the first 45 day period.

If your plan is covered under the Employee Retirement Income Security Act (ERISA), and you do not agree with the final determination upon review, you have the right to bring a civil action under section 502(a) of ERISA.

If the determination was made based on the definition of disability, or similar limitation or exclusion, an explanation of the scientific or clinical judgment for the determination, applying terms of the plan to your medical condition, will be provided free of charge upon request by you or your authorized representative.

In any event, a copy of the specific rule, guideline or protocol relied upon in the adverse determination will be provided free of charge upon your or your authorized representative's request.

If you have any questions, please call 1-800-726-7777.

Sincerely,

Debi Harrison
Actim Life Insurance Company

cc: Michelin



Aetna Life Insurance Company
Centralized Appeals Unit
PO Box 14557
Lexington, KY 40512-4557

Carole Roy
Sr. Technical Specialist
Fax: (888) 275-2174
Tel: 1-877-238-8202

**** MAINTAIN A COPY OF THIS LETTER FOR YOUR RECORDS ****

October 13, 2008

Burts, Turner, Rhodes, & Thompson
Attorneys at law
280 North Church Street
Spartanburg, SC 29308

Re: Appeal for Long Term Disability (LTD) Benefits
Claimant/Client: William Casey
Group Control: 607472
Employer: Michelin North America

Dear Attorney Thompson:

We have concluded our review of the decision to terminate Mr. Casey's benefits for LTD benefits. For the following reasons, the original determination is upheld upon appeal review.

The LTD plan defines the "Definition of Disability" as follows:

"You are deemed to be totally disabled while either of the following applies to you:

- During the period which ends right after the first 24 months benefits are payable in a period of total disability:

You are not able, solely because of injury or disease, to perform the material duties of your own occupation; except that if you start work at a reasonable occupation you will no longer be deemed totally disabled.

- Thereafter during such period of total disability:

You are not able, solely because of injury or disease, to work at any reasonable occupation."

The plan also states that "A Period of Total Disability":

GUNN 002418

"Also, a period of total disability will end after 24 monthly benefits are payable if it is determined that the disability is, at that time, caused to any extent by a mental condition (including conditions related to alcoholism or drug abuse) described in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association (hereafter called DSM). There are two exceptions to this rule which apply if you are confined as an inpatient in a hospital or treatment facility for treatment of that condition at the end of such 24 months. If the inpatient confinement lasts less than 30 days, the period of total disability will cease when you are no longer confined. If the inpatient confinement lasts 30 days or more, the period of total disability may continue until the date you have not been so confined for that condition for a total of 90 days during any 12 month period."

We have reviewed Mr. Casey's entire claim file including the documentation submitted on appeal.

The documentation contained in Mr. Casey's file indicated that he has been employed with Michelin North America since July 9, 1984. He held the position of HP Team Member prior to his last date worked of May 28, 2004. His disability began on May 29, 2004. Mr. Casey's medical conditions were listed as Major Depressive Disorder (single episode, severe) and Panic Disorder with Agoraphobia, his benefits were paid through the 24-month limitation (May 28, 2006) specified in the plan. The period in question is from May 29, 2006 forward.

In your appeal letter, you stated "...he has been physically and mentally disabled from any gainful employment since the last week of May and the first few days of June 2004." Along with your appeal letter, you submitted medical documentation from Dr. Joseph G. Grace, Dr. Jeffrey Smith, Dr. L. Randolph Wald, and Dr. Wilson P. Smith. As Mr. Casey's benefits had been approved and paid for the 24-month limitation for his mental nervous conditions, our review focused on his physical medical conditions.

To assist in the assessment of medical records, Milton Jay, Ed.D, Consulting Neuropsychologist, completed the review of Mr. Casey's entire claim file on October 6, 2006. Dr. Jay found that both Dr. Wald and Dr. Grace utilized the WAIS-III (plus two supplemental subtests, Letter-Number Sequencing and Symbol Search) to measure Intellect. From Dr. Jay's inspection of the individual subtest findings, he noted variability among the subtests and did not appear at all consistent with a single-point neurological threat such as brain infarctions due to air emboli during laser bronchoscopy. Of the 13 subtests given, five subtests differed quite significantly from one another between the two evaluations by Dr. Grace and Dr. Wald (tested three months apart). These five subtests were Digit-Symbol Coding, Digit Span, Picture Completion, Vocabulary, and Letter-Number Sequencing. These five subtests differed at the level of 3 or 4 scaled scores, statistically significant differences at 1.0 to 1.33 standard deviations, respectively.

6/14/06 10:07:25 P

Dr. Jay found that depression and anxiety were prominently supported in this case. Dr. Jay stated: "From my review of the general medical records regarding physical medical problems, I saw no records that indicated neurological examination signs or neurodiagnostic studies showing evidence of neurological impairment. Dr. Fogarty's speculation regarding "neurologic impairment" did not seem supported by objective neurological evidence or abnormal neurological examination findings. Dr. Fogarty appeared to regard the claimant's report of cognitive difficulties, particularly in concentration, as the principal expression of neurologic difficulties." Dr. Jay further stated "Consequently, I do not see adequate support that there was a neurologic basis to the claimant's cognitive complaints and performances as of 5/29/2006 and forward in time. I saw no adequate basis for restrictions and limitations in this man's occupational capacity on the basis of underlying neurologic injury as a cause of cognitive difficulties. Far more likely, it seemed to me, was that the cognitive weakness and cognitive complaints resulted from this man's abnormal mood condition."

Mr. Casey's file was also reviewed by Brian Mercer, M.D., Board Certified in Neurology. Dr. Mercer reviewed all of the documentation in Mr. Casey's file and completed his review on October 6, 2008. Dr. Mercer found Mr. Casey complained of difficulties with concentration, attention and cognitive function which he dated to the bronchoscopy, which was complicated by pneumomediastinum and bilateral pneumothoraces. His treating physicians diagnosed a neurologic deficit due to air emboli as the cause for his symptoms.

Mr. Casey's medical documentation first indicated that the elemental neurologic examinations were described as normal with no focal deficits to support evidence of cerebral dysfunction that might occur with air emboli. Second, the medical records did not contain any cranial imaging studies or EEG's to show evidence of abnormalities consistent with focal cerebral lesions due to air emboli. Third, as outlined in the report of Dr. Milton Jay, the neuropsychological findings are felt to be consistent with depression and anxiety. Fourth, the time course of reported cognitive symptoms and examinations would be inconsistent with air emboli occurring on May 29, 2004. Furthermore, it was noted that his mental status examinations by his primary care physician on July 27, 2004 and September 10, 2004 were described as being normal. However, subsequent evaluations described difficulty in conversation with attention and focus.

The medical records indicated that Mr. Casey had a history of chronic low back pain antedating the events of May 29, 2004. A lumbar MRI scan was described as being "practically normal" with two slight bulging discs. His examinations have shown only limited findings of reduced range of motion and intermittently mildly positive straight leg raises. There was no evidence of focal neurologic deficit to substantiate the presence of a lumbosacral radiculopathy. Dr. Scott (his orthopedist) indicated that he was capable of returning to work from the orthopedic perspective. Dr. Mercer found that "The findings described relative to

the lumbosacral region would be consistent with at least a medium level of functionality."

In conclusion, Dr. Mercer stated "...from the neurologic perspective, the records do not provide objective evidence to substantiate that Mr. Casey's cognitive symptomatology are on a physical neurologic basis for the multiple reasons outlined above. There is a longstanding history of chronic low back pain which would be consistent with at least a medium level of functionality. This opinion applies to the time period in question of 5/29/06 and forward."

On April 10, 2006, Mr. Casey's occupation was identified as #750.384-010, Tire Builder, Automobile. Said occupation was identified as the closest to match the requirements of his job as an HP Team Member. The occupation of #750.384-010 is categorized by the Dictionary of Occupational Titles to require a medium physical demand level.

Therefore, we have determined that the medical documentation in Mr. Casey's file did not continue to show evidence of impairments resulting from his physical medical conditions that would have functionally impaired him to a degree in which he was unable to perform his own occupation for the period from May 29, 2006 forward. As such, the determination to terminate his benefits effective May 28, 2008 was appropriate and remains in effect.

Mr. Casey is entitled to receive, upon request and free of charge, reasonable access to and copies of all documents, records and other information relevant to the claim.

If Mr. Casey's plan is covered under the Employee Retirement Income Security Act (ERISA), and he does not agree with the final determination upon review, he has the right to bring a civil action under section 502(a) of ERISA.

If either you or Mr. Casey has any questions, please call 1-877-238-6202.

Sincerely,

Carole Roy
Aetna Life Insurance Company

6140394723

4

GUNN 002421

EXHIBIT B

GUNN 002422

BURTS, TURNER, RHODES & THOMPSON
ATTORNEYS AT LAW
250 NORTH CHURCH STREET
SPARTANBURG, S.C. 29306

SAM BURTS (1907 - 1982)
NOEL TURNER
RICHARD H. RHODES
RAY E. THOMPSON, JR.
M. NOEL TURNER, II

July 12, 2006

MAILING ADDRESS
P.O. BOX 3408 29304
PHONE 804-585-8166
FAX 804-583-8927

Ms. Karen Van Deventer, Sr. Tech Specialist
Aetna Insurance Company
P.O. Box 14554
Lexington, KY 40512-4554

RE: Aetna Long Term Disability Policy of William Mark Casey, Disabled
Employee of Michelin Tire Corporation in Spartanburg, SC
Date Disability Began: May 28, 2004
Your Group Control No.: 607472

Dear Ms. Van Deventer:

I represent Mr. William Mark Casey in a civil action which arose out of the set of circumstances which rendered him disabled from his employment on or about May 28, 2004. Mr. Casey, 47, had been a full-time employee of Michelin Tire Corporation in Spartanburg continuously for 22 years prior to his disability. I understand that Aetna is now questioning whether Mr. Casey is entitled to continue to recover long term disability benefits under the Aetna Disability Policy and in fact his long term disability benefits were suspended/terminated by Aetna on May 28, 2006. On Thursday, July 6, 2006, I had a telephone conversation with Ms. Kelly K. a disability analysis with Aetna who discussed the case with me in some detail and recommended that I forward to you the following to be reviewed to have Mr. Casey's long term disability benefits re-instated. As the enclosed records indicate, he has been physically and mentally disabled from any gainful employment since the last week of May and the first few days of June 2004.

The information enclosed is as follows:

1. Joseph G. Grace, III, Ph.D., Licensed Counseling Psychologist
08/09/04 - 02/03/06, Bate Stamp No. 000458-000497
2. Jeffrey Smith, MD, M.D. with Piedmont Psychiatric Services
11/10/04 - 01/31/06, Bate Stamp No. 000498-000508
3. L. Randolph Waid, Ph.D., Licensed Clinical Psychologist
08/30/05-09/10/05, Bate Stamp No. 000557-000564
4. Dr. Wilson P. Smith, Jr., M.D. with Lung and Chest Medical Associates
07/14/04 - 08/12/04, Bate Stamp No. 000371-000448

Mr. Casey has not been gainfully employed in any capacity since May 28, 2004, and I believe these records will fully substantiate that and require the immediate re-instatement of his

0718060006

GUNN 002423

Ms. Karen Van Deventer, Sr. Tech. Specialist
July 12, 2006
Page 2

long term disability Aetna benefits. If Aetna is still taking the position that his benefits should have been suspended/terminated as they were on May 28, 2006, and will not be re-instated after review of this information, please send me a detailed letter stating the reason for the failure to retroactively institute the long term Aetna disability benefits. Please re-instate the benefits or provide such letter to me within thirty (30) days of the date of this letter.

I am enclosing a medical authorization form signed by Mr. Casey which will allow you to communicate with me as his attorney with reference to confidential medical records or information.

With warm regards,

I remain,
BURTS, TURNER, RHODES & THOMPSON

By:


RAY E. THOMPSON, JR.

RET:ar
Encl.

0718060005

GUNN 002424

EXHIBIT C

GUNN 002425

- 1 A. Monetary?
- 2 Q. Any type.
- 3 A. Most of my damages are in -- again, I -- I don't
- 4 know what happened and I don't know why and who am
- 5 I. Like I've got a one-year-old granddaughter that
- 6 I'm afraid to keep because I'm scared that I'll
- 7 miss a minute and won't know what's going -- I
- 8 mean, you can't -- you can't have a blank spot for
- 9 a minute with a granddaughter. I won't keep her
- 10 overnight. I won't keep her for more than a couple
- 11 hours. But I'd love to, you know, have her spend
- 12 the night. Hadn't had a date in three years. I
- 13 won't go out. I don't know why. I don't want to.
- 14 Q. Have you seen a neurologist?
- 15 A. No, sir.
- 16 Q. And I'm talking about a doctor who specializes in
- 17 the nervous system.
- 18 A. No, sir. I don't think so. I mean, I've -- I've
- 19 been sent to several now. I don't think so.
- 20 Q. Has anybody done any diagnostic studies, CT
- 21 studies, MRIs, any studies of your head or brain to
- 22 your knowledge?
- 23 A. Not to my knowledge; no, sir.
- 24 Q. Anybody suggested that you needed those kind of
- 25 exams?

EXHIBIT D

GUNN 002427

MEKESSON
Empowering Healthcare

Name: Johnson, Mark
DOB: 18-Oct-1958
ID: 53305541
Study Date: February 04, 2007 12:32

Final Report - MR MRI HEAD W/OUT CONTRAST

INDICATIONS: HEADACHE
COMMENTS:

PROCEDURE: PMR 0010- MRI HEAD W/OUT CONTRAST - Feb 4 2007
Accession #: 7799286

INTERPRETATION: MRI BRAIN WITHOUT CONTRAST

TECHNIQUE: Routine spin echo sequences with FLAIR and diffusion imaging.

FINDINGS: Negative for mass, extra-axial fluid or midline shift. The ventricles and sulci are normal in size. The brain parenchyma is of normal signal intensity without ischemic or demyelinating lesions.

The posterior fossa contents are within normal limits. The cerebellar tonsils terminate above the foramen magnum. The paranasal sinuses are clear.

CONCLUSION: NEGATIVE MRI OF THE BRAIN WITHOUT CONTRAST.

~~Read by: GREGORY J JOSEPH, MD on Feb 4 2007 1:57P~~

Transcribed by: GJJ on Feb 4 2007 1:57P

Signed by: DR. GREGORY J JOSEPH, MD on: Feb 4 2007 1:57P

Signed by: Gregory Joseph

Signed at: 15-Dec-2007

GUNN 002428

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
William Mark Casey,	)	
	)	
Plaintiff,	)	
	)	C.A. No.: 2006-CP-42-1728
v.	)	
	)	
Gregory J. Feldman, MD, Joseph A.	)	CERTIFICATE OF SERVICE .
Boscia, III, MD, and ate Lung and Critical	)	
Care Specialists, PC,	)	
	)	
Defendants.	)	

I hereby certify that a copies of Memorandum in Support of Defendant's Motion In
 Limine and Memorandum in Support of Defendants' Motion To Dismiss were sent this April 27,
 2010, by hand delivery to the following address:

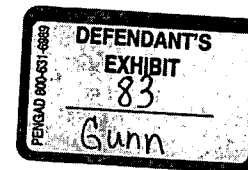
Ray E. Thompson, Jr., Esquire
 260 North Church Street
 Spartanburg, SC 29304

Noel E. Turner, III, Esquire
 260 North Church Street
 Spartanburg, SC 29304


 Donna C. Hill
 Paralegal to H. Spencer King

GUNN 002429

Time	Event-05-28-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
???? p. 41	Mr. Casey reports to plant nurse with exertional angina;	"1" aspirin given; started on oxygen; pain went to a 4; EMS called;	
9:10 am p. 37	Paramedics have arrived on scene; first BP of 148/110 documented at 9:10 am; Paramedic note: "exertional angina" x 2 weeks; started having chest pain at work; "Pt. states is now more of a pressure sensation";	162 mg aspirin given; 2 mg nitroglycerin given; oxygen started; IV access started; EKG obtained; Transported to SRHS ER;	
9:45 am p. 41	Pt. arrives to Spartanburg Regional Healthcare System ER; triage; Triage nurse notes: chest pain, history of high cholesterol, smoking; cardiac monitor placed; EKG obtained;	No labored respirations noted; breath sounds clear bilaterally; EKG by EMS with nonspecific changes; Protocol for Potential Acute Coronary Syndrome Patient begun (p. 52);	
9:50 am p. 43 p. 44	Chest Pain Pathway form done by Leshman; Pathway protocol includes: 12-lead EKG, cardiac monitoring, oxygen 2 liters/minute; IV access, CXR, CK-CK-MB, troponin, myoglobin, Aspirin 325, nitroglycerin, and options of CBC, BMP, PT, PTT AND CHF-BNP; (EKG already done by EMS)	Leshman notes: w/nausea; worse w/exertion; <u>no cough</u> ; 0 cholesterol; smoker; family hx. CAD;	No cough; ENT exam blank - 7 oral exam done;
9:53 am p. 51	AP portable chest film taken in ER; (*time indicated on film); blood specimens obtained;	"small metallic foreign body over aortopulmonary window; artifact vs. foreign body; clinical correlation suggested; no active cardiopulmonary disease"	? code on chest film suggests taken by student; w/ clinical correlation of no cough, wheezing, shortness of breath or hx. of acute aspiration, should film have been repeated w/ lateral view?
9:54 am p. 41	Pt. clothing removed; hospital gown provided;		Sequence suggests Pt. did not have hospital gown on at time chest film taken;
9:59 am p. 41	Pt. in ER- Cardiac Care Unit, Room 3; ER nurse notes: hx. of chest pain, onset within the hour with pain into back; same thing happened "couple of years ago";	Hx. substernal pain radiating to back w/ moderate exertion; relieved w/ nitroglycerin and O ₂ ; chest pain x 2 weeks while at work; respirations even and unlabored; <u>no</u> shortness of breath, <u>nausea</u> , <u>vomiting</u> or diaphoresis;	Indicates <u>no</u> nausea/vomiting;
10:16 am p. 41	Laboratory results documented; CBC; BMP; PT and INR; PTT, CPK, Troponin I; myoglobin;	P. 45-48; Labs as documented; (in particular, normal cardiac enzymes);	Full cardiac work up appears to have been sidetracked by unexpected finding on chest film;
????		Decision made by Leshman to consult hospitalist to evaluate abnormal chest film;	AP chest obtained as part of cardiac protocol; Given Pt. in no distress w/ cardiac enzymes negative, 2-hour time window for Leshman to obtain PA and lateral chest film;
12:14 pm p. 40		respirations even/unlabored; Pt. resting w/ no complaints; waiting for physician evaluation (Paladugu);	



GUNN 004415

Time	Event--05-28-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
1:20 pm p. 55	Admitting orders written by Paladugu for evaluation of foreign body;	Orders include: pulmonary consult w/ Feldman/Boscia; condition guarded; low sodium diet;	No order for PA and lateral chest film;
1:31 pm p. 58	Paladugu dictates H&P; Pt. w/no associated diaphoresis, shortness of breath, nausea; currently feels fine; <u>no cough</u> or phlegm;		Oropharyngeal exam would have noted if fillings/crown/teeth missing; Given absence of symptoms of cough, wheezing, aspiration and presumably normal oral exam, should PA and lateral film been ordered by Paladugu?
7777 p. 79 p. 58	Pt. stable; no documentation of symptoms warranting urgent treatment;	Pt. apparently seen in Consultation by Dr. Feldman (per Paladugu's discharge note (P. 79) who asked Dr. Boscia to do fiberoptic bronch.; Pulmonary evaluation for noncardiac chest pain for possible bronch.; HEENT exam notes pupils equal, round and reactive to light and accommodation; no mouth exam indicated;	No documentation by Feldman of consulting on Pt. and asking Boscia to bronch; ? oral exam; ? basis for Feldman asking Boscia to proceed w/bronch; ? discrepancy between absence of symptoms and finding of artifact vs. foreign body, ? PA and lateral film not done before proceeding w/bronch;
1:49 pm p. 40	RN note: "Pt. informed of bronch. to be done today by MD and RN; no distress"	Patient to endoscopy (endo suite in separate connected bldg., approx. 10 minute transport time);	No documentation that Boscia talked w/ patient prior to leaving for endoscopy or considered LUL foreign body aspiration extremely rare, especially in middle-aged "healthy" people; Additional pulmonary hx. focusing on possible events leading to aspiration (alcohol, seizures, etc.); careful oral exam indicated (especially in absence of respiratory complaints); Absence of respiratory complaints, no urgency to proceed with bronch. before obtaining "standard of care" PA and lateral chest film. Risks of chest film lower than risk of bronchoscopy.
2:00 pm p. 62	Endo. Nurse starts anesthesia Moderate Sedation Record/Preprocedure Assessment;	Nurse notes: Pt. able to deep breathe and cough freely; Hx. hypertension, $\square$ cholesterol;	Pt. does not appear to have mentioned problems w/aspiration of foreign body, tooth problem or respiratory symptoms to Endo. Nurse; ? only indication for bronch. is presence of foreign body vs. artifact on AP portable chest;

GUNN 004416

Time	Event-05-28-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
2:20 pm p. 63	Endo. nurse does anesthesia Intra-Procedure Interventions eval.; pt. okay for sedation; Surgical Time-Out indicated at 2:20;	Pt. given Versed 5 mg and Fentanyl 50 mcg;	
2:25 pm p. 63	Additional meds: Versed 5 mg and Fentanyl 50 mcg given;		
2:26 pm p. 65	Boscia dictates pulmonary Consult; "Patient complains of pain in his chest that is sharp that goes directly straight to his back." positive hx. of cough; no hemoptysis; no hx. of hypertension; no acute respiratory distress; lungs clear;	Reviewed x-ray; oral mucosa moist without thrush; Pt. has consented to fiberoptic bronch. to see if foreign body is removable; notes risks, benefits, alternatives discussed with Pt.	<u>Hx. of cough (not noted before);</u> <u>No hx. hypertension (hx. HTN noted before);</u> <u>When did Boscia talk w/patient, how long did he talk to him: Is the information in his history from the Pt. or is it a paraphrase of other histories in the chart?</u> <u>Oral mucosa checked, no mention of missing teeth/filling, crowns;</u> <u>No documentation of what risks and alternatives were discussed.</u>
????	Bronchoscopy inserted?		Boscia could not have inserted bronchoscope until after pulmonary consult dictated;
2:28 pm p. 63	Bronchoscope removed; procedure ended;		Bronchoscopy lasted about 2 min. Not unusual for routine normal procedure, but appears brief for procedure looking for foreign body.; No documentation of washings biopsy or cytology in hospital lab. records. ? Without biopsy, hard to say if LUL abnormality trivial or serious. Was Dr. in a hurry?
???? p. 66	Endo post-opt note written by Boscia;	Post Opt. diagnosis: foreign body;	Despite not visualizing a foreign body and not obtaining any specimens;

GUNN 004417

Time	Event-05-28-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
2:37 pm p. 67	Boscia dictates bronch. OP. note;	Very erythematous area, easily friable upon entering left main stem bronchus at distal end where take off of left upper lobe starts; no observable foreign body noted; airway post erythematous take off of LUL normal; CT of chest ordered post-bronchoscopy per Dr. Boscia;	Erythema and friable area would ordinarily warrant washings, brushings, etc. and could be due to trauma from bronchoscope, per se. PA and lateral chest film to verify foreign body in chest rather than artifact on top of chest still not done;
6:00 pm p. 60	CT lung scan without contrast ordered;		No foreign body identified; Finding of cardiac calcification raises issue that initial cardiac work-up was sidetracked and Pt, indeed, has abnormal coronary arteries;
6:05 pm p. 70	CT lung scan performed	Radiologist reviews AP chest film and notes Pt. works in construction; x-ray cannot be located for comparison; no metallic foreign bodies evident other than EKG snaps and leads; negative for opaque foreign body; positive left anterior descending coronary artery calcification;	

GUNN 004418

Time	Event-05-29-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
11:30 am p. 76	Boscia writes Progress Note: Pt. to require rigid bronch;	f/u with Feldman as outpatient; card given;	Given normal CT w/ no foreign body question rationale for rigid bronchoscopy; Follow up visit w/Feldman is for rigid bronchoscopy; ?outpatient office visit indicated to review chest film, CT scan, and examine Pt., discuss risks and benefits of rigid bronch. , obtain Informed Consent and dictate H&P prior to procedure;
2:30 pm p. 78	Paladugu writes order to discharge;		
2:35 pm p. 79	Paladugu dictates Discharge Summary;	"Pt. w/tightness straight to the back according to ER physician; however, on work up found to have left main bronchus containing some foreign body metallic in nature"; "It looks like a screw. It could have been a dental filling"; "Pt. seen in consultation w/Feldman who asked Boscia to bronch." "Pt. to undergo rigid bronch. a week or two later";	No hx. of missing dental filling/crown obtained; No documentation of oral exam by anyone, thus far, on 05/28 or 05/29, which would have resolved issue of dental filling; No written documentation of patient being seen in consult w/Feldman. Issue of normal CT not addressed; Issue of discordance between negative CT and need for rigid bronch. not addressed.
2:45 pm p. 116	Discharge Note indicates: "call Dr. Feldman on Monday and make a follow-up appointment in one week."		
2:50 pm p. 80 p. 76	Boscia writes order to f/u with Gonda in one week; f/u with Feldman in one week call office for appointment.;	P. 76: "Pt. discharged; will require rigid bronch. f/u with Feldman as outpatient. Card given"	Follow up with Feldman as out-patient appears to refer to outpatient rigid bronch. rather than outpatient office visit to assess discrepancies;

GUNN 004419

William Mark Casey (Pt.)

