TESTIMONY OF DR GEORGE DIGIACINTO; 2006 Trial Trans. LEXIS 1444

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF SUFFOLK: PART 33

22360/98

January 26, 2006

Reporter
2006 Trial Trans. LEXIS 1444 *

WILLIAM P FUREY AND CONSTANCE FUREY, Plaintiff v. ALBERT BUTLER MD AND NEW YORK SPINE AND BRAIN SURGERY PC, Defendant

Expert Name: Dr. Vincent DiGiacinto, M.D.

Disclaimer

Counsel

NEWMAN & OKUN P.C. Attorney for Plaintiff, New York, New York, BY: DAVID M. ODDO, ESQ., VARDARO & HELWIG, ESQ. Attorney for Defendant, Smithtown, New York, BY: WILLIAM D. DEMARIA, ESQ.

Proceedings

THE CLERK: Case on trial.

[4]COURT OFFICER: Jury entering.

[5]THE CLERK: Waive jury roll call?

[6]MR. ODDO: Yes.

[7]MR. DEMARIA: Yes.

[8]THE COURT: Plaintiff, any further

[9]witnesses for the Court?

[10]MR. ODDO: You Honor, at this time,

[11]the plaintiff would rest.

[12]THE COURT: Defendant have witnesses

[13] **[*2]** for the Court?

[14]MR. DEMARIA: Yes, Your Honor. The

[15]defendant calls Dr. George George

[16]Digiacinto.

[17]THE CLERK: Take the stand, remain

[18]standing and raise your right hand.

[19]DR. G-E-O-R-G-E D-I-G-I-A-C-I-N-T-O, having been

[20]first duly sworn, was examined and testified as

[21]follows:

[22]THE CLERK: State your name and

[23]address for the record, please.

[24]THE WITNESS: George Digiacinto,

[25]425 West 59 Street, New York, New York

[3]

[1]

[2]10019.

[3]THE COURT: Let's proceed.

[4]DIRECT EXAMINATION

[5]BY MR. DEMARIA:

[6]Q Good morning, doctor?

[7]A Good morning.

[8]Q I'm going to apologize for the quality of

[9]my voice, for you and to the jury, at if outset.

[10]Are you a physician duly licensed to

[11]practice medicine in the State of New York?

[12]A Yes, I am.

[13]Q When were you so licensed?

[14]A 1974.

[15]Q Where did you attend medical school?

[16]A Harvard Medical School.

[17]Q When did you graduate?

[18]A 1970.

[19]Q After graduation from medical school,

[20]what did you do next, professionally?

[21]A From '70 to '72, I was a Surgical House **[*3]**

[22]Officer at the Roosevelt Hospital in New York City.

[23]From 1972 to 1974, I was a Medical

[24]Officer in the United States Navy.

[25]From '74 to 1978, 1 was a

[4]

[2]Neurosurgical Resident at Columbia Presbyterian

[3]Hospital in New York City.

[4]Since 1978, I've been in the

[5]practice of neurosurgery.

[6]Q Have you been Board Certified in

[7]neurological surgery?

[8]A Yes, I have.

[9]Q What year was that?

[10]A 19, I think it was, '82.

[11]Q Doctor, with which hospitals are you

[12]affiliated, at the present time?

[13]A Currently I'm a Director of Neurology at

[14]St. Lukes Roosevelt Hospital in New York City.

[15]Q Doctor, do you hold any academic titles

[16]or employment, at the present time?

[17]A Instructor in neurological surgery at

[18]Columbia Presbyterian Medical Center.

[19]Q Have you authored, published articles

[20]relating to the specialty of neurosurgery?

[21]A Yes, I have.

[22]Q Are you currently a member of any

[23]professional societies or organizations?

[24]A Yes, I am.

[25]Q Tell the Court **[*4]** and jury the major ones?

[5]

[2]A The American Association of Neurological

[3]Surgery, New York State and New York County Medical

[4]Society. I think those are the major ones,

[5]medically.

[6]Q Did there come a time, in June of 2000,

[7]when you were asked to review certain materials, in

[8]connection with this case?

[9]A Yes.

[10]Q At that time, doctor, were you provided

[11]with copies of the hospital records relating to Mr.

[12]Furey's care and treatment at Presbyterian Hospital

[13]and Southside Hospital?

[14]A Yes, I was.

[15]Q Were you also provided with copies of the

[16]office records of Dr. Gudesblatt and Dr. McCormick,

[17]Dr. Cammisa, Dr. Casden, Dr. Cipolla and Dr.

[18]Butler?

[19]A Yes, I was.

[20]Q Were you also provided with copies of

[21]radiological studies, from Long Island MRI and

[22]Brookhaven MRI?

[23]A Yes.

[24]Q Did you review those?

[25]A Yes.

[6]

[2]Q Were you provided with the EBT testimony

[3]of Mr. and Mrs. Furey and Dr. Butler to review?

[4]A Yes. **[*5]**

[5]Q Doctor, have I provided you with the

[6]trial testimony of Dr. Butler and Dr. Silvers to

[7]review?

[8]A Yes, you have.

[9]Q Have you reviewed it?

[10]A Yes, I have.

[11]Q Doctor, have you been compensated for

[12]your time spent reviewing the various materials?

[13]A Yes, I have.

[14]Q What hourly rate of compensation?

[15]A At this time I'm being compensated

[16]$ 400.00 an hour.

[17]Back in 2000 it may have been

[18]$ 350.00 an hour.

[19]Q Have you and I met prior to today to

[20]II discuss the case?

[21]A Yes, we have.

[22]Q Do you expect to be compensated for your

[23]time away from your practice today?

[24]A Yes, I do.

[25]Q Have you testified as an expert at trial

[2]in the past?

[3]A Yes, I have.

[4]Q When was it that you first appeared at

[5]trial as an expert witness?

[6]A I think in 1986 or '87.

[7]Q On how many occasions, doctor, since 1987

[8]have you appeared at trials as an expert?

[9]A All types of trials I think approximately

[10]50 times.

[11]Q **[*6]** Have you testified at trial, doctor, as

[12]an expert witness for the Plaintiff and the

[13]Defendant?

[14]A Yes, I have.

[15]Q Doctor, are you familiar with the

[16]standards of practice among neurosurgeons as they

[17]existed in the community in 1997?

[18]A Yes, I have.

[19]Q Doctor, do you have an opinion with a

[20]reasonable degree of medical certainty, whether it

[21]was a departure, on the part of Dr. Butler, to have

[22]not used an operative microscope in the performance

[23]of the hemilaminectomy and discectomy performed on

[24]January 31?

[25]A Yes, I have an opinion.

[8]

[2]Q What is that opinion?

[3]A It was not a departure to not use the

[4]microscope.

[5]Q Explain the basis of that opinion?

[6]A There is no standard of care which

[7]requires the use of the microscope in 1997 or even

[8]today.

[9]In my experience as a neurosurgeon

[10]in my personal practice and in my interaction with

[11]any number of other neurosurgeons, while some do use

[12]it, the greater majority of neurosurgeons in 1997

[13]used the naked eye or much more often **[*7]** so-called

[14]magnifying loops plus a head light to afford

[15]magnification of the field and better visualization

[16]with lighting.

[17]There is absolutely no standard that

[18]requires, nor is it general practice, to utilize the

[19]operating microscope.

[20]Q Doctor, would the use of the operative

[21]microscope provide better visualization or

[22]magnification of the nerve root, at the time of the

[23]surgery?

[24]A The goal is to have adequate

[25]visualization. If it's not achieved through the size

[9]

[2]of his exposure, or through the lighting available,

[3]or through the magnification available, then he has

[4]to resort to something greater. There is higher

[5]magnification through the microscope. If there is a

[6]question do you need it, as I said, I feel today and

[7]in 1997 that I have an excellent view utilizing

[8]magnifying loops and a head light.

[9]Q You mentioned size and exposure?

[10]A I think there has been some discussion

[11]with microdiskectomy vs. Macro, bigger opening.

[12]The size of the exposure is how big

[13]of the incision you make and how much muscle you **[*8]** push

[14]to the side to get visualization. Microdiskectomy is

[15]more common this day.and you make the smaller

[16]exposure. That's to minimize the amount of the

[17]incision size and very importantly minimize the

[18]amount of muscle retraction.

[19]When you are looking at the disc,

[20]when you are doing the operation, you must have

[21]exactly the same exposure, whether it's an eight inch
[22]incision, a six inch incision or inch and-a-half
[23]incision. You are obligated to have adequate
[24]exposure and visualization and you tailor your
[25]incision and what you use for magnification to being
[10]
[2]able to have that good exposure.
[3]Q From your review of the Operative Report,
[4]doctor, what type of exposure did Dr. Butler make use
[5]of in this case?
[6]A Dr. Butler performed a standard
[7]discectomy which I think he said he used about a six
[8]inch incision and utilized the device called a Taylor
[9]retractor, which is a right angle device with a point
[10]on it that allows you to grab on to something called
[11]a lateral facet and achieve an exposure which is
[12]bigger. It's standard **[*9]** today. That would not be
[13]considered wrong to do that type of exposure in a
[14]lumbar discectomy.
[15]Q Based on the materials you have reviewed,
[16]do you have an opinion, with a reasonable degree of
[17]medical certainty, whether or not it was a departure
[18]from accepted standards of practice in 1997 for Dr.
[19]Butler to have performed surgery on January 31, 1997
[20]with a white blood count of 12.1 and a shift to the
[21]left on January 26, 1997, and with a temperature of
[22]100.3 at 11:00 p.m. On January 30, 1997 and a
[23]temperature of 100.1 at approximately 7:30 a.m. on
[24]January 31, 1987?
[25]A I do have an opinion.

[11]
" 2 Q What is your opinion in that regard?

[3]A It was not a departure for him to go

[4]ahead with surgery.

[5]Q Explain the basis of your opinion?

[6]A I think we'll take each piece of

[7]information and add it to the entire clinical

[8]picture.

[9]The patient had no systemic

[10]complaints that were recorded, noted by Dr. Butler.

[11]Dr. Butler, in reviewing the

[12]patient's records, saw no indication that there were

[13]any systemic complaints, **[*10]** giving him no reason to be

[14]concerned about the numbers that we talked about,

[15]100.1 and 100.3. In fact, there was also, between

[16]the two temperatures, a normal temperature, in fact a

[17]slightly subnormal temperature of 97.

[18]During the surgery the temperature

[19]was recorded as normal of 98.6.

[20]Therefore, those two very low grade

[21]fevers, they barely qualify for that, have to be

[22]looked at in that context.

[23]Again the overall picture of the

[24]patient is important. The white count, 12.2 is very

[25]little bit over normal and the shift, which was

[12]

[2]noted, was a couple of ticks away from normal.