Spartanburg Regional Healthcare System (SRHS)
Pre-Admission Visit 06/02/04 for 06/03/04 laser bronchoscopy

Timeline: 6/2/04
Page 6

Time	Event-06-02-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
9:07 am p. 122	Pt. to SRHS for pre-admission interview; General Consent to Treat obtained; RN notes: ongoing problems w/ pain midsternal, front to back; onset 3 weeks to 1 month; worse w/ movement; relieved by inactivity; pain renders inactive;	P. 117: Indicates anxiety related to perioperative experience resolved; pain management deficit resolved; potential risk of injury resolved and deficit for operative procedure and equipment used resolved;	Has not seen any doctors since discharge 5/29; P. 119: indicates Dr. Ghandi - should be Gonda; No mention of cough, foreign body aspiration and/or tooth problems by nurse; p.118: Plan of Care indicates Pt. aware of potential risks of injury. Not clear what risks nurse was referring to; since Pt. has not seen physician regarding the procedure yet, ? who has talked with him outside of nurse; ? if risks unique to rigid-bronch. (chipped tooth, etc.) and risk unique to laser (fire, bleeding, pneumothorax, air emboli, respiratory failure, etc.) discussed or mentioned;
9:24 am	Interview ended	Pt. to have procedure 06-03-04 in main OR; arrive at 9:15 AM; procedure at 11:45 AM;	

GUNN 004420

Time	Event-06-03-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
09:29 am p. 126	Pt. has Pre-Operative Record Patient Assessment completed;	Pt. has consented for treatment and procedure; <u>Consent: Yes;</u> <u>H&P: Yes;</u> Notes Feldman to do H&P and Consent in OR. Office was called.	Consent for treatment "Yes" apparently refers to Pt's verbal stmt. to nurse. since Feldman has not yet seen Pt. "H&P: Yes" apparently refers to H&P from prior admission by Paladugu/Boschia. since no documentation by Feldman of H&P; Indicates they had H&P. then indicates "call office to obtain". suggests nurses realized they need H&P by Feldman. who is doing the procedure. Should Pt. proceed for laser bronch. in OR without H&P and Consent by Feldman on chart?
10:51 am p. 141	Pt. in holding;		Out of holding at 11:56 am;
11:00 am p. 129	Anesthesia Pre-Opt. by Shantha;	Cardiovascular negative; Negative CT of chest noted: <u>H&P and Consent checked Yes;</u> Page 2 not completed: re: loose or broken teeth, caps, high blood pressure, chest pain, angina, smoking hx., snoring hx., Documents "chipped left upper incisor" (which can be a complication of rigid bronch.) present before procedure; No evidence of absense crown or filling noted on exam of teeth;	Does not indicate hypertension; angina as documented: Aware of negative CT. - Why is anesthesia proceeding with endo. To retrieve foreign body if CT is negative: did anesthesia realize procedure potentially unnecessary and question Feldman? Should Shantha have checked "H&P and Consent obtained" when Feldman yet to see patient and no H&P or Consent on chart? Pt. still yet to see physician
11:50 am p. 135	"anesthesia start" time per anesthesia record;		
11:57 am	Pt. into OR for bronch;		No documentation Feldman saw Pt. before the OR to discuss findings of previous tests, need for rigid bronch. and obtain Informed Consent in unhurried atmosphere; Once in OR Pt. under implied pressure to give consent;

GUNN 004421

Time	Event-06-03-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
11:57 am	Surgeon in OR for bronch.		Does not appear anesthesia communicated finding of negative CT and absence of indication for rigid bronch. to Feldman; does not appear Feldman aware of normal CT;
12:00 pm p. 135	Anesthesia record - bronch. For foreign body LUL;		Appears only 4 minutes (11:57- 12:01) time for Feldman to perform H&P and obtain Consent from Pt. before Pt. asleep; No documentation of risks of rigid and laser bronchoscopy, including bleeding, perforation, pneumothorax, air emboli, etc.
12:01 pm p. 135	IV induction; patient ventilated by anesthesia;		
12:06 pm p. 135	rigid bronch. per surgeon		
1:15 pm p. 135	Abrupt increase in systolic blood pressure from 100 to 140;		Pt. may have developed unrecognized perforation w/air leak/potential for air to enter pulmonary venous system w/resultant microemboli to systemic circulation;
????	bronch. started; no foreign body found; abnormal subsegment identified; lasered w/45 watts for 2 continuous seconds to metallic object and 35 watts for ? time; indicates washings done of area;		If metal object present, could have generated intense heat and ignited respiratory tract; No tape print out from laser machine showing duration of pulse, watts/pulse, # of pulses; Laser printer not working for some time prior to procedure according to endo. Nurses (verbal comment when asked for copy of printed tape No manual recording of same taken by Endo. Nurse, since would have required another individual; ? role of Hospital Laser Safety Committee; ? QA/Risk Management allowing non-emergency procedure with defective equipment;

GUNN 004422

Time	Event-06-03-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
1:56 pm p. 135	surgeon out; procedure stopped;	subsequent dictated bronch. report indicates crown/foreign body vaporized;	This would have required a large number of pulses or joules to vaporize an entire metallic fragment the size of a screw or, even more joules to vaporize a porcelain crown. Bronchoscope in 1 hr. 50 min.; almost 2. hr. procedure time; no biopsies taken to rule out tumor, etc. before laser therapy initiated; No documentation of washings or specimens in laboratory records; Long procedure time suggests multiple laser Pulses (raises question of what else going on in 2-hour period). For 2-hour procedure operative note very brief And does not document what occurred in 2-hour time period;
2:19 pm p. 147	patient out of OR; now in PACU (Postanesthesia Care Unit)	in post-opt care; monitors applied; restless, combative, sub cu air in face and neck;	
2:25 pm p. 155	7 perforation of bronchus; sub cu air; intubated by Shantha, vent. initiated;	Feldman orders Consult with Nguyenduy for chest tube;	Chest tube appropriate treatment for tension pneumothorax. Tension pneumothorax increases likelihood of air entering pulmonary venous system, given perforation by laser.
2:30 pm p. 159	Systolic BP further increases in BP to 180; Nguyenduy writes Consult. Report and sees patient in PACU;	Subcutaneous emphysema to upper thorax w/resp. difficulty requiring intubation; emphysema involving upper thorax and neck; probably bronchial trauma;	
2:34 pm p. 202	AP portable chest x-ray ordered by Feldman for barotrauma;	endo tube; small apical left pneumothorax; soft tissue emphysema changes at supraclavicular levels and superior mediastinum; lungs hypoinflated with uplifting and widening of baseline enlarged cardiac silhouette;	No evidence of foreign body on chest film, consistent w/previous negative CT scan;
2:48 pm p. 200	Laboratory; arterial blood gases (ABG) ordered by Feldman;	□ PO ₂ , total CO ₂ ;	
2:47 pm p. 202	AP portable chest x-ray ordered by Feldman for: foreign body in pharynx; comparison of earlier this afternoon;	Left chest tube placed; small apical pneumothorax appears diminished; lungs hypoinflated; advancement in soft tissue emphysema changes, now at both lateral hemithoraces and supraclavicular levels; streaks of air at superior mediastinum and continuing mediastinal air;	

GUNN 004423

Time	Event--06-03-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
3:50 pm p. 149	Feldman orders transfer to ICU;		
4:02 pm P. 158	Feldman dictates OP note for rigid bronch with laser;	<u>"Pt. does have a history of a missing crown"</u> <u>Entire tracheobronchial tree examined. no finding of foreign body: quite abnormal subsequent in LUL which appeared to be pouch/granulation tissue identified:</u> <u>Laser 45-watts over 2 seconds. granulation tissue vaporized with appearance of what appeared to be crown on surface.</u> <u>Laser 35-watts. no possibility of removal: no further foreign body seen: washings done:</u> <u>No foreign body seen: unclear to me whether laser went through the cartilage: have not identified or pulled crown. if in fact there was a crown. no longer seen on x-ray: Pt. to ICU: antibiotics for disruption of bronchus:</u> <u>Uncertain to me at this time whether the crown was vaporized or laser went through highly abnormal area of the lung:</u> <u>Significant irritation from previous bronch.</u> <u>Patient developed considerable pneumomediastinum. decision to place chest tube:</u>	<u>No note of missing crown/filling.</u> <u>No biopsy taken to document nature of abnormality: CT of lungs prior to bronch. normal: potential to reanalyze CT scan data as "virtual bronchoscopy" ? might not show any significant abnormality:</u> <u>Proceeding to vaporize crown would raise question as to endoscopist judgment.</u> <u>Number of pulses and duration not mentioned: Vaporizing a crown would require a very large number of pulses/watts/duration and would potentially destroy a large area of lung: No record of washings being received by laboratory:</u> <u>Previous bronch. appears to have lasted only 2 min. w/no biopsies or washings making irritation lasting a week unlikely if bronch. performed in competent fashion:</u> <u>Physician does not appear to have recognized onset of events leading to pneumomediastinum probably occurred around time of abrupt increase in BP: does not appear to have considered potential for micro air emboli with potential for brain damage and role for urgent hyperbaric treatment - hyperbaric chamber readily available in hospital:</u>

GUNN 004424

William Mark Casey (Pt.)

Spartanburg Regional Healthcare System (SRHS)
Admission 06/03/04 - 06/06/04

Timeline: 6/3/04
Page 11

Time	Event—06-03-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
4:25 pm P. 280	Pt. arrives to ICU, room 426-A, from recovery		
4:30 pm P. 280	Feldman sees pt. in ICU;		Nurse notes edema from nipple line up to clude head, pt. restless, lethargic; breath sounds decreased left lower lobe; crepitus noted;
6:40 pm P. 161	Nguyenduy dictates OP Report;		pt. w/ subcu. emphysema; respiratory distress; has tracheal tube; concern for left pneumothorax; chest tube placed; post placement radiograph shows tube in good place; extensive subacute and some continuous emphysema;
8:00 pm P. 274			generalized 2+ edema noted on flowsheet; cardiac normal sinus rhythm; crepitus-chest and neck bilaterally, decreased breath sounds left and right lower lobes;

GUNN 004425

William Mark Casey (Pt.)

Spartanburg Regional Healthcare System (SRHS)
Admission 06/03/04 - 06/06/04Timeline: 6/4/04
Page 12

Time	Event--06-04-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
7:20 am p. 266	Pt. restless and agitated; given Ativan 2 mg IV		
7:37 am p. 266	Ativan 2 mg IV given		Continues to have sub q air in chest and face, much less than yesterday
8:00 am p. 266	Pt. extubated by Feldman and respiratory;		
8:45 am p. 261	Chest tube discontinued by Feldman;		
9:20 am p. 261	BP 203/108, Labetolol 10 mg given IV; Tylox (2) given for back, chest and head pain; "everything hurts"		
9:55 am p. 261	Feldman notified of Pt's extreme agitation - Haldol 5 mg given IV; Feldman speaks with family;		
12:00 pm p. 259	Feldman made aware of continued high blood pressures;		nurse notes Feldman said he is "not concerned since the Pt. has chronic pain." Post anesthesia agitation associated with neurocognitive impairment in anesthesia literature. Feldman may not have recognized that given laser perforation of LUL in close proximity to pulmonary vein and given tension pneumothorax with subcutaneous emphysema, Pt. at risk for microemboli to brain as cause of agitation; hyperbaric oxygen, especially if given early, of benefit in preventing permanent brain damage;
12:35 pm p. 259	Feldman notified Pt. with increased agitation		Haldol 8 mg IV ordered and given;
4:05 pm p. 256	Feldman notified Pt. with increased agitation		Haldol 5mg IV ordered and given;

GUNN 004426

William Mark Casey (Pt.)

Spartanburg Regional Healthcare System (SRHS)
Admission 06/03/04 - 06/06/04

Timeline: 6/4/04
Page 13

Time	Event—06-04-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
4:40 pm p. 175	portable abdominal radiograph ordered by Nguyenduy-foreign body.	negative KUB	
5:05 pm p. 255	Pt. complaining of chest pain; Feldman speaks w/ Pt.& sister re: tolerance to pain meds. Lortab 10 mg q 6 hours ordered;		
??? p. 153	First documentation by Feldman that CT was done on 5/28; Clear/normal		does not address discrepancy between normal CT and bronch. note.

GUNN 004427

William Mark Casey (Pt.)

Spartanburg Regional Healthcare System (SRHS)
Admission 06/03/04 - 06/06/04

Timeline: 6/4/04
Page 14

Time	Event-06-04-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
5:17 pm p. 255	Fentanyl 100 mcg patch and Lortab 10 mg po given;		
8:00 pm p. 254			Cardiac: sinus tachycardia; bilateral crepitus over chest;

GUNN 004428

William Mark Casey (Pt.)

Spartanburg Regional Healthcare System (SRHS)
Admission 06/03/04 - 06/06/04

Timeline: 6/5/04
Page 15

Time	Event-06-05-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
8:00 am p. 247		Generalized 1+ edema, "minimal edema upper chest, neck area. Extremely improved since yesterday"; crepitus noted;	
11:24 am p.171	portable chest x-ray ordered by Feldman for history of foreign body in pharynx;	endotracheal and chest tubes removed; bilateral pneumothoraces, slightly larger on right;	
4:00 pm p. 172	portable chest x-ray ordered by Feldman for comparison to exam earlier today w/ right pneumothorax	bilateral pneumothoraces appear unchanged from earlier today;	
4:30 pm p. 172	Feldman calls, Pt. can go to the floor;		

GUNN 004429

William Mark Casey (Pt.)

Spartanburg Regional Healthcare System (SRHS)
Admission 06/03/04 - 06/06/04

Timeline: 6/6/04
Page 16

Time	Event-06-06-04	Noted by ER/OR nurse/Physician/other	Questions/Notes/Conflicts
?	PA and lateral chest x-ray ordered by Feldman for comparison to previous day;	bilateral pneumothoraces appear similar in size compared to previous day;	
1:45 pm p. 298	patient discharged home;	Discharged;	Does not appear Pt. was informed that CT scan from 05/28 was negative, and chest film foreign body was artifact, Per hospital policy of informing patients of diagnostic/therapeutic errors.

GUNN 004430

Donna Laughridge

From: Spencer King <sking@wardfirm.com>
Sent: Wednesday, January 23, 2008 1:34 PM
To: Billy Gunn
Subject: RE: CASEY v FELDMAN....meeting with Dr Brannon

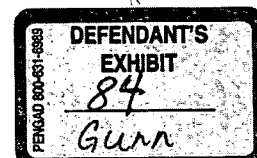
Great. I am alerting Feldman since he will a bizellon questions for me to ask Fogarty. I hate to pit this off but do not think I can do it till I get back. Can we schedule late March?

From: Billy Gunn [mailto:BGunn@holcombebomar.com]
Sent: Wednesday, January 23, 2008 12:19 PM
To: Spencer King
Cc: Donna Hill; Donna Laughridge
Subject: CASEY v FELDMAN....meeting with Dr Brannon

Spencer, attached is my memo to file re my meeting yesterday with Bill Brannon. He is contacting Hallenbeck and Dutka and getting blind oplnions on the case. There is much to do. I am going to set about to schedule depositions of Dr Fogarty and Jay Grace. It is time to go on the offensive re the "brain damage" issue. This baby is going to be tried.
Billy

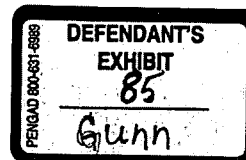
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Donna Laughridge

From: Billy Gunn
Sent: Monday, January 28, 2008 2:36 PM
To: 'Judy.Wilbanks@marsh.com'
Cc: 'Spencer King'
Subject: CASEY v FELDMAN...consultation by Drew Dutka MD



Judy,

I sent you some communications the other day regarding my meeting with Dr Bill Brannon on the topic of the plaintiffs claim of brain damage as a result of air emboli. It is very very suspicious as Dr Brannon pointed out. He may be even stronger than that on it. The plaintiff is trying to show that when the pt was reintubated he had positive pressure to his lung for a considerable period which subjected him to the possibility of air emboli. There is an article or two floating around which could loosely be taken to indicate that. Very loosely but it is going to take a man (or woman) of medicine to so opine.

Dr Brannon indicated to me the two best he knows on air emboli are fellows who trained under him in the Navy, both neurologists. One is a researcher and one is a clinician both in Maryland. The researcher is Dr Hallenbeck and the clinician is Dr Drew Dutka. They both did extensive work in the Navy with divers with the bends which is one of the primary ways in which permanent injury from air emboli arises.

Dr Dutka still sees pts in his practice in Rockville Md. He retired from the Navy. Dr Brannon emailed him with a letter of introduction for me and this morning I called him. He had indicated to Dr Brannon that he had consulted and done expert witness work on air emboli cases but doesn't like to do too many.

Anyway he was seeing pts (a good sign) and asked me to call back at one pm which I did. Told him about the case and he asked some questions the answers to which I was comfortable giving and which lead me to believe there is a good probability he can strongly refute the plaintiffs claim of brain damage from air emboli. HE indicated I can send him the materials but that it will be a couple of weeks before he can get to it because his son is coming in town to visit. I told him I needed to clear it with the client and would send the materials if permissible. My view is that we need to see if we can develop Dr Dutka as an expert witness on the damages point in support of both these

doctors. We are faced with a case in which the plaintiffs attorney feels like he has a real scorcher and is going to retire on it. Moreover, we have a sister of the plaintiff who is quarterbacking things and clearly is thinking there is going to be plenty of money to go around. Unfortunately we are not in a position to cut corners here. My doctor's liability is arguably very remote but this is work which needs to be done regardless. Ok to send the materials to Dr Dutka?

Thanks

Billy

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Donna Laughridge

From: Spencer King <sking@wardfirm.com>
Sent: Wednesday, February 20, 2008 8:23 AM
To: Billy Gunn
Subject: RE: CASEY v FELDMAN-informal report from DR Andrew Dutka

DAMN

From: Billy Gunn [mailto:BGunn@holcombemomar.com]
Sent: Wednesday, February 20, 2008 7:34 AM
To: Spencer King
Cc: Judy.Wilbanks@marsh.com; John Rogers
Subject: CASEY v FELDMAN-Informal report from DR Andrew Dutka



Spencer,
Last night I spoke on the phone with Dr Andrew Dutka, neurologist in Rockville Md who comes highly recommended as a leading expert on air emboli. Dr Dutka spent a career in the Navy working with divers and studying air emboli, then worked at the Bethesda Naval Hospital (or one of the other top govt medical facilities in the DC area) and now is in pvt practice. He had studied the medical records and depositions. Unfortunately, the report from him so far is not good for us. Dr Dutka says the possibility of air emboli causing injury is "decent"

He points to a number of factors.

One is that during the acute event the pts BP went up. He says there are other possibilities such as air hunger and pain. It is recognized that air emboli to the brain stem will raise BP. A Dr Dale Evans has written about this.

Dr Dutka also said the EKG tracings are important. The pts T waves which follow the pulse were large and peaked. This is recognized to come from air emboli or other brain injury.

He said the three main things which support air emboli are:

- 1-the pts immediate agitation from the acute event
- 2-the rise in BP
- 3-the big T waves.

Everything points to something happening to the pts brain.

Dr Dutka goes on to point out that all the claims Mr Casey makes and the test changes, all that they are trying to lay off on the event is arguable either way. He said there are so many things which can cause changes in testing, such as depression (this pt had a previous hx of it) which can cause changes of this type.

None of this is good for us but it does let us know the direction they may go with their expert in Gainesville or with tying in brain damage from air emboli.

I asked Dr Dutka to hang on to the materials and that we would talk to him further as discovery progresses.

Have a good and safe trip.

Billy

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RECEIVED

JUL 02 2009

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*ALSO MEMBER NORTH CAROLINA BAR

June 29, 2009

Theron G. Cochran, Esquire
Love, Thornton, Arnold & Thomason, PA
PO Box 10045
Greenville, SC 29603

Re: William Mark Casey v. Gregory J. Feldman, MD, Joseph A. Boscia, III,
MD, Upstate Lung and Critical Care Specialists, PC, and Devendra
Shantha, MD
CA No.: 2006-CP42-1728
Our File No.: 26-0266

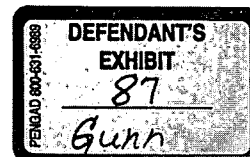
Dear Theron:

Please consider this as a our Pre-Mediation Report in the above-referenced case.

We represent Gregory J. Feldman, M.D., Joseph A. Boscia, III., M.D. and Upstate Lung and Critical Care Specialists, P.C. Devendra Shantha, M.D., an Anesthesiologist, is represented by William U. Gunn.

THE PLAINTIFF

William Mark Casey, date of birth [REDACTED]/58, at the time of the incident on May 28, 2004, was 46 years old. He presented to the emergency room at Spartanburg Regional Medical Center with chest pain. A plain film x-ray revealed a metallic object allegedly in the left main stem bronchus. Defendant Boscia was consulted by the emergency room staff and did a flexible bronchoscopy which did not locate the object, but did find abnormal tissue. That procedure was followed by a rigid bronchoscopy by Defendant Feldman on June 3, 2004, along with lasering. As a result of that procedure, Mr. Casey developed a pneumothorax which is a complication of the procedure. Plaintiff contends that Mr. Casey not only suffered a bronchial, lung or chest injury but also contends that he has suffered neurological deficit because of an air embolism to the brain. Mr. Casey was a long time Michelin employee working as a tire builder and has not returned to work. He was declared disabled by the Social Security Administration due to Casey's claims that he is forgetful, lacks focus, has become a recluse, has no interest in living and that he has had drastic personality changes.



JUA 000297

While Casey first appears to be reasonably forthright and a typical blue collar worker, it has become obvious in this litigation that he is less than truthful and honest as will be discussed further. Mr. Casey had the previous year suffered numerous stressors in his life which caused depression. He has been dishonest in describing his past medical history, both in deposition and to treating physicians. Mr. Casey claims he had no interest in activities including golf, which he claims he was very active in until after the procedure of June 3, 2004. The records from Three Pines Country Club where Mr. Casey was a member and actually lived, speak otherwise. Actually, Mr. Casey continued to play golf up until late summer of 2005 with scores much the same as pre-surgery.

When Mr. Casey was questioned in his deposition, he testified that he had not been to a neurologist (which is true) and that he had not had any diagnostic studies, MRI's or CT's of the head or brain (page 120), which is false. Both in the deposition and in discovery, the Plaintiff continued to deny that any diagnostic of the brain had been performed. Defense counsel however, has learned through receipt of a "confidential" unsigned report that Mr. Casey had undergone an MRI of the brain on February 4, 2007.

The MRI of the brain without contrast was conducted at Presbyterian Hospital in Charlotte, North Carolina using the alias of "Mark Johnson", with an incorrect social security number and date of birth. The examination was arranged by Plaintiff's attorney, Thompson's brother-in-law, Winston Godwin, Jr., M.D., a physician practicing in Charlotte, North Carolina. The Defendants feel that this development in the case is devastating to the Plaintiff. It is assumed that the study was concealed due to being normal.

FACTS

Mr. Casey's academic record in high school was average. He has no formal education past high school. He worked for a short period of time at Lockwood Greene Engineers, then went to Michelin Tire where he had been for eighteen (18) years as a truck tire builder. This is an extremely physically demanding job. Mr. Casey, over the past several years preceding this event, had developed significant lower back pain caused by bulging but not herniated discs.

In 2003, Mr. Casey and his wife separated and ultimately procured a divorce. The apparent cause was a disagreement over their teenage children, both of which were dysfunctional. Mr. and Mrs. Casey apparently disagreed on discipline of the children. While the divorce was apparently a long time coming, the impact on Casey was that it caused severe economic stress as they lost a two person household income.

Shortly after, Mr. Casey began expressing to his family physician, Dr. Frank Gonda, his complaints of anxiety and depression which resulted in Dr. Gonda treating him with Paxil and Effexor, both anti-depressants, which the Plaintiff is trying to "play down" and actually lied about during his deposition. There is evidence in Dr. Gonda's records of intermittent drug abuse.

Mr. Casey had a fear of a heart attack. His father died relatively young with a massive myocardial infarction. Mr. Casey had a significant cardiovascular work-up the previous year which was found to be normal other than some high cholesterol and potential problems related to cigarettes.

JUA 000298

Weeks after the procedure performed by Dr. Feldman, he began complaining of restlessness, inability to sleep, depression, memory loss and being a recluse.

LIABILITY

Allegations of negligence as to Dr. Boscia and Feldman are the following:

1. failing to follow up on CT before proceeding with the rigid bronchoscopy.

Allegations of negligence as to Dr. Feldman are the following:

1. failure to review the chest CT;
2. proceeding with a rigid bronchoscopy;
3. not conducting proper pre-op "time out";
4. performance of an unnecessary procedure;
5. attempting to perform a dangerous and contradictory procedure, i.e. laser, evaporation, melting of a substantial metal object.

DEFENSE

The Defense will argue that Mr. Casey presented to the emergency room with chest pain, shortness of breath and plain film x-rays showed a metallic body in the right main stem bronchus. The most common cause of chest pain, that relating to maladies of the heart, had been ruled out the previous year. Thus Dr. Boscia's decision to use a flexible bronchoscope to locate the metallic object was appropriate. Other films would have been another way but as to do the flexible or take other x-rays was a judgment call. Once Dr. Boscia located the granulated or abnormal tissue in the right main stem bronchus, it was appropriate and necessary for Dr. Feldman to do the rigid bronchoscopy and that a pneumothorax was a known complication of the procedure, and that Mr. Casey recovered from that without complication.

It is not anatomically possible and not supported by the facts, that Mr. Casey suffered any brain dysfunction or air embolism to the brain.

PLAINTIFF'S EXPERTS

The Plaintiff's experts are Dr. Charles M. Fogarty, M.D., a Pulmonologist who practices in Spartanburg. He is a former partner of Dr. Feldman. They intensely dislike each other. Dr. Fogarty has ventured into the area of brain dysfunction and concluded that Mr. Casey's difficulty concentrating comes from air emboli coming from the lengthy duration of anesthesia and laser preparation of the endotracheal tree, with resultant leakage of air into the extrapleural mediastinum and vascular spaces resulting in permanent neurological deficit, and that he is chronically disabled by virtue of this neurological impairment. He bases his opinions on heart bypass patients where a heart lung machine is used and may cause loss of some memory. Moreover, any reported cases of air embolism occurring following lasering are related to gas

JUA 000299

operated lasers, not water cooled. There are no water cooled cases of air emboli, the type used here.

Michael A. Jantz, M.D., also a Pulmonologist and Critical Care Specialist at the University of Florida, Gainesville, has rendered similar opinions. It is unknown why Dr. Jantz has chosen to become involved in this case. He has never testified in a medical negligence case but is doing this one because he was approached and asked to do so, and is not charging for his time. His opinions are very similar to those of Dr. Fogarty.

Joseph Glover Grace, III., Ph.D., a Psychologist who performed a battery of psychological personality tests upon Mr. Casey concludes that he has had some neurological damage as a result of the event. As stated, Dr. Grace is not a medical doctor and goes far afield in his opinions.

Randolph Waid, Ph.D. also a Psychologist, performed a similar battery of psychological personality testing and reaches much the same conclusion as Dr. Grace.

DEFENDANTS' EXPERTS

William Alleyne, M.D., is a Pulmonologist and Critical Care Specialist in Rock Hill. He is an excellent witness. He will testify that he is fully supportive of the decisions in this case and he believes that Dr. Feldman and Dr. Boscia met the standard of care. He is quite positive that once abnormal tissue was found in the right main stem bronchus, that a rigid bronchoscopy was appropriate.

Moreover, he does not believe that the Plaintiff suffered an air embolism or other cognitive dysfunction.

Kent Kistler, M.D., is a Neurologist in Greenville, South Carolina. He will testify that neurological injury would have shown immediate injury or interruption to the neurological system and likely detectable. In as much as there was none, he opines that there is evidence that there was no such neurological injury. He acknowledges that microbubbles may be introduced into the system but not likely the source of an injury.

Moreover, although Plaintiff had made an attempt to conceal same, we did learn that an MRI of the brain was performed on February 4, 2007, and was read by the Radiologist as normal.

OTHER WITNESSES

Francisco E. Gonda, M.D., the Plaintiff's family physician since 1992, testified as to drug abuse dating back to 2000. He testified of overuse, buying drugs off the street, blaming his ex-wife of taking his medications, and other signs of drug abuse.

Dr. Gonda further testified that throughout the course of his treatment, up through 2009, that he never saw any physical or mental changes and never saw any evidence of neurological injury or permanent brain damage. He further said that he was quite surprised to learn of Dr. Fogarty's assumptions and conclusions.

JUA 000300

Tuan Nguyenduy, M.D., a vascular surgeon was called by Dr. Feldman after the pneumothorax was discovered. He does not believe that Mr. Casey suffered an air embolism. That there was no communication between the air pocket and blood vessels. If he had suffered an air embolism, it would have caused immediate signs in change of mental status, vital signs and blood pressure, which did not occur. See anesthesiology records reporting the same as attached. This is the same as Dr. Kistler's opinion.

Milton Jay, Ph.D., is a psychologist and Brian Mercer, M.D., a neurologist. Doctors Jay and Mercer reviewed Mr. Casey's claim for disability from the Aetna Insurance Group which concluded that the cause of any mood disorder was not related to neurological deficits but were caused by depression.

Jeffrey Smith, M.D. is a psychiatrist who treated Mr. Casey from November 10, 2004 through November 17, 2008, was quite surprised when presented with the history of anxiety and depression pre-existing. That is very, very significant as he was given contrary history by Mr. Casey.

He further concludes that withdrawal, isolation, lack of interest, lack of motivation, and lack of energy are all symptoms that are part of the depressive picture.

Mr. Casey's abuse of prescriptive narcotics is evidenced by the attached chart

Eugene Mironer, M.D., a pain management specialist who saw Mr. Casey before and after the events that gave rise to this lawsuit, testified that Plaintiff abuses narcotic medications.

NEGOTIATIONS

While Defense counsel acknowledges that there is a factual issue as to whether or not a rigid bronchoscopy was a necessary procedure, Defendants feel strongly that it was medically necessary and do not believe that there is any negligence. The Defendants have instructed the JUA not to make any offers of settlement. Moreover, after discussions, and procuring opinions from coverage attorneys, the JUA and Defendants likely will agree to a policy release and the JUA will be released from any contractual obligation to pay any settlement or judgment. Any settlement or judgment will be paid by the Defendants and not by their carrier.

I am

Very truly yours,


H. Spencer King
The Ward Law Firm

HSK/mdt

cc: Judy Wilbanks, Claims Specialist

JUA 000301

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*ALSO MEMBER NORTH CAROLINA BAR

August 31, 2009

Judy Wilbanks, Claims Specialist
JUA
PO Box 128
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Re: William Mark Casey v. Gregory J. Feldman, MD, Joseph
A. Boscia, III, MD, Upstate Lung and Critical Care
Specialists, PC, and Devendra Shantha, MD
CA No.: 2006-CP42-1728
Our File No.: 26-0266

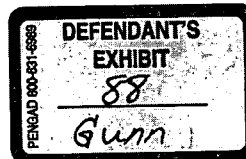
Dear Judy:

Please consider this as a our Pre-Trial Report in the above-referenced case.

We represent Gregory J. Feldman, M.D., Joseph A. Boscia, III., M.D. and Upstate Lung and Critical Care Specialists, P.C. Devendra Shantha, M.D., an anesthesiologist, is represented by William U. Gunn. This case is set for trial beginning October 19, 2009, and we expect the trial to take two (2) weeks.

THE PLAINTIFF

William Mark Casey, date of birth [REDACTED] /58, at the time of the incident on May 28, 2004, was 46 years old. He presented to the emergency room at Spartanburg Regional Medical Center with chest pain. A plain film x-ray revealed a metallic object allegedly in the left main stem bronchus. Defendant Boscia was consulted by the emergency room staff and did a flexible bronchoscopy which did not locate the object, but did find abnormal tissue. That procedure was followed by a rigid bronchoscopy by Defendant Feldman on June 3, 2004, along with lasering. As a result of that procedure, Mr. Casey developed a pneumothorax which is a complication of the procedure. Plaintiff contends that Mr. Casey not only suffered a bronchial, lung or chest injury but also contends that he has suffered neurological deficit because of an air embolism to the brain. Mr. Casey was a long time Michelin employee working as a tire builder and has not returned to work. He was declared disabled by the Social Security Administration due to Casey's claims that he is forgetful, lacks focus, has become a recluse, has no interest in living and that he has had drastic personality changes.



JUA 000276

When Mr. Casey was questioned in his deposition, he testified that he had not been to a neurologist (which is true) and that he had not had any diagnostic studies, MRI's or CT's of the head or brain (page 120), which is false. Both in the deposition and in discovery, the Plaintiff continued to deny that any diagnostic of the brain had been performed. Defense counsel however, has learned through receipt of a "confidential" unsigned report that Mr. Casey had undergone an MRI of the brain on February 4, 2007.

The MRI of the brain without contrast was conducted at Presbyterian Hospital in Charlotte, North Carolina using the alias of "Mark Johnson", with an incorrect social security number and date of birth. The examination was arranged by Plaintiff's attorney, Thompson's brother-in-law, Winston Godwin, Jr., M.D., a physician practicing in Charlotte, North Carolina. The Defendants feel that this development in the case is devastating to the Plaintiff. It is assumed that the study was concealed due to being normal.

FACTS

Mr. Casey's academic record in high school was average. He has no formal education past high school. He worked for a short period of time at Lockwood Greene Engineers, then went to Michelin Tire where he had been for eighteen (18) years as a truck tire builder. This is an extremely physically demanding job. Mr. Casey, over the past several years preceding this event, had developed significant lower back pain caused by bulging but not herniated discs.

In 2003, Mr. Casey and his wife separated and ultimately procured a divorce. The apparent cause was a disagreement over their teenage children, both of which were dysfunctional. Mr. and Mrs. Casey apparently disagreed on discipline of the children. While the divorce was apparently a long time coming, the impact on Casey was that it caused severe economic stress as they lost a two person household income.

Shortly after, Mr. Casey began expressing to his family physician, Dr. Frank Gonda, his complaints of anxiety and depression which resulted in Dr. Gonda treating him with Paxil and Effexor, both anti-depressants, which the Plaintiff is trying to "play down" and actually lied about during his deposition. There is evidence in Dr. Gonda's records of intermittent drug abuse.

Mr. Casey had a fear of a heart attack. His father died relatively young with a massive myocardial infarction. Mr. Casey had a significant cardiovascular work-up the previous year which was found to be normal other than some high cholesterol and potential problems related to cigarettes.

Weeks after the procedure performed by Dr. Feldman, he began complaining of restlessness, inability to sleep, depression, memory loss and being a recluse.

LIABILITY

Plaintiff's theory of liability is that the procedures performed by Drs. Feldman and Boscia were unnecessary and that the complication of pneumothorax that developed would not have developed if those procedures had not gone forward.

JUA 000277

While it is acknowledged that the metallic body is shown on the plain film X-ray was never located, abnormal tissue was which necessitated the procedure performed by Dr. Feldman.

Moreover, the claim that Mr. Casey suffered an air embolism, thus cognitive dysfunction, is bogus and not anatomically possible.

DEFENDANTS' EXPERTS

William Alleyne, M.D., is a Pulmonologist and Critical Care Specialist in Rock Hill. He is an excellent witness. He will testify that he is fully supportive of the decisions in this case and he believes that Dr. Feldman and Dr. Boscia met the standard of care. He is quite positive that once abnormal tissue was found in the right main stem bronchus, that a rigid bronchoscopy was appropriate.

Moreover, he does not believe that the Plaintiff suffered an air embolism or other cognitive dysfunction.

Kent Kistler, M.D., is a Neurologist in Greenville, South Carolina. He will testify that neurological injury would have shown immediate injury or interruption to the neurological system and likely detectable. In as much as there was none, he opines that there is evidence that there was no such neurological injury. He acknowledges that microbubbles may be introduced into the system but not likely the source of an injury.

Moreover, although Plaintiff had made an attempt to conceal same, we did learn that an MRI of the brain was performed on February 4, 2007, and was read by the Radiologist as normal.

Neil Parnes, M.D. is a radiologist and will testify to the anatomy and diagnostic studies.

???

FACT WITNESSES

Defendants will call fact witnesses who have been involved in care and treatment.

Francisco E. Gonda, M.D., the Plaintiff's family physician since 1992, testified as to drug abuse dating back to 2000. He testified of overuse, buying drugs off the street, blaming his ex-wife of taking his medications, and other signs of drug abuse.

Dr. Gonda further testified that throughout the course of his treatment, up through 2009, that he never saw any physical or mental changes and never saw any evidence of neurological injury or permanent brain damage. He further said that he was quite surprised to learn of Dr. Fogarty's assumptions and conclusions.

JUA 000278

Tuan Nguyenduy, M.D., a vascular surgeon was called by Dr. Feldman after the pneumothorax was discovered to insert a chest tube. He will testify that the pneumothorax was resolved, that there was no perforation of a pulmonary vein and no signs and symptoms of a pulmonary vein, and that there is no communication between the lung and brain to allow an air embolism. And that an air embolism would result in immediate cognitive dysfunction, which did not occur.

Milton Jay, Ph.D., is a psychologist employed by Aenta Insurance Company to review the and Brian Mercer, M.D., a neurologist. Doctors Jay and Mercer reviewed Mr. Casey's claim for disability for the Aetna Insurance Group which concluded that the cause of any mood disorder was not related to neurological deficits but were caused by depression, and concluded that Mr. Casey suffers neither from an air embolism nor other cognitive dysfunction. De Benne Esse depositions were taken and will be published.

Drs. Jay and Mercer will also offer opinions based upon their review in accordance with their degree of expertise.

Jeffrey Smith, M.D. is a psychiatrist who treated Mr. Casey from November 10, 2004 through November 17, 2008. Dr. Smith will testify that the procedure may have contributed to other stresses in Mr. Casey's life which resulted in anxiety and depression, which were pre-existing conditions and that Mr. Casey is able to return to gainful employment and has been so for more than two (2) years.

Dr. Nguenduy and Dr. Smith, while treating physicians, may offer opinions within their areas of expertise.

Eugene Mironer, M.D., a pain management specialist who saw Mr. Casey before and after the events that gave rise to this lawsuit, testified that Plaintiff abuses narcotic medications.

UNUSUAL PROBLEMS

1. Challenge to Plaintiff's experts:

Plaintiff's experts are Dr. Charles M. Fogarty, pulmonologist, of Spartanburg and Michael Jantz, M.D. of the University of Florida.

Both Doctors Fogarty and Jantz practice in the field of pulmonology. It is expected that they are supposed to render opinions regarding cognitive dysfunction and brain injury, which is an area outside of their expertise and which they do not treat. Defendants will challenge their qualifications to render opinions on neurological issues, including air embolism, cognitive dysfunction, and brain injury. In addition, Dr. Jantz is not board certified in pulmonology or internal medicine, thus he will be challenged as to his qualifications in those fields, also.

2. MRI, Presbyterian Hospital, Charlotte, N.C.

JUA 000279

Despite fictitious responses in discovery and depositions by Mr. Casey, an MRI of the brain was performed on Mr. Casey on February 4, 2007, using a fictitious name, social security number, and date of birth. The MRI is normal which speaks against any cognitive injury.

TIME

It is expected the trial will be lengthy and perhaps require longer than the two (2) weeks that have been set aside.

EXHIBITS

Parties have stipulated that all medical records will be marked as a common Court's Exhibit. A list of other exhibits is to be submitted. In that vein, witnesses may need to be called out of order. Charges are to be submitted.

SETTLEMENT NEGOTIATIONS

None.

I am

Very truly yours,

H. Spencer King
The Ward Law Firm

HSK/dch

JUA 000280

MAY-02-05 MON 11:59 AM

FAX NO.

P. 02/03

4/29/05

HOLCOMBE, BOMAR, GUNN & BRADFORD, P.A.

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A. TODD DARWIN
STACEY CAMPBELL DAVIS
DAVID D. PROCTOR

ROBERT L. WYNN, III, OF COUNSEL

April 29, 2005

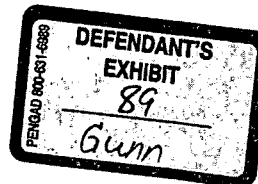
Writer's Direct Dial: 864-594-5321
E-mail Address: rbarrett@hbqb.com

F. Milton Mann, Jr., Esquire
Perrin, Mann, Patterson, Pressley & Mann, L.L.P.
Post Office Box 1655
Spartanburg, SC 29304

RE: South Carolina Pharmaceutical Research, Inc. v. Charles M. Fogarty, M.D.
Case Number: 2005-CP-42-1085
Our File Number: 8301

Dear Milton:

This firm has been retained by Dr. Charles M. Fogarty to represent him in connection with the action that you have instituted on behalf of South Carolina Pharmaceutical Research, Inc. Our information is that Dr. Fogarty was served by registered mail on April 20, 2005. As you were so kind to do in the action captioned Brenda B. Sprinkle v. Charles M. Fogarty, M.D., we would appreciate the courtesy of an extension of time in which to answer or otherwise responsively plead. If you are able to extend this courtesy, please sign and return to my attention the enclosed copy of this correspondence. For your convenience I have enclosed a self-addressed, stamped envelope.



MANN 000830

MAY-02-05 MON 11:59 AM

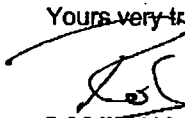
FAX NO.

P. 03/03

Thank you very much for your anticipated courtesy.

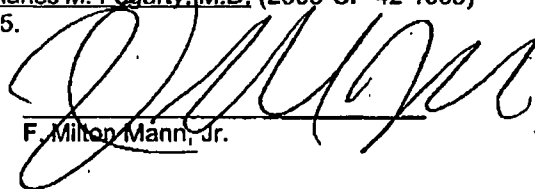
With kindest regards, I am

Yours very truly,



ROBERT M. BARRETT

A thirty day extension of time in which to answer or otherwise responsively plead in South Carolina Pharmaceutical Research, Inc. V. Charles M. Fogarty, M.D. (2005-CP-42-1085) is granted this 7th day of May, 2005.

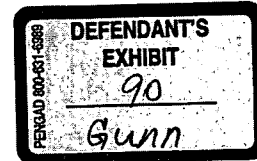


F. Milton Mann, Jr.

MANN 000831

Donna Laughridge

From: Billy Gunn
Sent: Sunday, March 16, 2008 9:58 AM
To: Shareholders
Subject: CASEY v FELDMAN-ethical question



Folks,

I have an ethical question (maybe I don't) which has not yet arisen in the above but is likely on the horizon.

This is a medical malpractice action in which I represent one of the Defendants Dave Shantha MD an anesthesiologist at SRMC who is a very nice fellow and best I can tell a really good doctor. Absolute gentleman. Greg Feldman is co defendant represented by Spencer. The plaintiff Mark Casey is represented by Chuck Thompson and Noel Turner. Their behaviour is bizarre. Feldman is bizarre too. Spencer is Spencer and naturally my client and I are men of reason and good judgment. Chuck Fogarty is also involved, not as a party but as a subsequent treater and now identified as an expert. Inasmuch as Koger is his lawyer I will reserve judgment on Dr Fogarty. At least I will not express it.

Plaintiffs claim is based upon a contention that on 6-3-04 Dr Feldman performed an unwarranted rigid bronchoscopy at SRMC which resulted in a pneumothorax. The plaintiff had to be reintubated and spent a couple of extra days in the hospital. The claimed negligence is that after a less invasive flexible bronchoscopy was done a few days before no metallic foreign object was removed. By the way, what had happened is that the pt had chest pain and a portable chest x ray in the ER had shown on the first admission a "metallic foreign object". They were trying to remove that with the flexible bronch on May 28. When they did not retrieve anything at that procedure they did a ct scan that night and no object was seen. Then Dr Feldman readmitted the pt a week later to do the rigid bronch to retrieve the object. The claim is that if Feldman had reviewed the ct scan of May 28, which was available, he would have seen no object was shown as being there and that he would not have rushed into the rigid bronch which caused the pneumothorax and the plaintiffs claimed brain damage.

The rigid bronch was accompanied by a YAG laser and my sources tell me the good news on June 3, 2004 is that 101 E Wood St did not go up in a mushroom.

Anyway, the claim as to my man Dave who did the anesthesia on the pl for the rigid is that a "timeout" should have been held which would have caused Feldman to see the procedure was not indicated . In that event we would not be having this problem.

Chuck and Noel have not identified an anesthesia expert. I don't think they will. I don't think they can get one. They have identified a pulmonologist at the U of Fla who will testify that both docs deviated from the std of care. I have Charlie Wallace MD at MUSC who is an anesthesiologist age 65 and former Chair of Charleston County Council who will testify for my man and have Chuck as the main course and Noel for dessert.

Here is how Rogers man Fogarty comes into it. Plaintiffs sister, who is quarterbacking this suit, works in the hospital cafeteria and has for many years. She has her ear to the ground. She was aware, like everyone else, of the Feldman-Fogarty wars. So after the bad result in the rigid bronch she guides her allegedly injured brother in to see Fogarty. Dr Fogarty is happy to accommodate, quickly seeing the landscape and proudly noting in his progress notes that the plaintiff has " injury from obvious pulmonary embolism". Aha, says the plaintiffs sister, retirement is in sight for Mark and the ball is rolling. It goes so far as about two months ago, during the discovery period, the plaintiff is sent in to Fogartys office for a chest x ray, PA view. Sticks a little metal back off an earring in his pocket and it shows on film. He and Fogarty have cooked up a method to demonstrate to a jury that this is what happened. Plaintiff had something in his pocket which made it look like he had a foreign object in his lung.

The foregoing injects the sleaze factor and I will have difficulty leaving this alone when Dr Fogarty mounts the witness stand and takes the oath. Maybe I should leave it to Spencer, but it will be hard to do that. Just too much to work with.

It gets worse.

I asked Chuck whether Dr Fogarty intends to testify that my anesthesiologist deviated from the std of care by not having the

procedure called off-the time out theory. Chuck could not give an intelligible or truthful answer. He grows increasingly bizarre. I am thinking though that Fogarty may well express that opinion just because Chuck has convinced him that will be of assistance in taking both guys down. We have mountains of stuff such as hospital policies and procedures, medical literature and the like which we know that Fogarty has provided Chuck (Thompson).

Dr Fogarty's deposition was set for April 1. Here. I noticed it. I subpoenaed Fogarty. Wrote him a letter with the subpoena and it was sent by process server on Feb 1. I sent him a check for four hundred scoots as a "down payment" on time away from his office. An unprecedented show of good faith and professional courtesy by the writer, always a top drawer fellow. Now the blackhats have asked that the deposition be postponed because they want to complete factual depositions before their "experts" are deposed. I have agreed to that because they agreed to my proposal that the case will not be set for a day certain until 09. I have dictated a letter to Dr Fogarty telling him the deposition will be postponed and providing a self addressed and stamped envelope for him to send out 400 dollar check back.

Here is the problem. If indeed Dr Fogarty ultimately testifies against Dr Shantha and says he deviated from the standard of care, then Dr Fogarty becomes quite fair game for me on cross examination. My obligation at trial is to use him to mop up the courtroom floor on cross examination. I will cheerfully do that. With great delight. It will be ugly. I wont use a thing from the Bradford or HB file. Everything I get will be provided by Spencer/Feldman or will be upon the public records of this County. Or maybe other sources. Wall off the Bradford file. Don't need it.

If Dr Fogarty properly tells me when sworn that he has no opinions regarding the tx and care of Dr Shantha because its outside his specialty or area of expertise, I will happily pass and leave everything up to Spencer.

Please unanimously tell me its ok for me either way.

Thanks
BG

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF SPARTANBURG) C.A. NO. 2010-CP-42-05743

Gregory J. Feldman, MD, Joseph A.)
Boscia, III, MD, and Upstate)
Lung & Critical Care Specialists, PC,)

Plaintiffs,)

Versus)

William Mark Casey, Ray E. "Chuck")
Thompson, and Charles M. Fogarty, MD,)

Defendants.)

DEPOSITION OF
H. SPENCER KING, III, ESQUIRE

Pursuant to Notice of Deposition and/or agreement
in the above-entitled case, the deposition of H. SPENCER
KING, III, ESQUIRE was taken on the 28th day of March,
2017, commencing at the hour of 10:31 a.m. in the offices
of The Ward Law Firm, Attorneys at Law, Spartanburg, South
Carolina.