[3]You have to take all that

[4]information, look at the patient and look at his

[5]clinical picture where he's in severe pain, he's been

[6]on bed rest for several days, and decide whether it's

[7]more appropriate to proceed and enable him to get

[8]mobilized sooner than later. There are a variety of

[9]reasons for moving ahead, phlebitis, a bleed could

[10]occur.

[11]Balancing the whole picture, I do

[12]not feel that Dr. Butler, with all the information

[13]that could have been available, departed **[*11]** in any way

[14]by going ahead with surgery.

[15]Q We had some testimony yesterday from Mr.

[16]Furey that he complained to Dr. Butler, prior to

[17]surgery, of feeling weak and also feeling nauseous.

[18]Should Dr. Butler, under those

[19]circumstances, doctor, have continued with the

[20]surgery?

[21]A I feel he should have, yes.

[22]Q Explain that to the jury please?

[23]A The patient was on bed rest. He was

[24]under the stress of being in bed. He was on pain

[25]medication which very often could make one feel weak

[13]

[2]and queasy and again the non-specificity of those

[3]particular complaints would not make me say Dr.

[4]Butler should have postponed the surgery.

[5]Q Doctor, in your review of the testimony

[6]of Dr. Silvers, I want you to assume that Dr.

[7]Silvers testified that one of the issues in this case

[8]is whether the disc fragment that was removed by Dr.

[9]McCormick at Presbyterian Hospital on October 7 of

[10]'97 that was compressing the L5 nerve root was left

[11]behind by Dr. Butler at the time of his surgery on

[12]January 31, 1997, whether the fragment moved, **[*12]** was a

[13]recurrent disc herniation that can occur in

[14]approximately five percent of patients.

[15]Do you have an opinion, doctor, with

[16]a reasonable degree of medical certainty, whether the

[17]fragment removed by Dr. McCormick was a fragment left

[18]behind by Dr. Butler or a recurrent disc fragment?

[19]A I do have an opinion.

[20]Q What is your opinion?

[21]A It was a recurrent disc fragment.

[22]Q Please explain the basis of that opinion

[23]to the jury?

[24]A The patient presented with severe pain.

[25]He underwent surgical intervention at the time of

[14]

[2]surgery. Dr. Butler described in his operative

[3]Report feeling at the end of his surgical procedure

[4]that the nerve root was free, it was no longer

[5]compressed. That's the goal of the surgery. That's

[6]what he described as doing, and that's when you are

[7]done with this surgery.

[8]Moreover, the patient after being

[9]uncomfortable post surgery, by the time he went home

[10]was taking only Advil.

[11]It was noted by subsequent

[12]evaluating physicians. Gudesblatt noticed the leg

[13]pain was improving. **[*13]** Dr. Dr. Cammisa noted that the

[14]leg pain was improving. Dr. Casden, and again I

[15]would have to read every one of the doctors, noted he

[16]was taking no pain medication and returning to work.

[17]He was in severe pain before

[18]surgery. After surgery he was off pain medications,

[19]telling other physicians that he had less pain and

[20]returning to work.

[21]That clearly demonstrates that there

[22]is a difference. The difference is as a result of

[23]the fragment or fragments compressing the nerve root

[24]having been removed.

[25]The subsequent further need for

[15]

[2]surgery indicates that a recurrent disc, which I

[3]think everyone agreed is around a 5% probability, was

[4]the reason for his need for further surgery, not that

[5]the fragment was there the whole time compressing the

[6]root and causing him problems. There was clear

[7]evidence from a variety doctors records of

[8]improvement.

[9]Q Doctor, I want you to assume that we've

[10]had testimony that the surgery performed by Dr.

[11]Butler was a clean procedure and that the surgery was

[12]documented to have started at 1:45 p.m. and was

[13] **[*14]** finished at 3:00 p.m..

[14]Assuming what I've asked, doctor, do

[15]you have an opinion, with a reasonable degree of

[16]medical certainty, whether prophylactic antibiotics

[17]should have been administered at the time of surgery

[18]on January 31, 1997?

[19]A I do have an opinion.

[20]Q What is that opinion?

[21]A That under the circumstances, there is no

[22]clear indication that prophylactic antibiotics needed

[23]to be used in this case.

[24]Q What are those factors particularly

[25]doctor?

[16]

[2]A The important factors in deciding whether

[3]or not you are going to use prophylactic antibiotics

[4]are the type of surgery, the circumstances of the

[5]surgery, and the length of the surgery.

[6]A clean operation means that there

[7]is no abrasion of the skin, there is no -- it's not

[8]an injury where you have gravel and dirt ground into

[9]the skin. There is no clear indication that there

[10]could be an infection sitting there already.

[11]One of the highest correlations of

[12]infection in surgery is related to time of surgery.

[13]An operation that predictably will **[*15]** take less than two

[14]hours, and this one took less than that, is not one

[15]that stands a significant chance of ending up with an

[16]infection. So length of surgery, type of condition

[17]of the patient.

[18]If this operation was done after he

[19]had been thrown off a motorcycle and scraped himself

[20]all up, that would be appropriate for the use of

[21]antibiotics.

[22]Q You mentioned the length of the

[23]operation.

[24]Did Dr. Butler have a basis for

[25]determining, prior to surgery, that the operation he

[17]

[2]was about to perform would take under two hours?

[3]A I think he did, yes.

[4]Q Would that fact be that he could

[5]determine prior to surgery regarding administration

[6]of prophylactic antibiotics?

[7]A Yes.

[8]Q Doctor, do you have an opinion, with a

[9]reasonable degree of medical certainty, whether Dr.

[10]Butler departed from accepted standards of practice

[11]in failing to perform an incision and drainage during

[12]Mr. Furey's readmission to Southside Hospital on

[13]February 13, 1997?

[14]MR. ODDO: Objection, Your Honor,

[15]medical degree of certainty **[*16]** as opposed to

[16]medical degree of probability?

[17]MR. DEMARIA: I disagree, judge.

[18]THE COURT: I'll allow him to answer

[19]the question.

[20]Overruled.

[21]A I do have an opinion.

[22]Q What is your opinion?

[23]A That Dr. Butler did not depart from the

[24]standard of care by not performing an incision and

[25]drainage of that infected wound that he observed on
r?

[18]

[2]the February 13.

[3]Q Explain the basis of that opinion?

[4]A When Dr. Butler observed the patient in

[5]his office, he saw clear evidence there was

[6]infection. He felt it was a superficial wound

[7]infection and he appropriately admitted the patient

[8]to the hospital, and started him on intravenous

[9]antibiotics.

[10]In his initial plan, while seeing

[11]the patient, before leaving the patient in the care

[12]of Dr. Seymour, he stated: We'll observe wound. If

[13]it continues to drain, I'm paraphrasing now, we'll

[14]consider incision and drainage.

[15]The appropriate treatment is

[16]observation and treatment with antibiotics. It's

[17]unnecessary to perform an operation out. It's

[18]unnecessary **[*17]** to perform a surgery which involved

[19]taking the patient to the Operating Room, putting him

[20]to sleep and putting him through another anesthesia.

[21]If it's a superficial and it

[22]responds to intravenous antibiotics, as it did, there

[23]is no reason to do a re-operation.

[24]Q I want you to assume Mr. Furey testified

[25]that from the time of Dr. Butler's surgery on January

[19]

[2]31, 1997 he has continued to experience numbness

[3]below the knee, along with intermittent spasm of his

[4]left leg.

[5]Assuming what I've asked, doctor,

[6]and based upon the records you have reviewed, do you

[7]have an opinion, with a reasonable degree of medical

[8]certainty, of the cause of the below the knee

[9]numbness and spasm of Mr. Furey's left leg?

[10]A I do have an opinion.

[11]Q What is your opinion?

[12]A The patient's presentation of very severe

[13]pain and it was noted by another examiner not to be

[14]able to get out of bed.

[15]You will recall the MRI scan that

[16]showed clear evidence of compression of the nerve

[17]root in the foramen. Recall Dr. Butler's description

[18]of dissecting **[*18]** out the nerve root and relieving the

[19]pressure and of necessity having to move the nerve

[20]root to remove disc materials. All those things can

[21]cause a very significant injury to the nerve root

[22]before surgery and to a certain degree as a result of

[23]necessary retraction at surgery, and one of the

[24]problems that such a situation can leave you with, is

[25]a permanent injury to the nerve root.

s

[20]

[2]My understanding the problem has

[3]persisted even until today. That indicates that there

[4]is a permanent injury to the nerve root, secondary to

[5]such severe compression.

[6]Q What is the nature of the injury that can

[7]occur to the nerve root, prior to surgery?

[8]A The nature of the injury, the severe

[9]compression by the nerve being tightly smashed by

[10]this fragment in a space that has no place to let the

[11]nerve root go. That's exactly what happens when a

[12]nerve root is trapped in the foramen. There is a

[13]circle of bone which is nerve root going through it

[14]and a fragment of disc jammed into it that's compress

[15]the nerve root.

[16]Unfortunately you can't **[*19]** presume that

[17]a nerve can get better once you decompressed it. You

[18]try to decompress it as expeditiously as possible,

[19]get pressure off of it as quickly as you can.

[20]If there is irreversible damage, and

[21]you don't know until the problem doesn't go away, you

[22]have to assume it was damaged at the time of that

[23]compression.

[24]MR. DEMARIA: Nothing further.

[25]Thank you.

[0]

[21]

[2]THE COURT: Retire the jury for five

[3]minutes please.

[4](Whereupon, at this time, there was

[5]a brief recess.)

[6]COURT OFFICER: Jury entering.

[7]THE CLERK: Waive jury roll call?

[8]MR. ODDO: Yes.

[9]MR. DEMARIA: Yes.

[10]THE CLERK: All jurors present.

[11]Let's proceed with cross examination

[12]please

[13]CROSS EXAMINATION

[14]BY MR. ODDO:

[15]Q Good morning, doctor?

[16]A Good morning.

[17]Q My name is David Oddo and I represent, as

you probably are aware, Mr. and Mrs. Furey in this matter?

A Yes.

Q We've never met before?

A Not to my recollection.

Q Now, doctor, you were contacted by Mr. Demaria's office to review **[*20]** this matter?

A Initially by another firm and subsequently by Mr. Demaria's office.

Q When was that?

A His office, sometime earlier this year, around June or July or something.

Q The materials that you testified to earlier, was that the extent of the materials that you reviewed, in connection with this case?

A I'm not sure if there is anything we left out.

Q Did you maintain a file or any notes, concerning your review of this matter?

A I have a file. I don't have any notes.

Q Do you have the file with you today?

A Part of the file with me today. Mr. Demaria asked me to bring it last night. I was home and I left the majority of the file in my office.

Q What's contained in your file here today?

A Reports of Dr. Gudesblatt, Cammisa, McCormick, Dr. Butler's records. Dr. Butler's operative reports and Dr. McCormick. Some of the Columbia records. Dr. Butler's Examination Before Trial and a few other things. This is a Verified

[24]Bill of Particulars **[*21]** sitting here. I think that

[25]comprises the majority of what I have with me today.