REPORTED BY: Rosalind Poole Walters,
Certified Verbatim Reporter-Master

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Attorney for Defendant Charles M. Fogarty, M.D.

Also attending: Dr. C. Fogarty, Mr. C. Fogarty

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(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH
MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 STIPULATIONS:

2 It is agreed by and between the counsel for the parties as
3 follows:

- 4 1. That this deposition is being taken pursuant to Rule 30
5 of the South Carolina Rules of Civil Procedure;
6 2. That the deponent waives the right to read and sign the
7 deposition transcript.

8 *****

9 H. SPENCER KING, III, ESQUIRE, being duly sworn to tell the
10 truth, the whole truth, and nothing but the truth of his own
11 knowledge concerning the matter herein, testified as
12 follows:

13 *****

14 EXAMINATION BY MR. MANN:

15 Q. Mr. King, could you state your name for the record for
16 us, please?

17 A. Henry Spencer King, III.

18 Q. Mr. King, I believe prior to today's deposition you
19 were provided with two notebooks.

20 A. I was.

21 Q. If you could pull out the second notebook for me and
22 turn to tab number 80, I would appreciate it.

23 A. Okay.

24 Q. That has previously been introduced as an exhibit.
25 We're running all the exhibit numbers instead of

1 plaintiff or defendant, we're just running them one to
2 however many we need. Have you seen that document
3 before, sir?

4 A. I have.

5 Q. And is it your understanding that allows you to answer
6 the questions that the litigants within this litigation
7 have for you?

8 A. To an extent. Insofar as it relates to questions
9 having to do with the lawsuit filed by Mr. Casey
10 against Dr. Feldman and Dr. Boscia, I understand that
11 all attorney-client privileges have been waived, my
12 file has been turned over, and I understand that's been
13 turned over to everybody. So as far as that lawsuit
14 goes.

15 Q. Yes, sir.

16 A. So far as the lawsuit brought by Dr. Feldman, which is
17 the lawsuit that I'm here for today and I'm subpoenaed
18 for, I do not interpret this order as directing me to
19 give opinions and perhaps other matters because I am
20 not involved in this lawsuit.

21 Q. Yes, sir.

22 A. So, again, questions related to the case that I'm here
23 today about, subpoenaed here today about I may refuse
24 to answer.

25 Q. And that's fine. And Mr. King, for the benefit -- and

1 we can go back into these notebooks, but let's do this
2 just so we get the housekeeping out of the way. So if
3 you could look in your notebook that's marked number
4 one, the first notebook, and if you'd be so kind to
5 turn to tab number one.

6 A. Yes, sir.

7 Q. Yes, sir, you're there at it. Have you seen that
8 document before?

9 A. Yes, sir.

10 Q. And that is the underlying lawsuit of this litigation.

11 A. Yes, sir.

12 Q. That is the lawsuit that you provided legal services
13 within. Correct?

14 A. Yes, sir. Yes, sir.

15 Q. For the benefit to try to make the deposition read
16 cleanly and make sure that we're on the same sheet of
17 music, we'll refer to that as "the underlying lawsuit."

18 A. Fine.

19 Q. And with your permission, we'll refer to the litigation
20 that's currently going on as "this litigation."

21 A. Okay.

22 Q. Let me ask you to look at number two, tab number two.
23 That is, I will represent to you, the current complaint
24 within this litigation. Do you recognize this
25 document?

1 A. No.

2 Q. And let me ask you to look at it for just a half a
3 second, you know, basically just the style of the case.

4 A. Okay.

5 Q. You understand that there's litigation going on between
6 Drs. Feldman, Boscia, Upstate Lung and Critical Care,
7 and Dr. Shantha who has been dismissed from this
8 litigation against Mr. Casey, Mr. Thompson -- and Mr.
9 Casey also has been dismissed from this litigation --
10 and Dr. Fogarty. You have not been asked to be
11 involved in this case, have you?

12 A. No.

13 Q. And you've not provided any kind of legal thought,
14 representations, consultation, et cetera. You've
15 provided no services --

16 A. No.

17 Q. -- with respect to this litigation.

18 A. No. No.

19 Q. And I don't believe you've been asked to.

20 A. No.

21 Q. So we understand that we've got a consent
22 confidentiality order that was entered by Judge Kelly
23 in this case which we looked at that was previously
24 marked deposition Exhibit 80, yes, sir. Now, I'm going
25 to add a couple of things. Let me please have this

1 marked. Let me ask that this be marked as Exhibit --
2 what are we up to -- 91, I believe.

3 (Deposition Exhibit Number 91 marked)

4 EXAMINATION RESUMED BY MR. MANN:

5 Q. Mr. King, have you seen that document before?

6 A. I have.

7 Q. And can you tell me what that is, sir?

8 A. It's the subpoena served on me directing my attendance
9 here this morning.

10 Q. And that's the basis of your attendance. Is that not
11 correct?

12 A. That's correct.

13 Q. I'm going to ask that this be marked number 92, please.

14 (Deposition Exhibit Number 92 marked)

15 EXAMINATION RESUMED BY MR. MANN:

16 Q. And have you seen that before, sir?

17 A. I have.

18 Q. And can you please tell us what that is?

19 A. That's the notice of the deposition.

20 Q. So I think that gets most of our housekeeping out of
21 the way. I think by inference my questions indicate
22 that you're an attorney, sir?

23 A. That's correct.

24 Q. How long have you been an attorney?

25 A. Fifty-one years.

1 Q. And Mr. King, currently what do you primarily do?

2 A. Medical malpractice.

3 Q. How long have you done primarily medical malpractice
4 for your primary field of expertise?

5 A. Twenty years.

6 Q. At some point in time, we looked earlier at the
7 underlying litigation, you were retained in that
8 litigation. Correct?

9 A. Correct.

10 Q. What was your role as an attorney in that litigation?

11 A. Defense counsel.

12 Q. And who were you representing, sir?

13 A. Initially I was representing Dr. Feldman and Dr.
14 Boscia.

15 Q. Were you also representing the practice group, as well?

16 A. Yes. Yes.

17 Q. And at some point in time that changed. Do you know
18 why that changed?

19 A. Dr. Shasta -- Shasta?

20 Q. Shantha.

21 A. Shantha, excuse me, was initially involved in the case.
22 Mr. Gunn was assigned by the JUA to represent him, and
23 he was dismissed. I can't tell you how or why. I
24 think summary judgment, but that's strictly 10 years
25 from memory. So don't hold me to that.

1 Q. Yes, sir.

2 A. Anyway, Dr. Shantha was out of the lawsuit. Mr. Gunn
3 had had involvement in the case. The case was
4 absolutely a huge amount of medical, huge amount of
5 evidence, and obviously I needed co-counsel or I needed
6 Dr. -- I needed Mr. Gunn to represent, to get involved,
7 and he took over Dr. Boscia.

8 Q. There was never -- and, again, if I ask a question --
9 let me back up and strike all that. So, number one,
10 Mr. King, you've taken a few depositions in your
11 career?

12 A. Two?

13 Q. No. You've taken a few depositions --

14 A. Oh, a few.

15 Q. -- within your career, sir?

16 A. Yes.

17 Q. So I don't need to go over the basics with you, do I?

18 A. I think I understand those.

19 Q. Okay. And any---

20 A. If I don't, it's a little late to learn.

21 Q. I was going to say. Anything that I can do or we can
22 do to accommodate you, of course we will.

23 A. Thank you.

24 Q. All right. With that said, though, you and Mr. Gunn
25 were initially the two attorneys involved on the

1 defense of the underlying case?

2 A. Correct.

3 Q. And he was representing Dr. Shantha?

4 A. Well, initially, yeah, Dr. Shantha.

5 Q. And at some point Dr. Shantha was out of the case?

6 A. Right.

7 Q. And then it's my understanding that Mr. Gunn started
8 representing Dr. Boscia?

9 A. Correct.

10 Q. Did you two have a -- for lack of a better term, were
11 there any conflicts on the defense side in the
12 representation of this case?

13 A. Not to my knowledge.

14 Q. So was there free-flowing information going between you
15 and Mr. Gunn in the preparation of the defense of this
16 case?

17 A. Yes.

18 Q. So at some point in time he started representing Dr.
19 Boscia?

20 A. Correct.

21 Q. That was extremely late in the case, if I'm not
22 correct?

23 A. Again, I can't -- I can't tell you.

24 Q. And let me---

25 A. The case -- the preparation was like -- the case went

1 on for about three years before we went to trial.

2 Q. Yes, sir.

3 A. So I can't tell you when Billy got involved.

4 Q. Let me see if I can maybe help with this question. So
5 if the documents show letters, dates and things of that
6 nature in the underlying litigation, you don't have any
7 reason to question --

8 A. No.

9 Q. -- those documents, do you?

10 A. No, not at all. Not at all.

11 Q. And in your recollection, in going through the case, in
12 other words, the depositions and things of that nature,
13 there was never a situation where you go whoa, hold on
14 a second, that deposition date's wrong?

15 A. No. No.

16 Q. That pleading date is wrong?

17 A. No. No.

18 Q. That letter date is wrong?

19 A. No.

20 Q. So the documents can speak for themselves. Is that
21 fair?

22 A. Correct.

23 Q. All right. In preparing the defense, I would assume
24 you propounded discovery?

25 A. Correct.

1 Q. Tell me about how you typically approach a medical
2 malpractice case in starting the discovery or starting
3 the process of trying to find out what's going on.

4 A. Well, the first thing that I do when I -- when the JUA
5 sends me a complaint, let's put it that way, the first
6 thing I will do is go meet with my client, get their
7 file, their chart, talk with them, and generally the
8 next thing I start doing is looking for experts. At
9 some point early on, the plaintiff will either serve me
10 with discovery, initial discovery, interrogatories,
11 production requests, and I will do likewise. I mean, I
12 don't necessarily wait on the plaintiff to serve me
13 before I serve. It could be -- it could be either.
14 Then you go through the exchange of responses to that.
15 Then you get into the deposition phase, which generally
16 includes parties, factual witnesses, then expert
17 witnesses. And that's kind of the---

18 Q. And do the expert witnesses give you some feedback as
19 to what documents, things, or issues that you may be
20 looking at in the case?

21 A. Sure.

22 Q. So is that one of the reasons why you start looking
23 very early --

24 A. I do.

25 Q. -- for expert witnesses?

1 A. I mean, again, you know, like I said, I've been doing
2 medical malpractice for about 20 years, but a lawyer
3 can't become knowledgeable as a physician in any
4 specialty, I don't care how much time you spend on it.
5 So I look at expert witnesses as teachers to me. That
6 to me is as important as what -- as what their
7 testimony is going -- what their opinions about the
8 case is, is to help me understand the medicine so I can
9 at least get close to the terminology in reference to
10 the anatomy.

11 Q. Is there more than one kind of expert witness in
12 medical malpractice cases?

13 A. I'm not sure what you mean by more than one.

14 Q. Are some expert witnesses considered work product and
15 not disclosed to opposing counsel?

16 A. Yes.

17 Q. And then the others are would you call them testifying
18 expert witnesses?

19 A. Yes.

20 Q. So can we clump them or can we agree to clump them in
21 two categories?

22 A. Yes.

23 Q. And you've worked with both --

24 A. Yes.

25 Q. -- in your profession and career?

1 A. Yes.

2 Q. If it is a testifying expert witness, any communication
3 that you have with that expert witness is discoverable,
4 is it not?

5 A. Correct. Correct.

6 Q. And any information that's prepared by that expert
7 witness is also discoverable?

8 A. Correct.

9 Q. And in this case, would you have requested for those
10 informations; and that is information prepared by
11 expert witnesses and disseminated to the plaintiff's
12 team?

13 A. Sure. I mean, that's a standard question in my initial
14 interrogatories.

15 Q. Okay. Let me see, and I may take a minute doing this
16 because I did not mark this one and I didn't memorize
17 where it is. So let's go off the record for about
18 three to five minutes.

19 (Off the Record; 10:46 -- 10:50 a.m.)

20 (Deposition Exhibit Number 93 marked)

21 EXAMINATION RESUMED BY MR. MANN:

22 Q. Mr. King, can you please identify that document for us?

23 A. That was the subpoena that was issued for the de bene
24 esse deposition of Dr. Fogarty signed by me.

25 Q. And would you tell us, please, how many pages that

1 document is?

2 A. Appears to be three.

3 Q. Yes, sir. And can you turn to page 3 for us?

4 A. Yes, sir.

5 Q. Let's keep that out for just a minute, and I'm going to
6 introduce Exhibit Number 94. Let's mark this as Number
7 94, please.

8 (Deposition Exhibit Number 94 marked)

9 EXAMINATION RESUMED BY MR. MANN:

10 Q. Mr. King, I'm going to pass that over to you. Mr.
11 King, I will represent to you in this litigation, not
12 the underlying, there are approximately approaching
13 100,000 pages of documents. This is one of many copies
14 of Dr. Fogarty's deposition; however, I do believe it
15 is a complete copy. Do you want me to just direct my
16 questions, or do you want to look at it for just a
17 minute before we start doing that?

18 A. I would suggest you direct me, because I have not
19 looked at this deposition since the trial of the
20 underlying case.

21 Q. Yes, sir.

22 A. My file was delivered to you all I want to say a year
23 ago, year and a half ago or something like that. So I
24 haven't even had access to it, and I can't -- I don't
25 remember -- I can't recall why I would have reason to

1 have looked at it since trial.

2 Q. And that's fine. I've got four or five points that I'd
3 like to direct your attention to.

4 A. Okay.

5 Q. With that said, though, at any point today if you feel
6 that you need access to your file, it can be brought
7 back over here and you can take as much time as you
8 need to look at it. So I don't want you to feel like
9 you're deprived of anything that you need to give your
10 best answer.

11 A. Okay.

12 Q. Is that fair?

13 A. That's fair.

14 Q. All right. Do you recall this deposition?

15 A. Yes.

16 Q. Do you recall where it was taken?

17 A. I think it was taken here.

18 Q. Was it taken in this room?

19 A. I believe.

20 Q. All right. And who---

21 A. One of the things I remember about it is I remember Dr.
22 -- it's interesting Dr. Fogarty's sitting over there in
23 that corner. I remember Dr. Fogarty bringing records
24 to the deposition which were fairly voluminous, and I
25 remember putting -- we put the boxes -- my memory is we

1 put the boxes right back there in the corner where Dr.
2 Fogarty happens -- of course, he was -- I think he was
3 probably sitting over here somewhere, probably where I
4 am, but we put the records over there. So that's kind
5 of a memory peg that I've got that I think that's why -
6 - I do think we took it here. And that's interesting.
7 I have -- if you ask me anything else about the
8 deposition, I'm going to -- my memory's not going to be
9 that good. I don't know why I focused on that, but...

10 Q. Yes, sir, and for what it's worth, I have that
11 recollection, also. I do remember it being in this
12 room. Looking back at the third page of what we marked
13 as Exhibit 93, you requested certain things to be
14 brought to the deposition, did you not?

15 A. Yes.

16 Q. And can you tell us what those things were that you
17 requested? And I'm fine with generalities or I'm fine
18 with you reading it, but can you tell us what you were
19 looking for to be brought to Dr. Fogarty's deposition?

20 A. Well, first off, you're asking for records of treatment
21 generated by the witness, in this case a physician, and
22 next would be any reports that he has rendered. Those
23 reports to me include both any medical reports that he
24 has generated based upon his treatment either for the
25 file or to any third parties and also includes reports

1 and opinions to the attorney who has retained them as
2 an expert. Then next would be -- again, because
3 communications with an expert witness that has been
4 identified as a trial witness, to be used at trial is
5 privileged, so I'm asking for any, any memorandums that
6 you generated, any communications, whatever that you
7 received from any third party. Okay?

8 Q. Yes, sir.

9 A. Including would be the plaintiff attorney, would be
10 other witnesses. Okay? Then -- and then if the --
11 and, again, some experts do this, some do not. Some
12 assist the attorney who's engaged them in preparation
13 for depositions of other witnesses. That's what four
14 is. Five is kind of a -- is broader. It's asking for
15 any documents of any kind and nature related to the
16 litigation. And then six is if anything has been
17 destroyed we ask that it be identified.

18 Q. Now, looking back at page 2 of the subpoena duces
19 tecum, the date and time was, looking midway on the
20 page, 10:00 a.m. on November 14, 2008. Is that
21 correct?

22 A. Correct.

23 Q. Now looking at the front page of what we have marked as
24 Exhibit 94, which is the deposition, that's not the
25 date and time that the deposition occurred, is it?

- 1 A. I don't know.
- 2 Q. It's on the notebook, first page of the deposition.
- 3 A. December 22, 2008.
- 4 Q. Do you recall if the deposition was carried over for
- 5 some kind of scheduling issue?
- 6 A. I don't remember.
- 7 Q. But the documents within your file would reflect
- 8 accurately what occurred as far as getting the
- 9 deposition ultimately taken? In other words, what I'm
- 10 asking -- let me ask it better. So the subpoena duces
- 11 tecum does not match the date the deposition was
- 12 actually taken.
- 13 A. Okay.
- 14 Q. Correct?
- 15 A. Right.
- 16 Q. I mean, is that what you're seeing with the documents?
- 17 A. Yes.
- 18 Q. Is it uncommon for depositions to get rescheduled?
- 19 A. Not at all.
- 20 Q. As a matter of fact, I believe your deposition got
- 21 rescheduled.
- 22 A. It did.
- 23 Q. Do attorneys always re-notice them or re-subpoena them?
- 24 A. No. I mean, I'm trying to think. I can't say I
- 25 haven't done it in the past, but I don't generally do

1 it and it is not -- I don't generally see other
2 attorneys adverse to me in proceedings doing it. And I
3 guess sometimes you could find correspondence. In this
4 case correspondence may exist between Mr. Thompson and
5 me, Mr. Gunn, whatever rescheduling the deposition to
6 this date, or it could have been verbal. I have no
7 idea.

8 Q. Would you consider this subpoena duces tecum to apply
9 to the deposition you ultimately took?

10 A. Yes.

11 Q. And you would expect the documents and things that you
12 requested to have been provided?

13 A. Yes.

14 Q. Let me call your attention to and if you look in the
15 notebook I'm not going to -- well, I can. There are
16 two numbers on these pages. One is down at the bottom
17 which is a Thompson zero whatever number.

18 A. Right.

19 Q. That is the Bates stamping that has occurred within
20 this case. Up at the top corner, maybe not on that
21 page, but is the page number of the deposition.

22 A. Right.

23 Q. Could I ask you to please turn to page 85 for me?

24 A. Okay.

25 Q. And are you there, sir?

1 A. I am.

2 Q. Going down to line number 20, do you see line number
3 20?

4 A. Yes.

5 Q. And my understanding is you're introducing what is
6 going to be an exhibit. Is that correct? You might
7 have to look above line 20. And I'm on page 85 of the
8 deposition or Thompson---

9 A. Well, I switched back over. I turned back to page 85
10 and line 20, and a question that I asked Dr. Fogarty,
11 "I'm going to hand you an office note of July 21,
12 2005." He says, "Yes, sir."

13 Q. Okay. Now---

14 A. So I assume that this -- that these questions related
15 to that letter.

16 Q. Yes, sir. Let me ask you to look above that. Let me
17 ask you to look at line numbers 18 and 19 on page 85.

18 A. "Exhibit 20 attached to deposition."

19 Q. So is it reasonable that you marked that office note?

20 A. Yes, sir.

21 Q. Let's go in the very back where the exhibits are, and
22 let me ask you to please turn your attention to -- I'm
23 going to go by the Bates number because there's not a
24 deposition number, but I'm at the very end of the
25 deposition. You see how far back I am. But I'm going

1 to ask you to turn to Thompson 018211. You'll see down
2 at the bottom Thompson number 018211.

3 A. Correct.

4 Q. And please let me know when you get there.

5 A. I'm there.

6 Q. I'm going to ask you to actually take a couple of
7 minutes and read that note, because we're going to
8 spend probably 30, 40 minutes talking about this note,
9 and so I'd rather you start off with a refreshment as
10 to that particular note, please.

11 MR. MANN:

12 And for the benefit of the court reporter, do you
13 mind if we to go off the record?

14 MS. CHEEK:

15 No. Fine.

16 (Off the Record; 11:02 -- 11:08 a.m.)

17 EXAMINATION RESUMED BY MR. MANN:

18 Q. You've had an opportunity to look at this note,
19 Spencer?

20 A. Yes.

21 Q. Thank you. Mr. King. Excuse me. Looking at the third
22 page of the note, it has a Bates stamp 000438, and then
23 it has the Thompson 018213 Bates stamp. It's going to
24 be the third page of that office visit note.

25 A. Okay.

1 Q. There is a paragraph right above Plan.

2 A. Right.

3 Q. And it starts with, "With reference."

4 A. Right.

5 Q. Would you please read that paragraph?

6 A. "With reference to the patient's difficulty
7 concentrating, he undoubtedly had air emboli given his
8 lengthy duration of anesthesia and laser perforation of
9 the endotracheal tree with resultant leakage of air
10 into the extra pleural and vascular extra pleural
11 mediastinal and vascular spaces. Although he is
12 fortunate not to have any gross motor deficit, he may
13 well have a permanent neurologic deficit in which case
14 the indication for taking medication may be moot and
15 the patient may simply need to recognize that although
16 he would like to go back to work, he may be chronically
17 disabled by his neurologic impairment."

18 Q. Okay. We're going to mark another exhibit and we're
19 going to start doing some comparisons. Okay? Let me
20 get this marked as 95, please.

21 (Deposition Exhibit Number 95 marked)

22 EXAMINATION RESUMED BY MR. MANN:

23 Q. Mr. King, I'm going to pass you that one, and I think
24 we need to go off the record for just a minute, Roz,
25 please.

1 (Off the Record; 11:10 -- 11:10 a.m.)

2 EXAMINATION RESUMED BY MR. MANN:

3 Q. Mr. King, I have given you a document that we have
4 marked as Number 95.

5 A. Right.

6 Q. And let me also hand you this, if I may, before you get
7 into that Number 95. Do you recognize this notebook?
8 And take your time looking at it. I'm not marking that
9 as an exhibit. All the parties have had an opportunity
10 to refer to it. And let me make a representation to
11 you, I'm going to represent to you that Exhibit 95 is
12 your selection of records that are in the Lung and
13 Chest tab within this notebook.

14 A. It looks like a notebook that we would have generated.

15 Q. And what would you have put in that notebook?

16 A. Generally we put all medical records in it.

17 Q. So if you had received medical records from any source,
18 you would have put them in this notebook so that you
19 could find them --

20 A. Yes.

21 Q. -- during the course of the litigation?

22 A. Yes.

23 Q. Do you accept my representation that 95 is a copy of
24 your Lung and Chest tab in here?

25 A. Should be, yeah.

1 Q. Okay. I'm going to set it aside, but if you need to
2 look at it, you are welcome to. Okay?

3 A. Okay.

4 Q. So I've noticed you're pretty astute and you've already
5 looked ahead, and you have found the 7/21/05 note
6 that's within that tab.

7 A. Well, I found one that is the first page is King 002145
8 and going through King 002147.

9 Q. Let me ask you to turn to King 002145, please.

10 A. Okay. All right.

11 Q. And what is the date of that office note?

12 A. July 21, 2005.

13 Q. And let me ask you to flip over to the third page of
14 that note. Remember that last paragraph we looked at
15 above Plan?

16 A. Yes.

17 Q. Would you read what is marked King 002147?

18 A. "With reference to the patient's difficulty
19 concentrating, air emboli have been reported as a
20 common complication when there is a laser perforation
21 of the endotracheal tree with resultant leakage of air
22 into extra pleural, vascular and mediastinal spaces.
23 Although he is fortunate not to have any gross motor
24 deficit, he may well have a permanent neurological
25 deficit in which case the indication for taking

1 medications such as Strattera may be moot. The patient
2 may simply need to recognize that although he would
3 like to go back to work, he may be chronically disabled
4 by the neurological impairment/permanent brain damage."

5 Q. Is that the same note you looked at earlier in Exhibit
6 94, which is the deposition of Dr. Fogarty?

7 A. They're different.

8 Q. That is correct. If I represent to you that attached
9 to Dr. Fogarty's deposition is only one copy of this
10 note that is dated 7/21/05, would you accept that
11 representation?

12 A. Yes.

13 Q. But they're not the same note, are they?

14 A. No.

15 Q. Does that cause you pause for concern as to why there
16 are two different notes?

17 A. Yes.

18 Q. Prior to us talking about this at this deposition, had
19 you ever noticed that there were at least two different
20 versions of this 7/21/05 note?