[2]I said r. Gudesblatt's records.

[3]Q Prior to coming here today, you had an

[4]opportunity to review the trial testimony of Dr.

[5]Butler?

[6]A Correct.

[7]Q And the trial testimony of Mr. Furey?

[8]A Correct.

[9]Q And--

[10]A I'm sorry, I did not, not Mr. Furey.

[11]Q Dr. Silvers?

[12]A Yes.

[13]Q You read Dr. Silvers trial testimony, Dr.

[14]Butler's trial testimony, you reviewed my clients

[15]deposition transcript from five years ago or so?

[16]A Yes, at some point.

[17]Q Now, you testified that your hourly rate

[18]is $ 400.00 an hour?

[19]A Yes.

[20]Q Is that to testify?

[21]A No.

[22]Q Is it the review -- it's also to review?

[23]A It is to review.

[24]Q So, do you get a separate fee for coming

[25]to testify today?

[24]

[2]A Yes, I do.

[3]Q What is that?

[4]A $ 5, 000.00.

[5]Q So you get $ 5, 000.00 to come here today

[6] **[*22]** and you charge by the hour to review the matter?

[7]A Correct.

[8]Q Approximately, how many hours did you

[9]review the matter?

[10]A I'm going to guess. I keep little

[11]stickies and add them up at the end, including

[12]meetings with Mr. Demaria, reviewing the depositions,

[13]going over the chart, again it's going to be another

[14]five or six hours, something on that order.

[15]Q Five or six hours and then your trial

[16]testimony today?

[17]A Yes.

[18]Q Now over the years you have had the

[19]opportunity to testify in Court approximately 50

[20]times or so?

[21]A Around that number.

[22]Q You have testified in courts in New York?

[23]A Correct.

[24]Q And testified in courts outside of New

[25]York?

[25]

[2]A Yes.

[3]Q And you testified--

[4]The majority of your testimony is on

[5]behalf of defendant doctors in medical malpractice

[6]cases?

[7]A The breakdown for all types of cases and

[8]I say all because some include personal injury cases,

[9]which are not medical malpractice cases, it breaks

[10]down to 75 percent **[*23]** defense and 25 percent plaintiff

[11]with all types. I couldn't break it down. Within

[12]malpractice about the same.

[13]Q It's about the same?

[14]A Around the same.

[15]Q Doctor, is it fair to say it's more than

[16]75 percent defendant doctor testimony in medical

[17]malpractice cases?

[18]A The last time I looked at it I think it

[19]was around there. I really don't keep an accurate

[20]number. I wouldn't argue with 82 percent or

[21]something like that. It's on that order.

[22]Q Now, other than the 50 times you

[23]testified, you have had the opportunity to review

[24]cases where you didn't have the opportunity to come

[25]to court and testify; correct?

[26]

[2]A That's true.

[3]Q Approximately how many times?

[4]A 200, 250, maybe 300. I really don't

[5]know.

[6]Q From 2000 on or so, how many have you

[7]reviewed?

[8]A I just would have to make the gross guess

[9]of 20, 15, 10. It would vary from year to year.

[10]Q Now, doctor, you're currently an Academic

[11]Instructor at Columbia Presbyterian?

[12]A Roosevelt Hospital **[*24]** is a teaching hospital

[13]for Columbia. I don't go to Columbia. I'm only at

[14]Roosevelt Hospital.

[15]Q But if you don't go -- what is your

[16]exact title?

[17]A Director of Neurosurgery at St. Luke's

[18]Roosevelt Hospital, Instructor of Neurological

[19]Association with affiliation through Columbia

[20]Presbyterian Medical Center.

[21]Q You have an affiliation with Columbia

[22]Presbyterian?

[23]A The hospital has an affiliation and I do

[24]since I'm on the faculty at Roosevelt.

[25]Q Because St. Lukes has a relationship with
i0
27

[2]Columbia, that's your relationship with Columbia?

[3]A Correct.

[4]Q Was that also the case back in 1997?

[5]A Yes.

[6]Q I want to ask you, doctor, how many

[7]actually -- tell me again, what surgery was performed

[8]by Dr. Butler of my clients?

[9]A Dr. Butler performed a foraminotomy, a

[10]laminotomy, removal of disc material. I'm using my

[11]terminology. I don't remember the terminology he

[12]used. His goal was to take pressure off the L5 nerve

[13]root by removing ligamentous structures, bony

[14] **[*25]** structures, and any disc material that he could

[15]visualize compressing against the nerve root.

[16]Q Doctor, you have performed that surgery

[17]before?

[18]A Yes.

[19]Q Approximately how many times?

[20]A Somewhere between 75 and 100 times a

[21]year, since 1978.

[22]Q You -- those surgeries took place at

[23]what hospital? More than one hospital?

[24]A Five or six different hospitals.

[25]Q Tell me what hospitals?
28

[2]A Harlem Hospital, Lenox Hill Hospital,

[3]Beth Israel North Hospital, which also is called

[4]Doctors Hospital and Columbia Presbyterian. When I

[5]initially went into practice, I was on staff at St.

[6]Lukes and Roosevelt which are technically one

[7]hospital but two separate spots.

[8]Q You performed this surgery at Columbia

[9]Presbyterian Hospital?

[10]A Yes.

[11]Q Doctor, in 1997, wasn't it the general

[12]practice at Columbia Presbyterian Hospital to perform

[13]this surgery under a microscope?
i 14 A Not that I'm aware of, sir.