21 A. I noticed it when I reviewed the notebooks that were
22 given to me by y'all in preparation for this
23 deposition.

24 Q. So you understand there's actually three copies of this
25 note at least?

1 A. I saw three copies in there.

2 Q. And we're going to talk about that a good little bit,
3 but you will definitely accept that there's only one
4 copy that is attached to Dr. Fogarty's deposition?

5 A. Yes.

6 Q. Quite frankly, it's not the copy that was provided to
7 you through your discovery efforts?

8 MR. HENRIKSON:

9 Object to the form.

10 EXAMINATION RESUMED BY MR. MANN:

11 Q. And let me be more specific, because I think Matt has a
12 good point. So we previously looked at your medical
13 notebook.

14 A. Right.

15 Q. And I have attached to your deposition Exhibit 95.

16 A. Correct.

17 Q. And it is my understanding from your prior testimony
18 that these are the records that you received through
19 your discovery efforts?

20 A. Correct. That's what I'm -- that's what I'm having
21 hesitation on is -- and I realize it's marked King
22 002147. That is -- that is a copy of what is in my
23 medical record notebook.

24 Q. Yes, sir.

25 A. Then that's the only one -- that's the only one I had.

1 Q. And you do understand that these two are not the same.

2 A. Correct.

3 Q. And as we stated, other than preparing for this
4 deposition --

5 A. Correct.

6 Q. -- with the information provided to you --

7 A. Yes.

8 Q. -- you have never noticed --

9 A. No.

10 Q. -- that there were multiple copies.

11 A. No. No.

12 Q. Let me ask you -- and, again, let's make sure. Exhibit
13 95, the one that's in your hand, Mr. King.

14 A. Right.

15 Q. Looking at the first page of that 7/21/05 note, I see
16 above the King 002145, I see a Lung and Chest dash 43.
17 Is that a typical Bates stamping that your office did
18 at this time? And I do understand this has been almost
19 10 years ago.

20 A. Yes. Yes.

21 Q. So you have no reason to doubt that that was not a
22 record that you received?

23 A. No.

24 Q. And, quite frankly, it would have been through your
25 discovery efforts?

1 A. Correct.

2 Q. Okay. Have you run into other cases, medical
3 malpractice cases where there have been multiple copies
4 of an office note dated the exact same date?

5 A. I don't recall another one.

6 Q. Is there to your understanding -- because, again, you
7 provide medical defense to physicians. Is there a way
8 to modify a medical record?

9 MS. CHEEK:

10 Objection.

11 EXAMINATION RESUMED BY MR. MANN:

12 A. For the physician to modify a medical record?

13 Q. Yes, sir. I did ask that question poorly. So based
14 upon your expertise as a medical malpractice attorney,
15 is there an accepted fashion within the medical
16 community for a physician to modify an office visit
17 record?

18 A. The practice that I would recommend and that I have
19 seen is if there is a modification that the
20 modification is noted, initialed, and dated.

21 Q. That's not what occurred between these two records, is
22 it?

23 A. Doesn't appear to be, no.

24 Q. And, again, during Dr. Fogarty's deposition he
25 produced, for lack of a better term, the undoubtable

1 note. Correct? which is marked Number 20 as an
2 exhibit to his deposition.

3 A. I cannot tell you without reading my -- going back
4 through and reading Dr. Fogarty's deposition, I cannot
5 tell you where I got Exhibit 20.

6 Q. Is it fair---

7 A. I mean, I could have -- I could have brought the
8 medical records that had been provided to me prior to
9 the deposition. I could have brought that to the
10 deposition, and would be more generally what I would
11 do, that I would hand the exhibit to the witness.
12 Otherwise, the other practice would be I could ask the
13 witness for his chart and his file and then pick it out
14 and mark it as an exhibit. So I can't tell you where
15 Exhibit 20 came from.

16 Q. well, if we know in your medical record notebook what
17 is marked Exhibit 20 to the deposition is not within
18 your medical record notebook --

19 A. Right.

20 Q. -- is it fair to assume that you didn't bring that to
21 the deposition?

22 MS. CHEEK:

23 objection.

24 EXAMINATION RESUMED BY MR. MANN:

25 A. I assume that to be correct, but, again, I don't know.

- 1 Q. And it's a minor point. So, anyway, I'd like you to
2 look again at those two optional paragraphs that we've
3 talked about that are contained on page 3 of the two
4 particular notes, and I'd like to discuss for just a
5 minute or two a comparison between the operative
6 language of both of those paragraphs, please. So if
7 you would take a look again and then let me ask you
8 some questions.
- 9 A. I'm having trouble keeping pages back.
- 10 Q. Yes, sir.
- 11 A. Help me. What page am I on?
- 12 Q. You're at 2147 in Exhibit Number 95, and you're at page
13 --
- 14 A. I've got that one.
- 15 Q. -- 18213. I know. I'm just putting it on the record
16 so we make sure we get it there.
- 17 A. Okay. Okay.
- 18 Q. Would you agree with me the paragraph that is in
19 Exhibit 20 attached to Dr. Fogarty's deposition wherein
20 it says he undoubtedly had air emboli --
- 21 A. Okay.
- 22 Q. -- is a much stronger statement than what is contained
23 in Exhibit Number 95?
- 24 MR. HENRIKSON:
- 25 Object to the form.

1 EXAMINATION RESUMED BY MR. MANN:

2 A. Right. Correct.

3 Q. And, again, if you're looking to establish a medical
4 malpractice case, what are the elements that you have
5 to establish, Mr. King?

6 A. Most probable.

7 Q. Is undoubtedly, does that reach the level of most
8 probable?

9 A. Yes.

10 Q. Now, looking back at page number 2147 of Exhibit 95,
11 does that reach that level?

12 A. Not in my judgment.

13 Q. So that might be a motivation to rewrite that exhibit?

14 MR. HENRIKSON:

15 Object to the form.

16 MS. CHEEK:

17 Objection.

18 EXAMINATION RESUMED BY MR. MANN:

19 Q. Could it possibly be?

20 A. I can't -- I don't know what the motivation would be.
21 I can't answer that.

22 Q. And that's fine. If you would have had both of those
23 notes when you were taking Dr. Fogarty's deposition,
24 would you have asked him as to the difference in that
25 paragraph's language?

1 A. Yes. Yes.

2 Q. If you'd have had three copies, would you have asked
3 him about all three?

4 A. Yes.

5 Q. And if you'd have had 10 different versions of that
6 note---

7 A. Yes. Yes.

8 Q. Okay. So that would have potentially changed how you
9 defended the case. Correct?

10 A. I can't say it would have changed how I would have
11 defended the case.

12 Q. All right. Let's move on to the next exhibit, and then
13 we're going to -- all right, let's mark this, and I
14 believe we're at 96. Correct? Let's mark that as 96.
15 Oh, hang on. Let's strike this, and I need to take a
16 brief recess, please.

17 MS. CHEEK:

18 That's fine.

19 (Off the Record; 11:24 a.m. -- 12:47 p.m.)

20 EXAMINATION RESUMED BY MR. MANN:

21 Q. Mr. King, we were previously talking about a couple of
22 versions of a note that were from 7/21/05, if I'm not
23 mistaken, and I went to introduce another exhibit, and
24 I apologize again that I didn't have the full exhibit,
25 so, therefore, we had to take a break. So thank you

1 for your patience. But before we do that let me ask
2 you briefly to turn in Dr. Fogarty's deposition, which
3 I believe is 94, and if I could direct your attention
4 to, again, we're working in the back of the deposition.
5 May I ask you to look at Thompson 018203.

6 A. Okay.

7 Q. And would you look at that document for just a brief
8 second and let me ask you a couple of general questions
9 about it, nothing specific, and tell me when you're
10 ready to talk about it.

11 A. Okay.

12 Q. Mr. King, can you tell us what the date of that
13 document is?

14 A. It was dated October, I think, 20. Excuse me. It's
15 dated October it looks like 20 struck over and changed
16 to October 30, 2008.

17 Q. And what is that document?

18 A. It's apparently a cover letter to Milton, to you, a
19 copy to Billy Gunn and to me setting out what areas
20 that Dr. Boscia -- no, excuse me -- Dr. Fogarty's
21 expert testimony regarding Dr. Boscia. And I'm sorry.
22 I misunderstood your question to begin with, and I
23 didn't realize when you asked me to read it that there
24 was two summaries of testimony. One is to Dr. Boscia
25 and one is Dr. Feldman, and I haven't read Feldman's

1 yet. So if you'd give me just a minute, let me read
2 that.

3 Q. And Mr. King, I don't know that you need to.

4 A. Okay.

5 Q. But there's also a third, Dr. Shantha, as well.

6 A. Okay.

7 Q. But does this refresh your memory at all as to when Dr.
8 Fogarty changed roles from being a treating physician
9 and was identified as an expert witness in the
10 underlying litigation?

11 MS. CHEEK:

12 Objection.

13 EXAMINATION RESUMED BY MR. MANN:

14 A. Again, we're talking about close to 10 years.

15 Q. Yes, sir.

16 A. I mean, I don't remember. I don't remember a period
17 that Dr. Fogarty was not an expert witness that I
18 expected to testify. I did not -- I don't remember
19 when I thought he was a fact witness.

20 Q. Do you make a distinction between treating physicians
21 and expert witnesses?

22 A. Yes.

23 Q. You do?

24 A. Yes. You can be both.

25 Q. Yes, sir. And I believe in this case, in the

1 underlying case I think that's what occurred. Is that
2 correct?

3 A. Yes, and, again, I can't tell you when those roles
4 changed.

5 Q. But the pleadings would?

6 A. Yes.

7 Q. And if we look at the pleadings, there at some point in
8 time is a formal announcement from Mr. Thompson
9 designating that Dr. Fogarty would be an expert
10 witness.

11 A. Correct.

12 Q. Do you recall that?

13 A. I do.

14 Q. And whatever the date is on that document, that's the
15 date.

16 A. Correct.

17 Q. Do you remember being told areas of potential testimony
18 prior to the receipt of this document October 30, 2008?

19 A. I do not.

20 (Deposition Exhibit Number 96 marked)

21 EXAMINATION RESUMED BY MR. MANN:

22 Q. Mr. King, I'm going to ask you to take a couple minutes
23 and look at this, and then I have a few questions about
24 it.

25 A. Okay.

- 1 Q. Have you seen that document before, sir?
- 2 A. I know there were three in the notebooks that you gave
- 3 me. I can't tell you if I have seen the one that you
- 4 just handed me.
- 5 Q. Okay. Let's look at the cover page of Number 96,
- 6 please. Can you tell me what that document is or
- 7 purports to be?
- 8 A. It appears to be a cover letter from -- to Chuck
- 9 Thompson dated August 24, 2005 from Maria, who
- 10 apparently has at least access to Lung and Chest
- 11 Medical Associates' letterhead. I don't know who Maria
- 12 is.
- 13 Q. Do you remember if Mr. Thompson was married during the
- 14 litigation?
- 15 A. I do.
- 16 Q. And have you heard the name Maria Kimbrell, I believe?
- 17 A. I can't -- I don't remember.
- 18 Q. And that's a perfectly acceptable answer, Mr. King. So
- 19 let's look at the very top. Does this appear to have
- 20 been faxed?
- 21 A. Yes.
- 22 Q. Do you see a fax date stamp --
- 23 A. Yes.
- 24 Q. -- at the top?
- 25 A. I do. I do.

1 Q. And I'm sorry, Roz. I apologize. We---

2 A. It also says fax transmittal. I'm sorry.

3 Q. Yes, sir. And up at the top, it's, what, August 24,
4 2005?

5 A. Right.

6 Q. It says, what, Confidential Health Information
7 Enclosed?

8 A. Yes, sir.

9 Q. It says, To Mr. Chuck Thompson? Or technically, I
10 think it says Chuck Thompson?

11 A. Correct.

12 Q. Facility, Burts Firm. Total number of pages four?

13 A. Okay. Okay.

14 Q. But on the cover sheet it says total pages sent, four?

15 A. Okay.

16 Q. Do you agree that there are four pages there?

17 A. There are four pages numbered, which the cover letter
18 is one and there's a three-page attachment.

19 Q. Total pages sent, four pages?

20 A. Yeah.

21 Q. Okay. What is this regarding? Is there a Re?

22 A. It is Re: Mark Casey.

23 Q. And can you read me what the note is?

24 A. "The 7/21/05 note we discussed earlier to follow. Dr.
25 Fogarty made a few changes, dash, nothing significant.

1 Please update your current copy. Thanks, Maria."

2 Q. And what is attached to this?

3 A. A letter of 7/21/05.

4 Q. A letter or is it an office visit note?

5 A. Excuse me. An office note. I'm sorry.

6 Q. Yes, sir. And let's go back to that paragraph we've
7 talked a lot about, and I would like you to look at
8 Thompson 000539, please. It's in the exhibit I just
9 handed you, Mr. King. I apologize. So Exhibit Number
10 96 looking down at the bottom corner.

11 A. Okay.

12 Q. And are you looking at 000539, sir?

13 A. I am.

14 Q. Now, let's look at that paragraph we've discussed
15 before that's above the plan. Would you please compare
16 that to the office note that was within your records
17 which we previously marked as Exhibit Number 95?

18 A. Okay.

19 Q. Does that appear to be the same note?

20 A. It is the same note with changes.

21 Q. What are the changes?

22 A. The word common before complication is not included,
23 and there's a difference between laser perforation and
24 a laser bronchoscopy, but the one we're talking about
25 refers to a laser bronchoscopy even without perforation

1 of the endotracheal tree would result in -- so this one
2 talks in terms of leakage without a perforation of the
3 endotracheal tree into the vascular and mediastinal
4 spaces.

5 Q. So from the notes that we have looked at today, we've
6 got one note that is attached to Dr. Fogarty's
7 deposition as Exhibit Number 20. Correct?

8 A. Correct.

9 Q. And it is the undoubtedly note.

10 A. Correct.

11 Q. You've got the note that was provided to your medical
12 records which you just compared it, and the page that
13 you were just quoting from is 002147?

14 A. Correct.

15 Q. And now you've got a third copy of this same 7/21/05
16 note that is at Thompson 000539. Correct, sir?

17 A. Correct.

18 Q. Okay. At any point were you given all three of these
19 notes together through your discovery request?

20 A. Mr. Mann, I don't -- I don't remember. I don't
21 remember. I don't remember ever being aware of more
22 than one. I think from the record, looking at it, if
23 the document marked King 002147 came from my medical
24 records, obviously I had that one.

25 Q. Yes, sir.

1 A. Okay? Then the one that was marked as an exhibit to
2 Dr. Fogarty's deposition, at some point I had it
3 because I marked it as an exhibit to Dr. Fogarty's
4 deposition.

5 Q. Yes, sir.

6 A. Where I got it and when I got it I can't tell you.

7 Q. Would you agree with me looking at Exhibit 96 that
8 someone from Lung and Chest named Maria is advising Mr.
9 Thompson to update his medical records and to
10 substitute a 7/21 note with the note that is attached
11 that we just looked at?

12 A. Yes.

13 Q. And, to your knowledge, you have never been given all
14 three of those notes at the same time through any of
15 your discovery requests?

16 A. No.

17 Q. Would you consider that the multiple copies of the
18 notes were actively being concealed from you?

19 MR. HENRIKSON:

20 Object to the form.

21 EXAMINATION RESUMED BY MR. MANN:

22 A. I have no knowledge of receiving Exhibit 96. Okay? So
23 that one I'll say was not provided to me in accordance
24 with the rules of discovery. Okay?

25 Q. Let's look at Number 90, Exhibit Number 90. whoa,

1 whoa. Hold on. Strike that. Let's look at Exhibit
2 Number 93. Do you have Number 93 handy?

3 A. I'm sorry. What's 93? 93 is the subpoena?

4 Q. Yeah, it's the subpoena duces tecum.

5 A. Okay.

6 Q. So, anyway, you sent this out prior to the deposition
7 of Dr. Fogarty. Correct?

8 A. Right. Right.

9 Q. And would you consider what we have marked as 96
10 falling within the ambit of your request for
11 production?

12 A. Yes, sir.

13 Q. And I will represent to you it is not attached to Dr.
14 Fogarty's deposition. I will represent that to you,
15 but if you need to look at it, please do, but will you
16 accept that it is not attached and not produced at his
17 deposition?

18 A. Yes, sir.

19 Q. And you feel that it should have been?

20 A. Yes, sir.

21 MR. HENRIKSON:

22 Object to the form.

23 EXAMINATION RESUMED BY MR. MANN:

24 A. Well, I feel like it should have been provided to me.

25 Q. Yes, sir.

1 A. Yeah. It would have been my -- it would have been my
2 call to whether or not it became an exhibit to Dr.
3 Fogarty's deposition.

4 Q. And thank you, and I tell you the truth, I'm always in
5 baby lawyer school, and, Mr. King, I do, I respect the
6 difference that you're drawing there.

7 A. Okay.

8 Q. So, anyway, so the three notes that we have looked at,
9 do you feel they all would have fell within the ambit
10 of what was requested to be produced at his deposition?

11 A. Yes, sir.

12 Q. Do you have any doubt in your mind that if you had
13 received what we previously marked as 96 that you would
14 have asked about it and attached it to his deposition?

15 A. No, sir, I would have asked.

16 Q. And would you have attached it?

17 A. Yes, sir.

18 Q. What about the multiple copies of the same note? would
19 you have asked about those and attached those to his
20 deposition?

21 A. I had Exhibit 93.

22 Q. I understand.

23 A. I cannot explain why I did not when the deposition was
24 ongoing or before, I can't tell you why I did not
25 notice the difference between the two and why I did not

1 -- and I don't -- again, I don't think I questioned him
2 about it in his deposition. I have no memory of it.

3 Q. And I'll represent you did not.

4 A. And I -- and I didn't. So I can't explain to you why I
5 did not recognize the distinction between the King
6 document 2147 and Exhibit 93.

7 Q. Yes, sir. And, again, going back to 96, and not to try
8 to keep asking the same question again, and this will
9 be the last time I've asked it, but would you agree
10 with me there were efforts going on between Mr.
11 Thompson and Dr. Fogarty for that note not to have been
12 produced?

13 MS. CHEEK:

14 Objection.

15 MR. HENRIKSON:

16 Object to the form.

17 EXAMINATION RESUMED BY MR. MANN:

18 A. All I can tell you, it wasn't.

19 Q. Do what, sir?

20 A. It wasn't produced. 96 was not produced. Obviously 93
21 was in my file.

22 Q. All right. Let me shuffle some papers. Let's go to
23 Dr. Fogarty's deposition, and I'm going to ask you to
24 look at a couple of things within it. And I did not
25 mark my cover. I believe it is Exhibit 94. Let me ask

1 you to look at page 24 of the deposition. We're going
2 to go back to the beginning. It's 24 of the
3 deposition, or we can use the Thompson number 017710.

4 A. I've got it.

5 Q. Are you to page 24, sir?

6 A. Yes.

7 Q. And I'm going to ask you to start and review from line
8 14 down.

9 A. Okay.

10 Q. Does that refresh your memory how the attached records
11 to this deposition got brought to Dr. Fogarty's
12 deposition?

13 MS. CHEEK:

14 Objection.

15 EXAMINATION RESUMED BY MR. MANN:

16 A. It tells me that records were brought to the
17 deposition.

18 Q. And, again, looking at the question at 14, can you read
19 that for us?

20 A. "Dr. Fogarty, we -- the notice of deposition asked you
21 to bring records with you. Have you seen the notice?
22 Yes, sir. Mr. Thompson showed me the notice this
23 weekend."

24 Q. And line 19?

25 A. "Did you bring the records? Yes, sir."

1 Q. Okay. And you asked the question at 21?

2 A. "Can I see what you brought? Do you want me to put the
3 box on the -- Yes, that's probably the best thing.
4 Okay."

5 Q. Does that refresh your memory that records were
6 brought?

7 A. Well, I think I opened with that, that my memory that
8 it was in here is because Dr. Fogarty brought records.

9 Q. But whatever records he brought, he didn't include what
10 we marked previously as Exhibit 96, did he?

11 MS. CHEEK:

12 Objection.

13 MR. HENRIKSON:

14 Object to the form.

15 EXAMINATION RESUMED BY MR. MANN:

16 Q. And 96 is this one with the fax cover sheet, Mr. King.

17 A. No, I've never seen 96.

18 Q. Okay. Now, let's move forward to -- and I'm going to
19 have to flip down a little bit. Let me ask you to go
20 to page 67 of the deposition, which is marked as
21 017754. Looking toward the bottom of the page, do you
22 see where there is referenced a document that had not
23 been produced?

24 A. Correct.

25 Q. And let me ask you to flip over to 017772.

1 MS. CHEEK:

2 what page of the deposition?

3 MR. MANN:

4 It would be 85.

5 EXAMINATION RESUMED BY MR. MANN:

6 Q. 85 of the deposition, Mr. King. I'm sorry.

7 A. Okay.

8 Q. And do you see where two pages were marked as Exhibit
9 Number 19?

10 A. I do.

11 Q. And, of course, you're welcome to look at this
12 deposition as much or as little as you need to, but let
13 me jump ahead and ask you to go to the very end to the
14 exhibits and let's go to Exhibit 19, and that would be
15 018209, 18209, and that will be Exhibit Number 19.

16 A. Okay.

17 Q. And get your notebook so you can look at this. We're
18 going to spend a couple minutes on this. Do you
19 remember that being produced during the deposition?

20 A. I can't say I remember it, no.

21 Q. Well, let's do this. What are we to? 97? Let's mark
22 this as 97, and let me just get to my point.

23 (Deposition Exhibit Number 97 marked)

24 EXAMINATION RESUMED BY MR. MANN:

25 Q. Looking at what we just marked as Exhibit Number 97,

1 does that appear to be the same? I understand there's
2 different writing on these two versions, but the
3 underlying marked-up version or, excuse me, the
4 underlying typewritten version, do those appear to be
5 the same?

6 A. With the changes, yes.

7 Q. How many pages is Exhibit Number 97?

8 A. I want to check my math.

9 Q. Mr. King, I'll represent it's 21 pages.

10 A. Okay. I counted that, but I was trying to do the math
11 to make sure.

12 Q. Yes, sir. But I will, I'll represent it's 21 pages.
13 And anybody can correct me.

14 A. Okay, I miscounted. I got 20, and that's why I was
15 doing the -- trying to do the math.

16 Q. And I will tell you this was produced through Mr.
17 Thompson's file. Have you ever seen this document
18 before?

19 A. I don't recall having seen it before.

20 Q. However, you did see the first two pages of it.

21 A. Yes. Yes.

22 Q. Which were attached to the deposition.

23 A. Deposition.

24 Q. But the rest of it you were not provided?

25 MS. CHEEK:

1 Objection.

2 EXAMINATION RESUMED BY MR. MANN:

3 A. I don't recall.

4 Q. If you would have been provided it, do you think you
5 would have attached it or asked questions---

6 A. Well, it's marked -- it's got my deposition number
7 marked for this today. That's the only -- that's why
8 my number is on it right now.

9 Q. Right.

10 A. It did not come from my file.

11 Q. Yes, sir, it did not come from your file. It came from
12 Mr. Thompson's file.

13 A. I have no knowledge of seeing it then.

14 Q. Okay. If this was a document that Dr. Fogarty assisted
15 in the preparation of, should it have been produced
16 pursuant to your subpoena?

17 A. Yes, sir.

18 Q. There is light at the end of the tunnel. I don't have
19 a lot more. Okay? And I appreciate your patience.
20 And I believe we're to, what, 98, please? Let's mark
21 this as 98.

22 (Deposition Exhibit Number 98 marked)

23 EXAMINATION RESUMED BY MR. MANN:

24 Q. Mr. King, I will represent to you this is another
25 document that was produced when Mr. Thompson's file was

1 produced. I will also represent to you it is not
2 attached to Dr. Fogarty's deposition.

3 A. I have no memory of seeing it.

4 Q. Can you tell me what it appears to be, please?

5 A. It appears to be questions that were faxed from
6 Spartanburg Medical to the phone number of Chuck
7 Thompson, Confidential, a set of questions, but, I
8 mean, I don't know -- I don't know who they were
9 directed -- who the questions were directed for.

10 Q. Will you accept my representation that the fax number
11 at the top, Spartanburg Medical, is the fax number of
12 Dr. Fogarty's pharmaceutical research company?

13 A. Yes, sir. I mean, I accept what you tell me.

14 Q. And if that is indeed his number, which I think can be
15 established, should that have been produced pursuant to
16 your subpoena duces tecum at his deposition?

17 A. Yes, sir.

18 Q. All right. Now the unpleasant questions. We looked
19 earlier, and we can go back in the deposition, but Dr.
20 Fogarty was asked if he brought everything to his
21 deposition. Do you feel that that was a truthful
22 statement?

23 MS. CHEEK:

24 Objection.

25 EXAMINATION RESUMED BY MR. MANN:

1 Q. Seeing these documents, these additional copies of the
2 same note that has been rewritten?

3 A. Based upon the records I'm seeing, no, here today.

4 Q. And if Mr. Thompson is sitting through that deposition,
5 would you consider him if he has received these
6 documents, which I think we've established he did
7 receive these documents, but if he has received these
8 documents, which all the documents show that he did,
9 would you consider that suborning perjury for not
10 correcting his client -- or, excuse me -- his expert
11 witness testimony during his deposition?

12 MR. HENRIKSON:

13 Object to the form.

14 MS. CHEEK:

15 Objection.

16 EXAMINATION RESUMED BY MR. MANN:

17 A. If Mr. Thompson in fact had also seen them, yes, sir.

18 Q. The MRI in this case, are you familiar with it?

19 A. Certainly.

20 Q. Do I need to show you the MRI in the documents, or do
21 you readily remember that one?

22 A. I remember it, but, I mean, you -- I mean, I remember -
23 - I remember it was a negative MRI of the brain, but I
24 can't -- I can't recite the verbiage to you.

25 Q. And that wasn't produced; it was actually sent to you

1 by an anonymous individual?

2 A. Correct.

3 Q. I think consensus is that Noel, Jr., Noel Turner, Jr.
4 sent it to you?

5 MR. HENRIKSON:

6 Object to the form.

7 MS. CHEEK:

8 Objection.

9 EXAMINATION RESUMED BY MR. MANN:

10 Q. Not Noel Turner, III.

11 A. I have no idea who sent it to me.

12 Q. So you don't have an opinion one way or the other as to
13 who sent it to you?

14 A. No.

15 Q. But you did receive it?

16 A. Yes.

17 Q. And, of course, you made inquiry respecting it?

18 A. I think factually -- I think my memory is that it came
19 in on a Monday morning. I picked up the phone and
20 called Billy Gunn.

21 Q. He was your co-counsel at this time?

22 A. Correct. That's as I recall that it transpired. I am
23 not -- I can't tell you what -- what all next occurred.
24 I want to say that there was a motion to quash it, but
25 I won't swear to that. I can't. What significantly I

1 remember is that we noticed the deposition of Mr.
2 Thompson's, I believe, brother-in-law who is a
3 physician in Charlotte I think at -- then I think it
4 was Presbyterian. I think it's now Novant. We noticed
5 his deposition and took his deposition.

6 Q. Yes, sir. Let me ask you a couple of general
7 questions, though. I think you've already testified it
8 was not produced?

9 A. No.

10 Q. You received word of it through an anonymous source?

11 A. Correct.

12 Q. This was well after Mr. Casey's deposition?

13 A. Yes, sir.

14 Q. The MRI occurred before his deposition?

15 A. Correct.

16 Q. He testified untruthfully during his deposition?

17 A. Correct.

18 Q. Mr. Thompson was there at his deposition?

19 A. Yes.

20 Q. He did not correct his client?

21 A. No.

22 Q. And I believe, to Mr. Thompson's credit, he
23 acknowledged that he instructed his client to testify
24 untruthfully?

25 MR. HENRIKSON:

1 Object to the form.

2 EXAMINATION RESUMED BY MR. MANN:

3 A. That's my memory, yes.

4 MR. HENRIKSON:

5 Move to strike. There's no basis for that.

6 EXAMINATION RESUMED BY MR. MANN:

7 Q. We're going to take a break. Let me have 10 or 15
8 minutes. I take that back. Let me ask this a
9 different way. I think we can skin this rabbit at
10 another angle. Do you remember attending a hearing for
11 sanctions respecting the nonproduction of the MRI?

12 A. Vaguely.

13 Q. Do you remember---

14 A. The problem---

15 Q. I'm sorry.

16 A. The problem I'm having, Mr. Mann, is the passage of
17 time. The production of the MRI, its admissibility was
18 dealt with and my memory is in some type of a motion
19 hearing. It was also dealt with in trial, and I think
20 -- I think two times, because there was -- we were --
21 we were limited as to what we could -- Judge Couch
22 ruled at one point there was a limitation on what we
23 could ask and what information we could share with the
24 jury, and I think that was -- I think there was two
25 times that that came up, but I'm not sure -- I'm not

1 sure what ultimately was not allowed. I mean,
2 obviously, it went into evidence. I remember Mr. Casey
3 testified that he was -- Mr. Thompson, you know, told
4 him where to go and arranged the visit with his
5 brother-in-law, told him that, and I remember Mr. Casey
6 acknowledged in trial that he -- that he was not candid
7 and was not honest in his deposition. And I don't
8 think Mr. -- I can't tell you I remember when Mr.
9 Thompson said that he -- that he didn't deny that. I
10 don't remember that.

11 Q. And you don't remember the conversations before Judge
12 Couch at the motion for sanctions?

13 A. I do not.

14 Q. And I do not know if there's a transcript of it. As a
15 matter of fact, I think there's not a transcript of it.
16 So, in deference to Mr. Henrikson I apologize. I'm not
17 sure that we have that transcript. Okay?

18 MR. HENRIKSON:

19 You can make it up to me by having a break right
20 now.

21 MR. MANN:

22 Well, we're having a break.

23 (Off the Record; 1:27 -- 1:35 p.m.)

24 EXAMINATION RESUMED BY MR. MANN:

25 Q. Mr. King, we've gone over a few things, but let me ask

1 you a few general lawyer questions, if I may. You are
2 an attorney licensed within the state of South
3 Carolina. Correct?

4 A. Yes, sir.

5 Q. Are you an officer of the court?

6 A. Yes, sir.

7 Q. Are those two different roles in your mind?

8 A. Yes, sir.

9 Q. Please tell me, please define them for me. What is an
10 attorney and what is an officer of the court?

11 A. An attorney is an advocate. Okay? As an officer of
12 the court I am charged with aiding, assisting in the
13 running of the court system according to the rules of
14 court and the ethical responsibilities and obligations
15 of lawyers.

16 Q. Tell me what suborning perjury is.

17 A. Knowing and not precluding or not reporting perjury.

18 Q. I believe we have talked multiple times about Mr.
19 Thompson suborning perjury. Is that correct?

20 A. Yes, sir.

21 MR. HENRIKSON:

22 Object to the form.

23 MS. CHEEK:

24 Objection.

25 EXAMINATION RESUMED BY MR. MANN:

1 Q. In this case, do you feel that Mr. Thompson suborned
2 perjury?

3 A. Yes, sir.

4 MR. HENRIKSON:

5 Same objection.

6 EXAMINATION RESUMED BY MR. MANN:

7 Q. Do you feel that he violated his duty as an officer of
8 the court?

9 A. Yes, sir.

10 MR. HENRIKSON:

11 Same objection.

12 EXAMINATION RESUMED BY MR. MANN:

13 Q. If you violate your duty as an officer of the court,
14 does that violate your duty as an attorney within a
15 case?

16 A. Yes, sir.

17 MR. HENRIKSON:

18 Same objection.

19 EXAMINATION RESUMED BY MR. MANN:

20 Q. We have discussed the production or the lack thereof
21 production of documents within the underlying case.

22 A. Yes, sir.

23 Q. Do you feel that Mr. Thompson discharged his duties as
24 an officer of the court in the production of documents
25 within this case?

1 MR. HENRIKSON:

2 Same objection.

3 EXAMINATION RESUMED BY MR. MANN:

4 A. Mr. Mann, that's difficult to answer, and I think so
5 far as the MRI, the creation of it, the concealment of
6 it all clearly was an ethical violation. All of us
7 have been -- have failed to produce documents. At
8 least I won't say everybody, but I can certainly say I
9 have, that I have been in litigation and have not
10 produced a document, not intentionally, not
11 intentionally at all, but it's a matter of it was just
12 an oversight that all of a sudden I realized that I've
13 gotten documents in and I haven't turned them over
14 because I've already answered interrogatories, I've
15 already answered production requests, and then I
16 realize, you know, a month before trial that I -- that
17 I've got these documents that I haven't turned over to
18 somebody, and I will -- I will call. And I will say
19 that I have sometimes showed up at trial and thought
20 that I produced a document, and it comes out in trial
21 that I haven't, that I haven't, and, again, it's a --
22 that's not -- in my judgment, that's not an ethical
23 violation, because that was not intentional. So I
24 can't tell you that Mr. Thompson intentionally didn't
25 present -- did not give us -- give me documents or give

1 Mr. Gunn and I documents that were in his file, but we
2 didn't get them.

3 Q. Let me---

4 A. It's concerning, but I can't say -- it's certainly not
5 the level of the MRI.

6 Q. Let me direct your attention back to Exhibit Number 96.

7 A. Okay. I'm sorry. Which is 96?

8 Q. 96, sir.

9 A. Okay.

10 Q. So let's go back over this document. Would you agree
11 with me that someone from Dr. Fogarty's office sent a
12 revised note to Mr. Thompson?

13 A. Yes, sir.

14 Q. And you've already told me that this note was not
15 produced to you?

16 A. No, sir.

17 Q. Are you still taking the position that this was not
18 willful, that this production, lack of production was
19 not willful?

20 MR. HENRIKSON:

21 Object to the form.

22 EXAMINATION RESUMED BY MR. MANN:

23 A. Again, it raises issues with me as to why we were not
24 provided it.

25 Q. Let me ask you to go to Number 98.

1 A. Okay.

2 Q. And I believe you've also said that that's a document
3 you were not provided?

4 A. Were not.

5 Q. And we've got that being sent to Mr. Thompson.

6 A. Yes, sir.

7 Q. And I will represent to you by Dr. Fogarty.

8 A. Okay.

9 Q. And it was not produced to you, was it?

10 A. No, sir.

11 Q. And that does not, for lack of a better term, rise to
12 the level of willful nonproduction of documents in your
13 mind within the underlying case?

14 MR. HENRIKSON:

15 Object to the form.

16 EXAMINATION RESUMED BY MR. MANN:

17 A. Again, it is quite concerning to me that it was not
18 produced.

19 Q. I'm going to take five minutes and call my client, but
20 I believe that's all my questions. So Mr. King, thank
21 you so much, but let me just go make sure before I pull
22 the plug. Okay?

23 A. Okay.

24 (Off the Record; 1:41 -- 1:45 p.m.)

25 MR. MANN:

1 I have no further questions.

2 EXAMINATION BY MS. CHEEK:

3 Q. Mr. King, my name is Ellen Cheek.

4 A. Hello, Ellen.

5 Q. I represent Dr. Fogarty in his case. We appreciate
6 your being here. I know you've got a couple of exhibit
7 notebooks in front of you, and I'd like for you to look
8 at a couple to establish when the complaint was filed
9 in the underlying medical malpractice action, which I
10 may refer to as the MMA, if that's acceptable to you.

11 A. Okay.

12 Q. And if you could look at Exhibit 1.

13 A. Okay.

14 Q. I see that the filing date of the complaint in the MMA
15 is May 24, 2006?

16 A. Yes. Yes, ma'am.

17 Q. And then if you could flip to Exhibit 32, which is the
18 answer you filed on behalf of Drs. Feldman, Boscia and
19 their group.

20 A. Correct. Okay.

21 Q. If you could tell me the date of that answer.

22 A. July 12, 2006.

23 Q. Thank you. You had explained earlier that your general
24 practice when assigned a medical malpractice action,
25 one of the first things you do is go meet with the

1 client. Correct?

2 A. Correct.

3 Q. And you did that with Drs. Feldman and Boscia?

4 A. My memory is yes, but I can't really -- I have a
5 general memory of it. I can't tell you specifics or
6 any details.

7 Q. Do you recall meeting with Dr. Feldman specifically
8 about this case after it was filed?

9 A. I remember meeting with Dr. Feldman numerous times
10 after the case was filed, but I can't tell you that I
11 met with him before the answer was filed. My guess is
12 that I did, but I can't -- I can't tell you that.

13 Q. Do you recall sending out subpoenas for medical records
14 for Mr. Casey before your answer was filed?

15 A. I'm sure I did, but I don't recall. You said before
16 the answer was filed?

17 Q. Yes.

18 A. I don't -- I can't answer that. It could have been
19 before. It could have been after.

20 (Deposition Exhibit Numbers 99 and 100 marked)

21 EXAMINATION RESUMED BY MS. CHEEK:

22 Q. Mr. King, I'm going to hand you what's been marked as
23 Exhibits 99 and 100.

24 A. Okay.

25 Q. Do you agree that Exhibit 99 is a cover letter sent by

1 your office on June 16, 2006 to Lung and Chest Medical
2 Associates?

3 A. Yes.

4 Q. And do you agree that that's enclosing a subpoena or
5 the cover letter states it's enclosing a subpoena?

6 A. Yes.

7 Q. And the subpoena is for medical records with respect to
8 Mark Casey. Correct?

9 A. Correct.

10 Q. If you could look at Exhibit 100, please.

11 A. Okay.

12 Q. would you agree that that's a cover letter from your
13 office also dated June 16 for Casey's medical records,
14 subpoena to Frank Gonda?

15 A. Yes.

16 Q. And you agree these letters were sent out before the
17 date of your answer in the MMA?

18 A. Yes.

19 Q. I know it has been a long time. Do you recall
20 receiving the records in response to those subpoenas?

21 A. No, I don't recall. I'm looking at the one to Lung and
22 Chest, and it says -- there's a note, "Donna," which
23 would have been Donna Hill, "invoice faxed 8/14/06,
24 Thanks, Maria Kimbrell." So I would say that we did
25 not get records from Lung and Chest until August, but,

1 I mean, that's the only -- and I don't know other than
2 that reference right there. I don't see any -- I see a
3 -- and I don't know where -- I don't know whose -- I
4 don't know any of these. There's a note "mail" and
5 "bill" and "SDS 7/3/06." Those look to have been done
6 by the same person, but I can't tell you who it was and
7 what the significance of them were.

8 Q. You don't recall not receiving records from either of
9 these entities, do you? Any difficulties in getting a
10 subpoena response?

11 A. No. No.

12 Q. And looking back at that 99 with the handwritten note
13 about an invoice being faxed, it would indicate that an
14 invoice was faxed at least as of August 14, 2006 with
15 respect to records that were produced. Would you agree
16 with that inference?

17 A. Right.

18 Q. Do you recall receiving from Mr. Gunn in this lawsuit
19 documents that Mr. Thompson had produced to his firm?

20 A. In looking through the documents that were given to me
21 in preparation for this deposition, there was an e-mail
22 to Billy Gunn with documents, and it had a statement
23 that he named a staff member, female staff member has
24 been unable to reach Mr. King, or Spencer, so you may
25 want to share these with him or something like that.

1 And Billy -- and that's how I got them, because I got
2 them -- I got them from Billy Gunn, and I had no memory
3 of this until I went through that, and I said this is
4 bizarre. I mean, my -- you know, my fax is my fax, and
5 why you fax them to Billy and don't fax them to me, you
6 know, I don't understand and I don't remember. I just
7 happened to notice -- find that in the records of the
8 items that were given to me in these notebooks, which I
9 thought what's this about. But they were documents
10 that were sent to Billy. Did I ultimately get them?
11 Yeah, I did from Billy, but I don't -- I can't answer
12 why Mr. Thompson chose not to fax them to me or e-mail
13 them to me. I don't know if that was what you were
14 referring to or not, but that's....

15 Q. Let's take a look at this and maybe we can track back,
16 because I know you said you had looked at some
17 documents. If you could flip to tab 33 in your exhibit
18 notebook over there.

19 A. I see it.

20 Q. So this is a June 20, 2006 letter.

21 A. Yes.

22 Q. From Mr. Thompson to Billy Gunn enclosing a number of
23 medical records.

24 A. Right.

25 Q. This is the one that references an inability to contact

1 you. Correct?

2 A. Yes.

3 Q. The next exhibit, 34 is a letter from Billy to Mr.
4 Thompson thanking him for an extension and for
5 providing us with copies of the medical records Mr.
6 Thompson had. Do you see that?

7 A. Right.

8 Q. And now if I could get you to flip back to Exhibit
9 Number 23, please.

10 A. Okay.

11 Q. I should have had you keep your finger on the tab 33.
12 I'm sorry, Mr. King, for making you flip back and
13 forth. But listed in Exhibit 33 there is an item
14 number six, Lung and Chest Medical, Dr. Charles Fogarty
15 medical records. Do you see that?

16 A. Yes.

17 Q. Our understanding is that the Exhibit 23, there's a
18 Thompson Bates stamp, but you see above it there's
19 almost a manual -- remember the old manual Bates stamp
20 here?

21 A. Yes.

22 Q. It begins with 446?

23 A. Yes.

24 Q. And it actually goes in descending order throughout
25 these documents. The first page is 446. Then it goes

1 to 445, 444. Do you see that Bates stamp there?

2 A. I do, yes.

3 Q. So I'll represent to you that the manual Bates stamp
4 was included on medical records that Mr. Thompson
5 produced in this case. Did you have any recollection
6 of that?

7 A. I don't, no.

8 Q. Okay. And then in terms of just the timing of your
9 receiving the records -- I have fallen down on my
10 copying job of exhibits, too. This is going to be
11 Exhibit 101 and we're just going to need to make a copy
12 of it.

13 (Deposition Exhibit Number 101 marked)

14 EXAMINATION RESUMED BY MS. CHEEK:

15 Q. Let me hand you Exhibit 101 and let you take a look at
16 it. It's a Holcombe Bomar statement for legal services
17 rendered. It appears to be a July 7, 2006 invoice for
18 copies of medical records. Would you agree with that?

19 A. Yes.

20 Q. Do you have any recollection of whether this is an
21 invoice for the copy of the records that you had to get
22 from Billy because Mr. Thompson didn't get them to you?

23 A. I have no idea.

24 Q. It's possible it is, though?

25 A. It is, yeah.

1 Q. You said you couldn't remember exactly when you met
2 with Dr. Feldman for the first time in relation to the
3 medical malpractice action?

4 A. Correct.

5 Q. You did meet with him at some point early on in that
6 litigation. Is that correct?

7 A. Yes.

8 Q. Do you recall where that meeting occurred?

9 A. I would assume his office.

10 Q. Did you obtain from Dr. Feldman at that meeting a copy
11 of his chart regarding Mr. Casey?

12 A. I obviously -- at some early point in time I got Dr.
13 Feldman's chart. I can't tell you when. My memory is
14 that Dr. Feldman had an assistant at that point in
15 time, and I know I can't ask Mr. Mann questions, but
16 she was the office manager. I remember she was I think
17 in the meeting. She died I think during this
18 litigation, and I think she provided me the chart.
19 When, I don't know. Whether I got it that day or got
20 it within a couple of days, I don't -- I don't
21 remember. Marietta?

22 MR. MANN:

23 (Counsel nods head).

24 WITNESS:

25 Okay.

1 MR. MANN:

2 Let the record reflect I'm over here nodding
3 inappropriately. So, anyway, I apologize.

4 MS. CHEEK:

5 well, what was her name?

6 MR. MANN:

7 It was Marietta Howard, and she did pass and she
8 is sorely missed.

9 EXAMINATION RESUMED BY MS. CHEEK:

10 Q. When you met with Dr. Feldman about the medical
11 malpractice suit, he had an opinion very strongly about
12 the legitimacy of that lawsuit, didn't he?

13 A. Yes.

14 Q. And what was that opinion?

15 A. That it was without merit.

16 Q. What were the bases of that opinion that he relayed to
17 you?

18 A. I can't really tell you that. I don't really recall.

19 Q. As Dr. Feldman's assigned counsel you received multiple
20 communications from Dr. Feldman during the medical
21 malpractice action. Correct?

22 A. Yes.

23 Q. And that occurred from the very early stages of the
24 lawsuit. Is that correct?

25 A. Yes.

1 Q. And Dr. Feldman e-mailed you prolifically during that
2 lawsuit, didn't he?

3 A. Yes.

4 Q. Did Dr. Feldman also telephone you or did he mainly
5 correspond to you via e-mail?

6 A. Dr. Feldman and I had numerous telephone conversations
7 throughout the conversation, but I think Dr. Feldman's
8 primary means of communication was an e-mail. My
9 primary means of communication is the telephone. So I
10 think that I probably originated phone calls more often
11 than he did. He orchestrated e-mails more often than I
12 did. That's just my memory.

13 Q. Dr. Feldman also communicated to you very early on in
14 the medical malpractice action his belief that Dr.
15 Fogarty was somehow involved in that case. Correct?

16 A. I don't remember that. Obviously at some point in time
17 that occurred, but I can't tell you when I became aware
18 of Dr. Feldman's feeling that Dr. Fogarty was involved.

19 Q. Despite the date that you can't remember, Dr. Feldman
20 ultimately did convey to you his belief that Dr.
21 Fogarty was somehow behind the medical malpractice
22 action. Correct?

23 A. Yes, at some point.

24 Q. What do you recall Dr. Feldman telling you about that
25 belief?

1 A. Ellen, I have to go back. When I got the case, my
2 assessment was that the issue was whether or not this
3 was an unnecessary surgical procedure that resulted in
4 a pneumothorax. That was -- that was my capsule
5 assessment of what the case was about. When the case
6 turned into the plaintiff's allegation that it
7 resulted, that the procedure conducted by Dr. Feldman
8 of a rigid bronchoscopy resulted in a brain embolism,
9 that changed the case in my perception. That's my
10 first memory of Dr. Fogarty's involvement in the case
11 and Dr. Feldman's comments about Dr. Fogarty.

12 Q. Now, the basis of the medical malpractice action was
13 always the allegation that Mr. Casey had suffered an
14 air embolism causing brain damage. Correct?

15 A. That was included as allegations in the complaint. I
16 mean, I did not assess that that was the focus of the
17 case initially.

18 Q. Okay. Let's just turn back to Exhibit 1, if you would,
19 for just a minute, which, I'm sorry, should be in your
20 exhibit notebook right there.

21 A. Paragraph seven?

22 Q. This is the complaint in the medical malpractice
23 action.

24 A. Right.

25 Q. And would you agree with me that paragraph seven in

1 this complaint alleges that Mr. Casey suffered
2 perforation of the lung that caused air embolism --

3 A. Yes.

4 Q. -- resulting loss of blood circulation --

5 A. Yes. Yes.

6 Q. -- causing permanent brain damage?

7 A. Yes.

8 Q. And so when the complaint came in, you saw that one of
9 the allegations was the plaintiff was allegedly
10 permanently brain injured?

11 A. Yes.

12 Q. And when you received the Lung and Chest records in
13 your office, you were able to pair up that the air
14 embolism theory was one contained in an office note of
15 Dr. Fogarty. Correct?

16 A. That I can't tell you. My memory is that following Mr.
17 Casey's discharge from the hospital he was released to
18 return to work, contended that he wasn't able to do so,
19 somehow apparently became dissatisfied with Dr. Feldman
20 and Dr. Boscia, I think primarily Dr. Feldman, and then
21 Dr. Fogarty started treating him. Now, where the --
22 where the air embolism gets involved, I can't tell you,
23 whether it was early on as the -- again, it's alleged
24 in the complaint, but whether or not when I first saw
25 Dr. Fogarty's records whether it was included in that,

1 I can't tell you. It well may be. Factually, I think
2 at some point in time in my mind the case changed from
3 a pneumothorax to an air embolism.

4 Q. But we'll agree that the allegation of the air embolism
5 and brain damage is in the complaint?

6 A. In the complaint, yes.

7 Q. And we've looked this morning at July 21, 2005 office
8 notes of Dr. Fogarty in which an air embolism theory of
9 injury causing brain damage is contained in those
10 notes.

11 A. Yes.

12 Q. Would you agree?

13 A. Yes.

14 Q. So when Dr. Fogarty's records are in your possession,
15 you could have looked through them and seen that --

16 A. Correct.

17 Q. -- he was espousing this theory of damage?

18 A. Correct. Correct.

19 Q. We talked a little bit earlier about the e-mails that
20 Dr. Feldman would send you during the medical
21 malpractice action. Those included medical research he
22 had performed on the underlying issues. Correct?

23 A. Correct.

24 Q. Those included his theories on Dr. Fogarty's
25 involvement in the case. Correct?

1 A. Correct.

2 Q. Those included his idea that Dr. Fogarty was also
3 behind a newspaper article publicizing the medical
4 malpractice action. Correct?

5 A. Correct.

6 Q. And it was Dr. Feldman's belief that Dr. Fogarty had
7 somehow leaked news of the medical malpractice action
8 to the Spartanburg Herald-Journal. Correct?