[15]Q Did you perform any of these surgeries at

[16]that hospital, in 1997? **[*26]**

[17]A No.

[18]Q How about '96?

[19]A I think I left staff there really much,

[20]much before that, in the early'80's, no mid 80's.

[21]Q You hadn't performed a surgery from mid

[22]80's to today?

[23]A Until today.

[24]Q At that hospital?

[25]A Correct.

?J
29

[2]Q Do you presently do these types of

[3]surgeries?

[4]A Yes.

[5]Q Is it your testimony today that you will

[6]do these surgeries today without a microscope?

[7]A Absolutely.

[8]Q You do them with a loop?

[9]A Yes.

[10]Q What's the magnification of your loop?

[11]A Mine are six times.

[12]Q And you also do them with lighting, some

[13]illumination?

[14]A A head light that I wear on my head.

[15]Q The magnification is important to you so

[16]that you have a better view of the operative field?

[17]A Yes.

[18]Q And you can more easily identify the

[19]nerve root, let's say?

[20]A Yes.

[21]Q You can see the nerve root clearly and

[22]you could see any fragments that may be in the

[23]operative field. **[*27]** Isn't that the purpose of the

[24]magnification, to help you see these things?

[25]A Yes.
30

[2]Q And you do that because in this type of

[3]surgery, the one in this particular case, there is a

[4]small hole through the lamina?

[5]A Correct.

[6]Q And you are actually--

[7]The procedure is taking place, part

[8]of the procedure is taking place six to eight inches

[9]into that hole?

[10]A I don't think it's -- I don't have a

[11]ruler, when I do it.

[12]Q What would you say?

[13]A Four or five. It depends on how big the

[14]patient is. With a very heavy patient, it well could

[15]be over that, and a thin patient it might be two or

[16]three inches.

[17]Q Because all patients differ?

[18]A Yes.

[19]Q When you -- withdrawn-

[20]Do you have any personal --

[21]withdrawn--

[22]Do you know Dr. McCormick?

[23]A Yes, I do.

[24]Q You are aware from looking at the chart

[25]Dr. McCormick in 1997, in October, used a microscope 11

[31]

[2]in his procedure?

[3]A Yes, I am.

[4]Q Did you **[*28]** know Dr. McCormick back in '97?

[5]A Yes.

[6]Q Were you a member, if you know, of any of

[7]the same medical associations or groups, any medical

[8]associations or groups that you were with him that

[9]you know you were a member with him on?

[10]A Yes.

[11]Q What were those?

[12]A I'm sure he's a member of American

[13]Association of Neurosurgery. I'm guessing he's a

[14]member of New York County and New York State Medical

[15]Society.

[16]Q You also-- you had an opportunity to look

[17]at Dr. Butler's Operative Report, right?

[18]A Yes.

[19]Q Just so we're clear, you have given us

[20]some opinions today and the opinions --

[21]Let's take them one at a time.

[22]You gave an opinion that it was not

[23]a departure to use the microscope.

[24]A No, sir, not a departure not to use it.

[25]It was not a departure not to use the microscope.

[0]

[32]

[2]You said not a departure to use the microscope.

[3]Q That's what you testified to?

[4]A Yes.

[5]Q Your testimony is that the greater

[6]majority of neurosurgeons at the time used **[*29]** the naked

[7]eye?

[8]A No, no. I said could use the naked eye

[9]or loops.

[10]Q So your opinion is that it's not, it was

[11]not the general practice of neurosurgeons at the time

[12]to use a microscope?

[13]A That's correct.

[14]Q It's your testimony that your experience

[15]has shown you have an excellent view with a loop?

[16]A Yes.

[17]Q You have an excellent view with the head

[18]gear, the illumination you use?

[19]A Yes.

[20]Q You also stated that you as the surgeon

[21]have an obligation to have adequate vision and

[22]exposure to the operative field?

[23]A Correct.

[24]Q You testified -- -- withdrawn-

[25]Is it your opinion that Dr. Butler
33

[2]had adequate vision and exposure of the operative

[3]field in this case?

[4]A With the information I have available,

[5]yes.

[6]Q The information you have available is his

[7]Operative Report?

[8]A Yes.

[9]Q There is nothing else that could tell you

[10]whether or not he had adequate vision or exposure?

[11]A I have to remember if he referred to the **[*30]**

[12]at all in his deposition or testimony. I just don't

[13]remember. I also have to recall that in the record

[14]it shows that the patient improved, indicating he

[15]accomplished what he wanted to.

[16]Q You know what, we can go right into that

[17]now, if you like.

[18]The notation, that is, the patient

[19]improved, you are aware, doctor, that the day

[20]following surgery Mr. Furey was complaining of severe

[21]pain in his low back, correct?

[22]A Yes.

[23]Q And he was experiencing numbness below

[24]his knee?

[25]A Correct.

I*

[34]

[2]Q And you are aware that prior to the

[3]surgery Mr. Furey did not exhibit symptoms of

[4]numbness below his knee, correct?

[5]A Yes.

[6]Q And you are also aware that the pain that

[7]Mr. Furey was suffering was the same type of pain in

[8]his low back that he had prior to the surgery?

[9]A I'll trust that. I don't recall that.

[10]Q I don't want-- I want-- I don't want you

[11]to do that. If that's your understanding of the

[12]evidence, I'm asking you if it is.

[13]A I just don't recall how he described **[*31]** the

[14]low back pain prior to the surgery. Again I'm not

[15]disagreeing. I can't say offhand recall it.