9 A. That I can't remember.

10 Q. Could you please turn to tab or Exhibit 28 in your
11 exhibit notebook?

12 A. Okay.

13 Q. This is a Spartanburg Herald-Journal article dated May
14 31, 2006.

15 A. Correct.

16 Q. Do you recall seeing this article before?

17 A. I remember it. I remember Dr. Feldman showing it to
18 me.

19 Q. And Dr. Feldman also conveyed to you his belief that
20 Dr. Fogarty had leaked this. Correct?

21 A. That I don't recall. I can't recall that. I remember
22 that he was -- Dr. Feldman was quite upset as to why
23 the Herald-Journal picked up the lawsuit, because the
24 Herald-Journal generally doesn't pick up medical
25 malpractice lawsuits. Again, I probably told him that,

1 that, again, I didn't know why. And I cannot tell you
2 what investigation was made calling the Herald-Journal,
3 if there was one. I have no memory of that. Again, if
4 we called them, they probably said, you know, newspaper
5 is confidential and didn't tell us. So I -- you know,
6 I go back to I don't remember any follow-up other than
7 Dr. Feldman was quite upset about this article.

8 Q. And you do recall, whether you discussed it at that
9 point, Dr. Feldman ultimately did share with you his
10 opinion that Dr. Fogarty was behind that newspaper
11 article, don't you?

12 A. I don't deny that.

13 Q. We had looked at the date of the filing of the medical
14 malpractice action being --

15 A. 2005.

16 Q. -- May 2005, and then the date of this newspaper
17 article is that same month.

18 A. Correct.

19 Q. Would you agree?

20 A. Yes.

21 Q. Is your legal assistant the same one now as you had
22 back in --

23 A. No.

24 Q. -- when this suit---

25 A. No.

1 Q. Who was your assistant when this suit was going on? Do
2 you recall?

3 A. Donna Hill.

4 Q. Was she employed by you during the entire medical
5 malpractice action?

6 A. No. She was -- she was employed, and I don't have the
7 dates, but she was employed with me for a period of
8 time, left to teach school. I hired a replacement,
9 Mitzi Higgins, that was here for maybe two years. Then
10 she married and moved. Donna Hill had decided she
11 didn't want to be a schoolteacher anymore and called me
12 and said can I come home, and I said yes. So she came
13 -- she came back. So Donna Hill's initials and
14 fingerprints are on my file in the beginning and in the
15 end, and then Mitzi Higgins' are in there in the mid-
16 term.

17 Q. Is Donna still here?

18 A. No.

19 Q. Is she still living?

20 A. Yes.

21 Q. Is she here in Spartanburg?

22 A. I think she lives in Columbia.

23 Q. Do you know where Mitzi lives?

24 A. No, I don't.

25 Q. Do you think somebody here at the firm does?

1 A. That I don't know.

2 Q. The e-mails that Dr. Feldman sent you were here to your
3 firm address. Correct?

4 A. Yes.

5 Q. And responding to a subpoena in this case, did you or
6 somebody at your firm make a search of your e-mail
7 system?

8 A. Yes.

9 Q. Was that you or somebody else?

10 A. I generally do not copy e-mails. I generally don't use
11 e-mails for substantive matters. I use them for
12 communication, yeah, we'll do it, see you at 10 o'clock
13 in the morning kind of things. I don't -- I don't use
14 it. I don't type well enough. I don't use them for
15 substantive matters, and I don't -- I don't generally
16 copy them. So when my file was produced, I think
17 Milton asked about e-mails, and I said I don't know
18 that we have them. We contacted Beowulf, who was our
19 Internet provider supporter. They came in. We had
20 changed computer systems. Since this case we had
21 changed computer systems, so I didn't have -- didn't
22 know what was there. They went into our system and
23 reproduced what was available. That was provided to
24 Mr. Mann. I don't know what was on there.

25 Q. Do I infer correctly from your response that you

1 believe there were e-mails that were found by Beowulf
2 on your system?

3 A. That I -- that I can't tell you. I remember asking
4 them is there likely going to be anything here since
5 we've changed systems, and they -- my impression was
6 they said yes, but I never had a communication with
7 them, yes, we recovered e-mails, no, we didn't recover
8 e-mails. I don't know. Again, whatever they --
9 whatever they found. What we asked them to produce was
10 everything in -- that was in the system, in our
11 computer related to this lawsuit.

12 Q. Is there a particular contact at Beowulf with whom your
13 firm deals, or is it just the company?

14 A. You would have to -- I'd have to ask Suzanne Byers, who
15 is our office manager, who -- who our primary contact
16 is with Beowulf. I don't deal with that. When I have
17 an issue I call Suzanne.

18 Q. What's Suzanne's position here?

19 A. She's the office manager.

20 Q. Was she the person who would have -- strike that.
21 Could you flip, please, to Exhibit 50 in your notebook?

22 A. Okay.

23 Q. You agree this is an October 10, 2007 letter --

24 A. Yes.

25 Q. -- from you to Judy Wilbanks --

1 A. Yes.

2 Q. -- at the JUA? Could you read the body of that e-mail?

3 A. This is to Judy Wilbanks, Claims Specialist with JUA,
4 dated October 10, 2007. "Just for your information, I
5 am copying you on some, but not all of the e-mails that
6 Dr. Feldman has sent me attempting to direct this
7 litigation, most of which deal with ancillary issues
8 and minutiae such as the article in the Herald-Journal,
9 lawsuits against competitors, et cetera, et cetera. I
10 have directed him to seek legal advice of others,
11 parentheses, he has his own attorney, end parens, if he
12 feels he has redress. My sole job is to defend this
13 lawsuit. That does not include filing suit against
14 anyone. I just wanted to leave you this information."

15 Q. The first line of this references e-mails that Dr.
16 Feldman has sent you. Do you know whether those would
17 have been a hard copy attachment to Judy or via e-mail?
18 Do you have any idea?

19 A. My guess is that those -- that those were hard copies.
20 Well, it says I am copying -- well, I am copying you on
21 some. That to me says that we -- we hard-copied them
22 from the computer.

23 Q. And the substance of these e-mails or the chosen few, I
24 guess, you would agree that you had been discussing,
25 let's see, Dr. Feldman's attempts to direct this

1 litigation. What are you referencing there? What
2 behavior by Dr. Feldman are you describing to Judy?

3 A. Dr. Feldman felt that counterclaims against or suits
4 against Chuck Thompson, against Dr. Fogarty, and, I'm
5 not sure, others were warranted. I didn't agree. I
6 mean, it is not unusual at all that the first time I
7 meet with a physician he tells me he wants to sue, he
8 wants to sue the lawyer, he wants to sue, sue the
9 plaintiff, he wants to sue everybody in sight, and I
10 say, look, we got to get done with this lawsuit, till
11 this lawsuit is over you can't sue anybody. And then I
12 at some point in time if somebody pursues it, I say,
13 I'm a defense lawyer. I mean, I don't -- I don't sue.
14 I seldom sue anybody. So, you know, if you -- if you
15 want to bring a lawsuit after this case is over, you
16 will need to get somebody other than me, and that's --
17 and that's what I'm saying here I think Dr. Feldman
18 wanted, thought that I should pursue claims against
19 others, that there were other issues, and my focus on
20 this case was to defend the suit by Mark Casey.

21 Q. It also references Dr. Feldman e-mailing you regarding
22 minutiae such as the article in the Herald-Journal.
23 That was the article that we had looked at previously.
24 Correct?

25 A. Right.

1 Q. And it was also Dr. Feldman's belief that Dr. Fogarty
2 had leaked that to the media. Correct?

3 A. That I -- that I can't tell you.

4 Q. And then you reference lawsuits against competitors, et
5 cetera, et cetera. What did the -- well, October 10,
6 2007. This is quite some time since the medical
7 malpractice action was initially filed.

8 A. Right.

9 Q. And Dr. Feldman is persisting to you that he wants to
10 sue Mr. Thompson and Dr. Fogarty. Correct?

11 A. Correct.

12 Q. And that not only started early, but it persisted
13 during the entire medical malpractice suit, didn't it?

14 A. From time to time.

15 Q. And you had mentioned that generally speaking you would
16 tell doctors who are defendants and feel wronged and
17 want to sue that they have to wait until after the
18 medical malpractice action is concluded before they do.
19 Is that correct?

20 A. Or they can also -- if they disagree with that advice,
21 they can seek somebody else's opinion, but that's not
22 my role.

23 Q. And what is your opinion that they have to wait till
24 the medical malpractice action suit is completed before
25 pursuing that additional lawsuit?

1 A. Well, I don't know how you could make a claim for a
2 suit being wrongfully filed against you until you have
3 prevailed in that lawsuit.

4 Q. Does the JUA have a similar policy or opinion or even
5 insurance provision that relates to the filing of
6 countersuits against or in relation to pending
7 malpractice actions? That's a bad question.

8 A. I can't -- I can't tell you they do. I mean, to my --
9 to my knowledge, it's never been discussed. I mean, I
10 have never discussed it. This letter to Ms. Wilbanks
11 is probably -- is probably -- I can't remember -- I
12 can't remember another case that there has been an
13 issue where it has been raised by the client more than
14 on one occasion. And when I generally say that's for
15 another day, I don't hear about it again.

16 Q. And, again, that was not the case with Dr. Feldman?

17 A. No.

18 Q. If you could flip back one exhibit to Number 49,
19 please. You'll see this is a September 4, 2007 report
20 from you to Judy Wilbanks --

21 A. Right.

22 Q. -- in the underlying medical malpractice action?

23 A. Yes.

24 Q. If I could refer you to the second page of that letter.

25 A. Yes.

1 Q. I'm looking at the fifth full paragraph on that page,
2 please, beginning with, "He and his sister."

3 A. "When he and his sister did not get satisfactory answer
4 from the insurers they visited the competitive
5 pulmonary group, Lung and Chest. Dr. Fogarty of Lung
6 and Chest and your insured Dr. Feldman are bitter
7 rivals that have been involved in litigation.
8 Apparently both believe that every problem in their
9 lives stem from some action of the other. Dr. Fogarty
10 -- Dr. Feldman in this action believes Dr. Fogarty
11 supported Casey in this litigation."

12 Q. That accurately summarizes Dr. Feldman's beliefs as he
13 conveyed them to you. Correct?

14 A. Correct.

15 Q. What causes of action did Dr. Feldman believe he
16 possessed against Dr. Fogarty and Mr. Thompson?

17 A. I have no idea.

18 Q. Did he ever discuss with you his belief that he had a
19 conspiracy claim against them?

20 A. Again, you'd have to -- you'd have to show me a
21 document. Ellen, that wasn't my focus. I mean, again,
22 my focus is defend lawsuits, and -- and I'm not --
23 again, I'm not -- I don't do plaintiff work, and so if
24 he said conspiracy to me or bad faith or made any
25 characteristics of a cause of action, it would not --

1 it would not affect what I did. And any advice I gave
2 him would be you would have to talk to somebody other
3 than me.

4 Q. During the medical malpractice action Dr. Feldman did
5 have personal counsel. Correct?

6 A. He did, yes.

7 Q. And that was Mr. Mann. Correct?

8 A. Yes.

9 Q. Did Attorney Mann represent Dr. Feldman as his personal
10 counsel from the beginning of the medical malpractice
11 action?

12 A. My memory is yes.

13 Q. Did Attorney Mann ever speak to you about Dr. Feldman's
14 desire to file lawsuits against Dr. Fogarty and Mr.
15 Thompson?

16 A. I'm sure he did.

17 Q. Do you recall the substance of any of those
18 conversations?

19 A. Not really.

20 Q. Why are you sure that you had those conversations with
21 Mr. Mann?

22 A. I just do. I mean, I remember. I remember the -- I
23 just remember that that issue was included in
24 conversation from time to time that we had during the
25 course of this litigation.

- 1 Q. You made it clear to Dr. Feldman and Attorney Mann that
2 your opinion was that any lawsuit against Dr. Fogarty
3 and Mr. Thompson would have to be pursued after the end
4 of the medical malpractice action. Correct?
- 5 A. Correct.
- 6 Q. And Dr. Feldman ultimately did just that. Correct? He
7 waited until after the medical malpractice action was
8 concluded before filing this lawsuit?
- 9 A. Yes.
- 10 Q. During the medical malpractice action, Dr. Feldman
11 through Attorney Mann sued one of Mr. Casey's expert
12 witnesses. Do you recall that?
- 13 A. Not that I recall. I don't think so.
- 14 Q. Do you recall a lawsuit being filed by Attorney Mann in
15 Florida against a Dr. Jantz?
- 16 A. Vaguely.
- 17 Q. Do you recall the JUA's displeasure at that lawsuit
18 being filed?
- 19 A. No, I don't, because I didn't even remember -- I have a
20 vague memory that that case may have been filed.
21 Again, I wasn't involved in it. I didn't do anything
22 involved in it. I wouldn't even know that JUA knew.
- 23 Q. Do you recall, although I think I know the answer to
24 this question, do you recall Billy Gunn's and your
25 securing from Attorney Mann an agreement to withdraw

1 that lawsuit and to refrain from filing any such
2 lawsuits while the medical malpractice action was
3 pending?

4 A. while the medical malpractice suit?

5 Q. Correct.

6 A. I do not until you said it. I do now, but I don't -- I
7 don't remember it -- I didn't remember it when you
8 began asking me questions, but I do now remember it.

9 Q. Are you saying you remember the lawsuit or the
10 conversation about how no more lawsuits would be filed?

11 A. I remember -- I remember -- and I can't tell you the
12 verbiage, and I don't -- I can't tell you what
13 precipitated us doing that, but I do remember Billy and
14 I talking to Milton. Again, I -- telling him that we
15 would like him to dismiss that lawsuit and agree not to
16 file any more lawsuits. I remember that. I can't tell
17 you any more than that. I think Billy drafted the
18 document, but I -- if I did, I don't know. You know, I
19 was involved in it, but I can't -- again, I have no --
20 I have no information, no details about it. As you age
21 your memory slips.

22 Q. Getting younger is tough, isn't it?

23 A. It is.

24 Q. During the medical malpractice action another topic of
25 conversation with Dr. Feldman was his belief that Dr.

1 Fogarty was hiding records. Correct?

2 A. Yes.

3 Q. What records did Dr. Feldman believe that Dr. Fogarty
4 was hiding?

5 A. That I can't tell you. I can't -- I don't remember.

6 Q. Did you ever take any action to explore what records
7 Dr. Feldman thought Dr. Fogarty was hiding?

8 A. Again, not anything that comes to mind.

9 Q. When you deposed Dr. Fogarty in the medical malpractice
10 action did you question him, to your recollection, on
11 whether he was hiding any records in that case?

12 A. I don't -- I don't recall that I did.

13 Q. Do you recall whether that was decisional on your part
14 to avoid that topic of conversation, or was it
15 otherwise?

16 A. I don't recall any discussion with anybody about should
17 we go into this or not. I don't remember that.
18 Without reading all of Dr. Fogarty's deposition, a
19 standard question that I generally ask experts -- I
20 can't tell you I asked Dr. Fogarty this, but a question
21 that I generally ask experts, are these all the
22 documents that you have, are these all the reports that
23 you have written. Those are standard questions that I
24 ask. Whether they were asked in this case or not, I
25 can't tell you.

1 Q. Now, Dr. Fogarty's opinion about Mr. Casey's condition
2 was that he had suffered an air embolism that resulted
3 in brain damage. Correct?

4 A. You're saying Dr. Fogarty's?

5 Q. Yes.

6 A. Yes.

7 Q. And when he was deposed in the medical malpractice
8 action, you were attempting to have him elaborate on
9 that opinion. Correct?

10 A. Yes.

11 Q. Did you feel that Dr. Fogarty -- let me strike that.
12 You were able to question Dr. Fogarty on his opinion
13 that Mr. Casey had suffered an air embolism --

14 A. Yes.

15 Q. -- and resulting brain damage. Correct?

16 A. Yes.

17 Q. Could you turn to Exhibit 83? This is a document that
18 says Spartanburg Regional Healthcare System Timeline
19 5/28/04. Is this familiar to you? Do you know who
20 prepared this document?

21 A. I do not. I do not. Can I take a five-minute recess?

22 Q. Absolutely.

23 A. Thank you.

24 (Off the Record; 2:37 -- 2:46 p.m.)

25 EXAMINATION RESUMED BY MS. CHEEK:

1 Q. Mr. King, we had looked earlier this afternoon at
2 Exhibit 23 in your other notebook, please.

3 A. Yes.

4 Q. Do you recall our having discussed these as being Bates
5 numbered by Mr. Thompson and produced to Gunn and then
6 to you in the medical malpractice action?

7 A. I don't remember that was what we said. I don't think
8 I was asked that, because I don't -- I don't know how
9 Mr. Gunn -- excuse me. I don't know how -- if Mr. Gunn
10 had this, I don't know.

11 Q. Well, let me ask you another question then.

12 A. I can't answer that. I don't know.

13 Q. You'll see that these are Lung and Chest. It's a
14 collection of Lung and Chest documents --

15 A. Right.

16 Q. -- that have been Bates stamped manually in reverse
17 order.

18 A. Right.

19 Q. Correct? If I can also get you to unearth your Exhibit
20 95 from today.

21 A. Okay.

22 Q. Actually, I spoke too soon. Before you look at 95, the
23 Number 23 that's right under it, please, if you can
24 look at---

25 A. Number 23?

1 Q. In your notebook, 23.

2 A. All right.

3 Q. If you can flip to -- and let's just use those reverse
4 Bates stamp numbers, the 1440 at Thompson 32163.

5 A. Okay, I'm confused.

6 Q. I'm sorry for being confusing. Let's set this 95
7 aside.

8 A. Okay.

9 Q. Let's look at Exhibit 23.

10 A. Okay.

11 Q. If you will flip to page Thompson 32163?

12 A. Okay.

13 Q. Do you agree that the Thompson 32163 through 32165 is
14 an office note dated July 21, 2005?

15 A. Yes.

16 Q. This is one that you were looking at earlier with
17 Attorney Mann?

18 A. Yes.

19 Q. And is the one on which Dr. Fogarty was deposed?

20 A. Okay.

21 Q. Do you agree? Or do you want to look back at the one
22 that's marked for his deposition, Dr. Fogarty's, to
23 confirm?

24 A. Yeah, let me look again. Let me see -- let's see the
25 one that was marked in Dr. Fogarty's deposition.

1 Q. The easy way to do that is to look at---

2 A. Let me look back in Dr. Fogarty's deposition. What is
3 this in Fogarty? In his deposition, what is that?

4 Q. Number 20 to it?

5 MR. MANN:

6 It's 20 to that deposition, but hold on and I can
7 give you the Bates number. That should be Thompson
8 18211.

9 MS. CHEEK:

10 Thank you.

11 EXAMINATION RESUMED BY MS. CHEEK:

12 A. Okay. It appears to be the same, yeah.

13 Q. And if I represent to you that medical records that
14 were Bates stamped manually in reverse order were
15 produced by Mr. Thompson during the medical malpractice
16 action, would you agree that the July 21 note that's
17 included in your Exhibit Number 23 and on which Dr.
18 Fogarty was deposed is that note?

19 A. Yes.

20 Q. Thank you. Let's turn to Exhibit 95 again, please. I
21 know we have gone over this with Attorney Mann at
22 length today, but if you could turn, the first or
23 second page of this exhibit is a document entitled Lung
24 and Chest Medical Summary. If you could look at that,
25 please.

1 A. Yes.

2 Q. Is that medical summary that follows that first page --

3 A. Yes.

4 Q. -- one that somebody in your office prepared?

5 A. Yes.

6 Q. Looking at the page that says Lung and Chest Medical
7 Summary, it says, "Medical records from Lung and Chest
8 Medical Associates received in answer to subpoena." Do
9 you see that?

10 A. Yes.

11 Q. We had looked earlier at Exhibit 99 at a subpoena that
12 you issued to Lung and Chest Medical Associates.

13 A. Okay.

14 Q. Can I infer that these are the records, this is a
15 summary based on the records you received in response
16 to that subpoena?

17 A. It appears that it is. The only thing I'm concerned
18 about that I can't answer is because it starts off as
19 Wilson Smith is the provider and switches over to
20 Charlie Fogarty, and I went back and looked at this
21 when I got the documents, and I don't understand that.

22 Q. Do you recall Dr. Smith's having seen Mr. Casey
23 initially when Casey went to Lung and Chest and then
24 Dr. Fogarty's taking over his care?

25 A. I can't answer that. I don't know.

1 MR. MANN:

2 Spencer, can we go off the record one second?

3 MS. CHEEK:

4 Okay.

5 (Off the Record; 2:54 -- 2:58 p.m.)

6 MS. CHEEK:

7 The parties are going to stipulate on the record
8 that the documents that are Exhibit 23 Bates labeled
9 Thompson 32157 through 32232 are documents that Chuck
10 Thompson delivered to Mr. Gunn on or about June 20,
11 2006 and are documents that were also delivered to Mr.
12 King in the medical malpractice action on or before
13 July 7, 2006.

14 MR. MANN:

15 That is so stipulated.

16 MS. CHEEK:

17 I appreciate that.

18 MR. MANN:

19 Mr. King, for your benefit, we're just trying to
20 make this easier.

21 WITNESS:

22 Thank you.

23 MR. MANN:

24 As opposed to you having to call Ms. Higgins or
25 Ms. Hill or anyone else to verify when or if records

1 hit your file, because we all feel that that is when
2 those records hit the various files. And so we've
3 agreed upon that just to make it easier for everyone
4 involved.

5 WITNESS:

6 Fine with me.

7 MR. MANN:

8 Okay. Thank you, Mr. King.

9 EXAMINATION RESUMED BY MS. CHEEK:

10 Q. So that is with respect to Exhibit 23, and we were
11 looking at Exhibit 95.

12 A. We're back in which number?

13 Q. 95 would be today. Let's go back off the record for a
14 second.

15 MR. MANN:

16 Yeah, off the record.

17 (Off the Record; 3:01 -- 3:04 p.m.)

18 MS. CHEEK:

19 We have two more stipulations as to documents.

20 The first or actually the second stipulation of the day
21 is that the documents that have been marked as Exhibit
22 95, 95 includes a summary of documents, but the
23 documents themselves which are Bates labeled Lung and
24 Chest 1 through Lung and Chest 67 appears Kings 2103 to
25 2169. The stipulation of the parties is that these are

1 records that Mr. King received pursuant to subpoena
2 issued to Lung and Chest dated June 16, 2006, and that
3 subpoena is marked as Exhibit 99 to this litigation.
4 The stipulation is further that these documents were
5 received by Attorney King on or before August 14, 2006.

6 MR. MANN:

7 So stipulated.

8 MR. HENRIKSON:

9 what's the date, the date of stipulated receipt?

10 MR. MANN:

11 8/14.

12 MS. CHEEK:

13 August 14, 2006. The third---

14 MR. MANN:

15 Matt, that's good with your stipulation, too?

16 MR. HENRIKSON:

17 Yes, I agree with that.

18 MR. MANN:

19 Thank you, sir.

20 MS. CHEEK:

21 The third stipulation is that -- we need to mark
22 this.

23 (Deposition Exhibit Number 102 marked)

24 MS. CHEEK:

25 The medical records contained within Exhibit 102,

1 which exhibit begins again with a medical summary and
2 contains behind it medical records Bates labeled King
3 1876 to King 2050 are medical records that Attorney
4 King received in response to a subpoena dated June 16,
5 2006 in the underlying lawsuit, Exhibit 100 in this
6 suit, and that the date by which those records were
7 received is no later than July 3, 2006.

8 MR. MANN:

9 So stipulated.

10 MR. HENRIKSON:

11 So stipulated.

12 MR. MANN:

13 And off the record.

14 (Off the Record; 3:07 -- 3:07 p.m.)

15 EXAMINATION RESUMED BY MS. CHEEK:

16 Q. I think finally we are going to return to Exhibit 95.
17 You and I were discussing before that stipulation
18 break---

19 A. I got away from that. Are we talking about---

20 Q. We're talking about --

21 A. Exhibit 83?

22 Q. -- Exhibit 95. This is your Lung and Chest.

23 A. Okay.

24 Q. And I'd asked whether you recalled whether -- let me
25 stipulate to you that when Mr. Casey first began

1 treating at Lung and Chest after leaving the Upstate
2 Lung practice that he was seen by Wilson Smith.

3 A. Okay.

4 Q. That later his treating physician was changed to Dr.
5 Fogarty. And my question to you was whether in Exhibit
6 95, the Lung and Chest Medical Summary, that we see in
7 King 2091 through 2102 is something your office or your
8 assistant prepared based on the records that you
9 received from Lung and Chest in response to your
10 subpoena.

11 A. That appears to be correct.

12 Q. Could you please turn to King 2145?

13 A. Okay.

14 Q. This is the July 21, 2005 office note that you were
15 discussing earlier today with Attorney Mann?

16 A. Right.

17 Q. The paragraph on the third page of that note having
18 language that includes air emboli have been reported as
19 a common complication when there's laser perforation.
20 Do you remember discussing that?

21 A. Right.

22 Q. Based on the parties' stipulation, you will agree that
23 these records, including that note, were ones that your
24 law firm had received and had in its possession no
25 later than August 14, 2006. Correct?

1 A. Correct, yes.

2 Q. If I could ask you to pick up Exhibit 102, please.

3 A. Okay.

4 Q. The first number of pages in this exhibit appear to be
5 a medical summary that your office prepared based on
6 records received in response to your subpoena to Dr.
7 Gonda. Correct?

8 A. Correct.

9 Q. If I could get you to flip to King 1945, please.

10 A. Okay.

11 Q. I'm sorry. I had my page wrong, Mr. King. I'd
12 actually like to refer you to King 1947. It's a few
13 pages back.

14 A. Okay.

15 Q. Do you see that's a July 21, 2005 --

16 A. Yes.

17 Q. -- office note?

18 A. Yes.

19 Q. You'll see on the third page of this that the paragraph
20 you had looked at earlier with Attorney Mann is the one
21 that says air emboli have been reported as a
22 complication of laser bronchoscopy even without
23 perforation of the endotracheal tree?

24 A. Yes.

25 Q. So based on your review of this and the parties'

1 stipulation, you would agree that this version of the
2 July 21 note was one that you had in your possession no
3 later than July 3, 2006?

4 A. Based upon your stipulation, yes.

5 Q. I see in the King 1947 through page 1949 there's
6 actually a highlighted bracket around the paragraph
7 that we've been looking at. Do you see that?

8 A. On King 1949?

9 Q. Yes.

10 A. No, I don't.

11 Q. You see it's in yellow here to the side?

12 A. Oh. Oh. Oh, yes.

13 Q. And I'm just going to refer back to your -- I don't
14 know how we filed these records in this original. Do
15 you have any reason to think that this highlighting was
16 not reflected in your original copy of this?

17 A. No.

18 MR. MANN:

19 Let's just stipulate. We'll stipulate that it was
20 there.

21 MS. CHEEK:

22 we're just going to stipulate it's there?

23 MR. MANN:

24 Yeah. I'm sure it was, because I asked the copy
25 service to copy anything in color that had color.

1 EXAMINATION RESUMED BY MS. CHEEK:

2 Q. Mr. King, earlier today you had talked with Attorney
3 Mann about differences between and among the three
4 notes that we've been discussing. Correct?

5 A. Yes. Yes.

6 Q. And you picked up those differences and stated what
7 they were based on your having read the documents.
8 Correct?

9 A. Correct.

10 Q. Since the documents were in your possession in the
11 medical malpractice case, you could have engaged in
12 that same exercise during the medical malpractice
13 action. Correct?

14 A. I think I saw three versions. I think I identified two
15 versions, the one that is marked as an exhibit in Dr.
16 Feldman's deposition, then the one that we're just now
17 looking at, which I said I don't -- I don't recall why
18 I didn't question, that obviously I had -- the records
19 showed that I had this version, and I don't recall why
20 I didn't -- I don't believe that I questioned Dr.
21 Fogarty on the difference between those two documents.
22 I don't think I did. The third one he showed me I
23 don't think I -- I said I didn't think I had seen that
24 one, and I haven't seen it again.

25 Q. Okay. We have -- and I realize this was disjointed and

1 interrupted by some station breaks, but all three
2 documents that we've looked at, we've established that
3 there's one contained in Exhibit 23 that has the
4 undoubtedly language, it's unsigned, that these were
5 ones that Chuck Thompson had provided to Mr. Gunn --

6 A. Right.

7 Q. -- and you during the litigation.

8 A. Yes.

9 Q. That's the one that ended up being in Dr. Fogarty's
10 deposition. We've then established that in Exhibit 95,
11 which records you received by the summer of 2006, that
12 the second version of the note was contained in those
13 records?

14 A. Correct.

15 Q. And now we've established that in Exhibit 102, that the
16 third version of the note that we have looked at this
17 morning is contained in the medical records that you
18 had received from Dr. Gonda by, again, the summer of
19 2006?

20 A. I haven't looked at Dr. Gonda's records. So I don't
21 know that that's in there.

22 Q. Okay.

23 A. I mean, if you tell me it is, it is.

24 Q. Well, let's look at Exhibit 102 then and take a look at
25 Dr. Gonda's records. Exhibit 102 is preceded by the

1 medical summary that your office did of the records
2 received from Dr. Gonda's office?

3 A. Right.

4 Q. And then at King 1947 through 1949 appears the third
5 note?

6 A. Okay. Okay. That's the one I said I did not have any
7 memory of seeing. Again, it's in my -- it's Bated as
8 being one that was in Dr. Gonda's records, and I don't
9 deny that.

10 Q. And so if by the summer of 2006 you had in your file
11 all three of the note versions we've discussed today,
12 you would have been able to engage in an exercise to
13 compare them. Correct?

14 A. Yes.

15 Q. And you also would have been able to question Dr.
16 Fogarty on any discrepancies or differences by the time
17 he was deposed in December 2008. Correct?

18 A. True.

19 Q. When Dr. Fogarty was deposed and brought his records
20 into this room that you recall, were the records in
21 their entirety attached to and made an exhibit to his
22 deposition?

23 A. I would have to look. I don't -- I don't recall. I
24 don't -- I don't recall. I mean, we can look at -- we
25 can look at his deposition and it would tell us.

1 Q. Gosh, I hate to make you read his whole deposition.

2 A. Well, it would be -- the court reporter should have
3 marked it.

4 Q. I don't think she's described---

5 A. I mean, she -- Thompson 17689 is a list of exhibits.

6 Q. So let me ask for your recollection. Do you remember
7 without going through each one of these exhibits that
8 looks like there's 21 defendant exhibits, four
9 plaintiff exhibits---

10 A. Well, they're all attached. So no, they show that the
11 entire file was not marked.

12 Q. So Dr. Fogarty -- and just to make sure I'm clear --
13 brought documents to his deposition that weren't made
14 an exhibit to his deposition?

15 A. That's what appears, yes. I'm looking and this appears
16 to be -- I'm looking at the court reporter's list, and
17 she shows that there were -- as you said, there were 21
18 defendant's exhibits, there are 21 exhibits attached to
19 this deposition, and there are four plaintiff exhibits.
20 So I think -- so I think the answer is that the entire
21 file was not marked as an exhibit.

22 Q. Do you recall having reviewed either before or during
23 Dr. Fogarty's deposition in that medical malpractice
24 action the entirety of the file that he brought with
25 him?

1 A. No.

2 Q. Is it possible then that there are documents that could
3 have been in Dr. Fogarty's file that he brought to the
4 deposition that are not attached as exhibits to the
5 deposition?

6 A. Yes.

7 MR. HENRIKSON:

8 It said they went off the record to look at all
9 the records that were brought in. Then they went back
10 on the record and asked questions.

11 EXAMINATION RESUMED BY MS. CHEEK:

12 Q. Okay. I appreciate Attorney Henrikson's help. You've
13 got Dr. Fogarty's deposition in front of you. If I can
14 refer you to page 24 of the actual deposition. I'll
15 let you read that to yourself.

16 A. Okay.

17 Q. And see if that refreshes your recollection according
18 to what---

19 A. It looks like that we took a -- we went off the record
20 at 10:45 to go through the box, which was a box of
21 records that Dr. Fogarty produced, and then we came
22 back on the record at 11:02.

23 Q. Can I ask you -- are you finished with your answer?

24 A. Yeah.

25 Q. Let me ask you to turn to Exhibit 9 in your materials,

1 9 in your exhibit notebook, please. I'm going to ask
2 you to read this e-mail to yourself. It's from Greg
3 Feldman dated February 16, 2008.

4 A. Right.

5 Q. To you and Attorney Mann.

6 A. Right. "Air embolism -- air emboli have been reported
7 as a common complication of laser bronchoscopy even
8 without perforation of the endotracheal tree with
9 resultant leakage of air into extra pleural, vascular
10 and mediastinal space. Although he is fortunate not to
11 have such gross mental deficit, he may well have
12 permanent neurological deficit, which indicates taking
13 medications such as Strattera. Spencer, above you have
14 quoted from Dr. Fogarty's record. I cannot find this
15 in Lung and Chest records your paralegals provided. We
16 are meeting on Tuesday, and I have a series of
17 astonishing statements but not this one. Did you give
18 me all Dr. Fogarty's records? Please locate source of
19 the above statement."

20 Q. Do you recall receiving this e-mail from Dr. Feldman?

21 A. I do. And I can't -- I can't remember what was done,
22 but I remember -- I remember this e-mail.

23 Q. Do you recall other e-mails from Dr. Feldman during the
24 medical malpractice action where he's noting
25 differences among Dr. Fogarty's July 21 notes?

1 A. I do not. ✓

2 Q. Do you have a refreshed recollection after reading this
3 e-mail of what records it was that Dr. Feldman was
4 contending Dr. Fogarty was hiding during the medical
5 malpractice case?

6 A. I do not. I think this -- I think this refers to this
7 letter that we've been -- we've been talking about this
8 morning, but I can't -- I can't remember what I did,
9 and I can't remember that that was an issue. Again,
10 I'm looking at the date. I think this was after Dr.
11 Fogarty's deposition, wasn't it?

12 Q. This was a February 16, 2008 e-mail. Dr. Fogarty was
13 deposed in December of 2008.

14 A. Okay. So I had -- yeah, I had this before. I can't --
15 I can't explain that. So I can't explain the three
16 copies. I can't explain why I didn't question Dr.
17 Fogarty about the three copies.

18 Q. Were you ever asked by Dr. Feldman or Attorney Mann to
19 refrain from asking Dr. Fogarty those questions?

20 A. No.

21 Q. Do you recall a defense strategy that included not
22 asking Dr. Fogarty --

23 A. No.

24 Q. -- those questions? Did Dr. Feldman ever tell you that
25 he believed the medical malpractice action was related

1 to a business lawsuit that he was maintaining against
2 Dr. Fogarty?

3 A. No.

4 Q. If I could get you to turn to Exhibit 35 in your
5 exhibit notebook, please. Would you agree this is in
6 the Casey lawsuit?

7 A. It is.

8 Q. Plaintiff's Supplemental Responses to Interrogatories
9 Served on Defendants and that the date it was served
10 was August 31, 2007

11 A. Yes.

12 Q. If you can look on the second page, would you agree
13 that within these discovery responses Dr. Fogarty is
14 identified as an expert?

15 A. Yes.

16 MS. CHEEK:

17 Let's take a break for just a minute, please.

18 MR. MANN:

19 Sure.

20 (Off the Record; 3:29 -- 3:36 p.m.)

21 EXAMINATION RESUMED BY MS. CHEEK:

22 Q. Mr. King, we are drawing toward the end here. The
23 medical records that your office collected and obtained
24 during the medical malpractice action, did you provide
25 copies of those to Dr. Feldman?

1 A. Obviously I provided some to him. The intent was to
2 provide him with all medical records we procured. I
3 can't say that that was accomplished.

4 Q. And Dr. Feldman had a great interest in the litigation.
5 Correct?

6 A. Yes. Yes.

7 Q. And I've seen it said that he went through medical
8 records and deposition testimony with a fine-toothed
9 comb. would you agree or disagree with that?

10 A. I would basically agree.

11 MR. MANN:

12 Ellen, we can stipulate to that. We can go three
13 or four steps beyond that if we need to on the
14 stipulation.

15 MS. CHEEK:

16 I understand.

17 EXAMINATION RESUMED BY MS. CHEEK:

18 Q. Your assessment of the medical malpractice case
19 liability-wise was reported at length in your reports
20 to the JUA. would you agree?

21 A. Yes.

22 Q. And the reports that I've seen that you made to Ms.
23 wilbanks beginning early on in the medical malpractice
24 case was that you believed the case had legal and
25 medical merit. would you agree with that?

1 A. I do.

2 Q. You also on occasions in your reports detailed your
3 beliefs about the case defense and its strengths and
4 weaknesses. Correct?

5 A. Correct.

6 Q. If I could get you to turn, for example, to Exhibit 18,
7 this is an April 17, 2009 report from you to Judy
8 wilbanks?

9 A. Right.

10 Q. You characterize it as a pretrial report. I know how
11 those go. I know trial didn't occur till the next
12 year, but if I could get you to turn to the third page
13 of that report under the defense subheading.

14 A. Right.

15 Q. Could you read those two paragraphs into the record,
16 please?

17 A. "With respect to the rigid bronchoscopy performed by
18 Dr. Feldman, I think a jury will conclude that it was
19 an unnecessary procedure that should not have been
20 performed without significantly more discussion with
21 Mr. Casey. In fact, if Dr. Feldman felt the need to
22 proceed, there should have been much better
23 documentation of the patient's appreciation. A
24 pneumothorax is a complication that would not have
25 occurred had the procedure not been done. It is not

1 believed that the pneumothorax caused any permanent
2 damage to the lungs or chest."

3 Q. Does that accurately summarize your assessment as to
4 the liability issues or at least some of them in the
5 medical malpractice case?

6 A. Except my opinion, which is not included in this one,
7 that the brain embolism did not occur as a result of
8 the pneumothorax or the rigid bronchoscopy.

9 Q. Now, there was competing medical opinions regarding
10 whether that could have occurred or was likely to
11 occur. Correct?

12 A. Yes. Yes.

13 Q. So you're stating what your personal belief was as to
14 whether it occurred. Correct?

15 A. My belief that it did not occur is based upon the
16 information, opinions, facts given to me by Dr.
17 Alleyne, a pulmonologist, and Dr. Kistler, a
18 neurologist, who were two of the defense witnesses.

19 Q. And you recall Mr. Gunn's and your seeking other
20 defense witnesses, one of whom opined that an air
21 embolism could have occurred to Mr. Casey. Correct?

22 A. I don't. Who would that be?

23 Q. Mr. or Dr. Dutka.

24 A. I don't remember talking to Dr. Dutka.

25 Q. Do you remember Mr. Gunn's having reported his

1 conversation to you that he had with Dr. Dutka where
2 Dr. Dutka stated that it was possible that Casey could
3 have been injured by air embolism?

4 Q. I vaguely remember Billy talking to someone that had
5 some expertise in diving incidents. That's all I can -
6 - I can tell you. I just -- I remember that. I don't
7 remember -- I don't remember receiving details of the -
8 - of the conversation. I don't remember that.

9 Q. If I could get you to look at Exhibit 19, please.

10 A. Okay.

11 Q. Do you agree this is a May 14, 2009 --

12 A. Yes.

13 Q. -- pretrial brief evaluation --

14 A. Yes.

15 Q. -- to Judy Wilbanks?

16 A. Yes.

17 Q. On the second page, will you agree that you have
18 outlined for Ms. Wilbanks a verdict range that you
19 thought was possible in this case?

20 A. Yes.

21 Q. And that that outlines a verdict, potential verdict
22 based on your assessment of 150,000 to 500,000, a mid-
23 range of 200,000 to 250,000?

24 A. Correct.

25 Q. And if I could get you to turn to Exhibit 21?

1 A. Correct.

2 Q. This is an October 19, 2009 letter to Dr. Feldman?

3 A. Right.

4 Q. The second paragraph states, "You've argued that you do
5 not believe this case has legal or medical merit. I
6 must tell you that it does."

7 A. Correct.

8 Q. In this letter you are explaining your belief to Dr.
9 Feldman that the case does have legal and medical
10 merit. Correct?

11 A. Correct.

12 Q. I have finished my questioning. I really appreciate
13 your time.

14 A. Thank you.

15 MR. HENRIKSON:

16 I don't have any other questions at this time.

17 MR. MANN:

18 Mr. King, I have no questions.

19 (There being no further questions, this deposition concluded
20 at 3:46 p.m.)

21

22

23

24

25

1 CERTIFICATE OF REPORTER

2
3 I, ROSALIND POOLE WALTERS, a Notary Public in and for
4 the State of South Carolina, do hereby certify that the
5 foregoing 113 pages represents a true and accurate
6 transcript of the deposition of H. SPENCER KING, III,
7 ESQUIRE, which was taken by me on the 28th day of March,
8 2017.

9 That the witness was first duly sworn to tell the
10 truth, the whole truth and nothing but the truth of his own
11 knowledge concerning this matter.

12 That I am not related to nor the employee of any of the
13 parties hereto, nor related to or employed by any attorney
14 or counsel employed by the parties hereto, nor interested in
15 the outcome of this action.
16

17
18 _____
19 Rosalind Poole Walters, CVR-M
20 Notary Public for South Carolina
21 Commission Expires: 4/29/26
22
23
24
25

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., et al., Plaintiffs,

v.

William Mark Casey, et al., Defendants.

SUBPOENA IN A CIVIL CASE

Case Number: 2010-CP-42-05743

Pending in Spartanburg County

TO: **Spencer H. King, Esquire**, Ward Law Firm, 233 S. Pine Street, #B, Spartanburg, SC 29302

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION Ward Law Firm, 233 S. Pine Street, #B, Spartanburg, SC 29302	DATE AND TIME March 28, 2017, 9:30 AM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

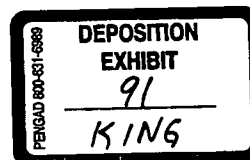
PLACE :	DATE AND TIME , AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES. DATE March 15, 2017



ATTORNEY/ISSUING OFFICER'S SIGNATURE, ATTORNEY FOR PLAINTIFFS

[Signature]

03/15/17

F. Milton Mann, Jr., Esquire

CLERK OF COURT/ISSUING OFFICER SIGNATURE

DATE

PRINT NAME

PROOF OF SERVICE

SERVED:	DATE February 16, 2017	FEES AND MILEAGE TENDERED TO WITNESS ☐ YES ☒ NO AMOUNT \$
	PLACE Ward Law Firm, 233 S. Pine Street, #B, Spartanburg, SC 29302	
SERVED ON March 15, 2017		MANNER OF SERVICE Hand-Delivered to Receptionist
SERVED BY Katelyn S. Owens		TITLE Attorney for Plaintiffs

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.
Executed on March 15, 2017

Katelyn Owens
SIGNATURE OF SERVER

151 Harold Fleming Court, Spartanburg, SC 29303
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- i. fails to allow reasonable time for compliance; or
- ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or
- iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- iv. subjects a person to undue burden.

(B) If a subpoena:

- i. requires disclosure of a trade secret or other confidential research, development, or commercial information; or
- ii. requires disclosure of an unretained experts opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or
- iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

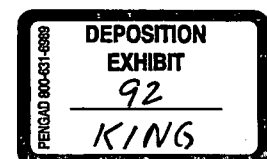
(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	C.A. NO.: 2010-CP-42-05743
Gregory J. Feldman, M.D., Joseph A.	)	
Boscla, III, M.D., Upstate Lung and	)	
Critical Care Specialists, P.C., and	)	
Devendra T. Shantha, M.D.,	)	
	)	PLAINTIFFS' NOTICE OF DEPOSITION TO
Plaintiffs,	)	SPENCER H. KING, ESQUIRE
	)	
v.	)	
	)	
William Mark Casey, Ray E. "Chuck"	)	
Thompson, and Charles M. Fogarty, M.D.,	)	
	)	
Defendants.	)	
_____	)	

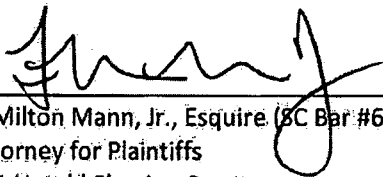
TO: SPENCER H. KING, ESQUIRE:

YOU WILL TAKE NOTICE that the undersigned attorney for the Plaintiffs, pursuant to Rules 30 and 45 of the South Carolina Rules of Civil Procedure, will take, or cause to be taken, the deposition as indicated below:

<u>Name of Deponent</u>	<u>Place of Deposition</u>	<u>Date and Time</u>
Spencer H. King, Esquire	Ward Law Firm 233 S. Pine Street #B Spartanburg, SC 29302 Phone: 864-591-2364	Tuesday, March 28, 2017 at 9:30 a.m.



The deposition will be taken before a notary public or some other person authorized by law to take depositions. The deposition will continue from day to day until concluded.

By: 
F. Milton Mann, Jr., Esquire (SC Bar #68250)
Attorney for Plaintiffs
151 Harold Fleming Court
Spartanburg, SC 29303
864/680-5079 - Cell
866/452-2276 - Fax

March 15, 2017

THE WARD LAW FIRM, P.A.

ATTORNEYS AT LAW
POST OFFICE BOX 3188
SPARTANBURG, SOUTH CAROLINA 29304

JAMES W. HUDGENS
GENE ADAMS
H. SPENCER KING
ROBERT E. DAVIS*
JASON IMHOFF
JOHN ROGERS

*ALSO MEMBER NORTH CAROLINA BAR

COPY

RUFUS M. WARD (1906-1988)
L. PAUL BARNES (1931-1986)

233 SOUTH PINE STREET
SPARTANBURG, S.C. 29302

FAX No. (864) 583-8981
E-mail: sking@wardfirm.com

Direct No. (864) 591-2364

October 7, 2008

Ray E. Thompson, Jr., Esquire
Noel E. Turner, III., Esquire
PO Box 3408
Spartanburg, SC 29304

Re: William Mark Casey v. Gregory J. Feldman, MD, Joseph A. Boscia, III,
MD, Upstate Lung and Critical Care Specialists, PC, and Devendra
Shantha, MD

CA No.: 2006-CP42-1728

Our File No.: 26-0266

Dear Chuck:

Please find enclosed a Subpoena Duces Tecum and Notice of De Benne Esse Deposition
of Dr. Fogarty along with a Certificate of Service for same.

I am

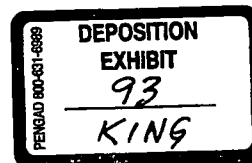
Very truly yours,

H. Spencer King
The Ward Law Firm, P.A.

HSK/mdh

Enclosures

cc: William U. Gunn, Esquire w/enclosures
Milton Mann, Esquire w/enclosures



FILED
CLERK OF COURT
SPARTANBURG COUNTY
2008 NOV 25 PM 3:52
HARC KITCHENS

THOMPSON 052286

STATE OF SOUTH CAROLINA
ISSUED BY THE CLERK OF COURT IN THE COUNTY OF SPARTANBURG

William Mark Casey,
Plaintiff,

v.

Gregory J. Feldman, MD,
Joseph A. Boscia, III, MD, Upstate Lung and
Critical Care Specialists, PC, and
Devendra Shantha, MD,

Defendants.

SUBPOENA DUCES TECUM

C.A. No. 2006-CP-42-1728

COPY

TO: Charles Fogarty, M.D., c/o Ray E. Thompson, Jr., Esquire, P.O. Box 3408, Spartanburg, SC 29304

☐ YOU ARE COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above case.

Place of Testimony -

Courtroom:

Date and Time:

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

Place: The Ward Law Firm
233 S. Pine Street
Spartanburg, SC 29302

Date and Time: 10:00 am on November 14, 2008

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time below:

All medical records from your practice including, but not limited to, doctor's notes, nurse's notes, laboratory studies, pathology reports, pathology specimens, radiology films and/or reports, reports in your files from other healthcare providers, as well as any and all other medical records and parts of your medical file concerning treatment of Plaintiff William Mark Casey, SSN 251-02-2977, DOB: 11/03/1958 and complete billing records for his care as well as the information listed in ATTACHMENT A.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

Premises

Date and Time

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

H. Spencer King, Esq.,
The Ward Law Firm, P.A., 233 South Pine Street
PO Box 3188, Spartanburg, SC 29304-3188 (864/582-4365)

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE: October 7, 2008

Attorney for Defendants Gregory J. Feldman, MD, Joseph A. Boscia, MD, and Upstate Lung and Critical Care Specialists, PC

SCCA FORM 254 (7/93)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on Reverse)

THOMPSON 052287

ATTACHMENT "A"

1. All records regarding your treatment of Plaintiff William Mark Casey.
2. All reports regarding your treatment of Plaintiff William Mark Casey.
3. All notes, communications, memorandums including e-mails, to and from any third party related to this litigation or the parties to this litigation.
4. Copies of all questions, memoranda and documents furnished to Plaintiff's counsel related to the depositions of other witnesses.
5. All documents of any kind and nature related to this litigation.
6. If any records as described above have been destroyed, please provide documents with the dates of destruction, the name of the person who destroyed them, the basis for the destruction, and the reason for the destruction.

FILED
CLERK OF COURT
SEATTLE COUNTY
2000 NOV 25 PM 3:52
MARC KITCHENS

THOMPSON 052288