[16]Q The purpose of Dr. Butler's surgery was

[17]to decompress the L5 nerve root, correct?

[18]A Correct.

[19]Q And would you agree that the reason for

[20]Mr. Furey's problems while in the hospital was a

[21]compression problem on the L5 nerve root?

[22]A Prior to surgery, yes.

[23]Q So, if the nerve was decompressed by Dr.

[24]Butler, would you agree that there would be some

[25]improvement in Mr. Furey's symptoms?

35

[2]A It may or may not be.

[3]Q Now, there may not be because there may

[4]be such severe damage to the nerve; correct?

[5]A One possibility, yes.

[6]Q And one of the ways that the nerve could

[7]be damaged permanently is during surgery; correct?

[8]A It's possible, yes.

[9]Q If Dr. Butler didn't carefully and gently

[10]retract the nerve root from the area that he was

[11]operating on that, could cause permanent damage to

[12]the nerve root?

[13]A There are certainly degrees of excessive

[14]retraction **[*32]** which would could cause damage to the

[15]nerve root, yes. I could take a hammer and hit it,

[16]that would damage it. That wouldn't be appropriate

[17]though.

[18]Q It's your understanding that --

[19]withdrawn--

[20]So, if there was not damage to the

[21]nerve root from either the herniated disk or from the

[22]retraction, would you expect Mr. Furey to have relief

[23]of his symptoms?

[24]A Again he may or may not.

[25]Q Would you expect it?

[2]A I have to say it the same way, he a may

[3]or may not.

[4]Q Mr. Furey did not get better?

[5]Is it your understanding, in review

[6]of the records, Mr. Furey's condition of his low back

[7]continued days after surgery?

[8]A In the hospital, yes.

[9]Q And his leg numbness never went away?

[10]A That's my understanding.

[11]Q Your understanding he had leg numbness

[12]from post surgery to the present?

[13]A Again the most recent record I have is

[14]not present but he's told you that and I have no

[15]reason not to believe it.

[16]Q Doctor, isn't it true that one of the

[17]factors in causing **[*33]** permanent nerve damage to the

[18]nerve root would be the duration of time of

[19]compression?

[20]A Yes.

[21]Q Would it also be the degree of the amount

[22]of compression?

[23]A Yes.

[24]Q So the longer the nerve root is

[25]compressed, the more chance that he's going to have
37

[2]permanent damage to the nerve root?

[3]A Correct.

[4]Q You also gave us an opinion with respect

[5]to, it was not a departure for Dr. Butler to do the

[6]surgery due to his increase in temperature prior to

[7]surgery and his slightly elevated white blood cell

[8]count?

[9]A Correct.

[10]Q You had indicated Mr. Furey did not have

[11]any systematic complaints that would lead you to

[12]believe that he had some sort of infection?

[13]A There was no information that I could

[14]glean from the chart that would indicate that.

[15]Q Doctor, when you do surgery, do you look

[16]before you do surgery at laboratory reports?

[17]A Not necessarily, unless there as reason

[18]to.

[19]Q So as a matter of custom and practice

[20]yourself, you don't look at lab work? **[*34]**

[21]A I may or may not. Usually I don't. It's

[22]reviewed by the anesthesiologist prior to surgery and

[23]any major abnormality is indicated to me, if

[24]necessary.

[25]Q It's your testimony that you rely on the
38

[2]anesthesiologist to tell you if there is a reason,

[3]from his opinion, not to go do surgery?

[4]A It's his responsibility to review all lab

[5]data to make sure the patient can go to sleep and

[6]there is no contraindication. When I have the

[7]patient, there is no reason for me to have concern.

[8]I then depend on the anesthesiologist who is required

[9]to do probably the riskiest part of the procedure to

[10]put the patient to sleep. It's safe to do it and no

[11]reason not to do it. I do rely on them to review the

[12]data, yes.

[13]Q As a neurosurgeon, you are the one
is 14 perform the surgery?

[15]A Yes.

[16]Q You are, for no better term, captain of

[17]the ship?

[18]A I think you can use that term.

[19]Q You are responsible for what takes place

[20]during the surgery, aren't you?

[21]A Correct.

[22]Q Now, doctor, **[*35]** you also review, prior to

[23]surgery, you review the patient's temperature, don't

[24]you?

[25]A No.

39

[2]Q You don't?

[3]A No.

[4]Q You rely on the anesthesiologist?

[5]A Unless I'm told it's elevated or unless

[6]I'm worried for some reason, I wouldn't specifically

[7]go chase it down because if it was significantly

[8]elevated, someone is responsible, specifically the

[9]anesthesiologist is responsible to tell me that.

[10]That's one of the issues he will use in deciding

[11]whether or not a patient should be placed under

[12]general anesthesia. It is his obligation to inform

[13]me of that.

[14]Q The anesthesiologist is concerned from

[15]his standpoint, correct?

[16]A Yes.

[17]Q As to how it would affect him putting the

[18]patient under anesthesia; correct?

[19]A Yes.

[20]Q Don't you have a different concern?

[21]A An elevated temperature would be of

[22]concern to an anesthesiologist perhaps in a different

[23]way. It would be of equal concern.

[24]Q Of equal concern but may be different?.

[25]Your concern as the surgeon **[*36]** would be whether or not
?J
40

[2]there is an infectious processing going on?

[3]A It would be one of the things, yes.

[4]Q That would be your concern?

[5]A It may be, yes.

[6]Q Now, Mr. Furey as you know from --

[7]To save time, the jury heard this

[8]for days now, that Mr. Furey had a fever the early

[9]morning hours prior to his surgery?

[10]A I don't remember the exact time. I think

[11]it was 11:00 p.m. and 4:00 a.m. It was normal during

[12]surgery.

[13]Q What about prior to surgery?

[14]A I believe at 8:00 A.M. it was 100.2.

[15]Q 8:00 A.M. the morning of the surgery?

[16]A Yes.

[17]Q It had been abnormally low four hours

[18]prior to that?

[19]A It was measured as such, yes.

[20]Q So that wouldn't be of any concern for

[21]you, the deviation in temperature?

[22]A If I looked at that deviation in

[23]temperature and had that in front of me, I would ask

[24]what the temperature was at the time of surgery. If

[25]it was normal, I would take that into account with

[41]

[2]all the **[*37]** other pieces of information and make the

[3]decision as to whether it was appropriate to go ahead

[4]or not go ahead.

[5]Q Was Mr. Furey's temperature normal at the

[6]time of surgery?

[7]A My recollection it was normal during

[8]surgery, sir.

[9]Q Do you have the Temperature Flow Sheet?

[10]A I don't have that chart.

[11]COURT OFFICER: Plaintiff's Exhibit

[12]3 in evidence shown to the witness.

[13]A Any idea where I should start looking.

[14]MR. ODDO: Can I approach the

[15]witness?

[16]THE COURT: Please do.

[17]A This is a Flow Sheet which is not

[18]intraoperative. It looks like this is a post-op Flow

[19]Sheet.

[20]The next abnormal reading is 2/1,

[21]which is the day after the surgery, which is 102.

[22]Q I direct your attention to the morning of

[23]January 31?

[24]A Yes, sir.

[25]Q I'm going to take you to midnight. I'll

[42]

[2]take you to midnight on the 31st.

[3]Do you see that there at twelve?

[4]A The first reading on the sheet?

[5]Q Yes.

[6]A Yes.

[7]Q What is the temperature?

[8]A 100.2. **[*38]** It's right at the line.

[9]Q Is it closer to 100.3, doctor?

[10]A There is a circle. It looks like 100.2

[11]and the line goes a little higher.

[12]Q For purposes of my question, it could be

[13]100.2 or 100.3?

[14]A Yes.

[15]Q The next temperature reading, was it 4:00

[16]a.m.

[17]A Approximately, yes.

[18]Q That was the below normal 97 point we'll

[19]call it six, if you like?

[20]A Yes, correct.

[21]Q The next reading, doctor, is that 8:00

[22]A.M.

[23]A Correct.

[24]Q What is that reading?

[25]A 100.1 or 100.2, around there.
43

[2]Q That was the last temperature reading

[3]taken prior to surgery, is that correct?

[4]A I believe so, yes.

[5]Q So, is it fair to say that Mr. Furey had

[6]a fever hours prior to surgery?

[7]A He had a temperature of 100 point what

[8]did we decide that was. 100.1 or 100.2, which is

[9]very borderline.

[10]Q Now, when you look at that, doctor, in

[11]relation to the two prior readings with one below

[12]normal and one was back up, your testimony today **[*39]** is

[13]that would cause you no concern with whether or not

[14]to go through with this surgery?

[15]A Again if I had that information, if I had

[16]the white count that we had, if I had the patient in

[17]severe pain with severe nerve root compression, who

[18]has been on bed rest for five days, I would balance

[19]all of those factors, the nerve root injury, the more

[20]risk there is of long term damage that it's

[21]compressed, I believe I would have decided in seeing

[22]the patient go ahead with the surgery.

[23]Q Let me ask you this now.

[24]His white blood cell count you are

[25]aware it was taken?

44

[2]A Yes.

[3]Q Now it was taken on the first day of his

[4]admission, the 26th of January, correct?

[5]A I understand that.

[6]Q Are you also aware it was never taken

[7]again prior to surgery?

[8]A Yes.

[9]Q A slightly elevated count on admission

[10]was never followed up until surgery; correct?

[11]A As far as I know, that's correct.

[12]Q You as the surgeon about to perform

[13]surgery that doesn't concern you?

[14]A Again **[*40]** it's the totality of the whole

[15]picture looking at the patient and I think that we

[16]have to remember, as has been pointed out, that you

[17]have a nerve root under severe compression, the

[18]longer its compressed, the more risk of permanent

[19]injury.

[20]You have to balance that. You have

[21]to balance the risk of the patient staying on bed

[22]rest which has bad medical affects, with the

[23]potential risk of an infection that's not visible in

[24]the patient potentially maybe eventually possibly

[25]causing a problem, and I think it's totally

[45]

[2]reasonable to decide that this patient needed surgery

[3]at that time, based on all the information we have

[4]available.

[5]Q Doctor, based on all the information and

[6]looking at that total picture, wouldn't you want to

[7]know a recent white blood count?

[8]A Again I'm not seeing the patient. I can

[9]only answer that question, if I'm looking at the

[10]patient. I've answered the question as best I can.

[11]Q Now I'm going to add another factor into

[12]this, doctor.

[13]Not only let's say the white blood

[14]cell count is elevated, but **[*41]** there is a shift to the

[15]left.

[16]Now adding that to the total

[17]picture, does that change your opinion?

[18]A I was including that, as we had discussed

[19]that earlier, I was including that as well.

[20]Q Now, doctor, let's go back.

[21]You just testified just now that you

[22]would do the surgery because the longer the

[23]compression the more chance of nerve root damage,

[24]correct?

[25]A Yes.

46

[2]Q Now, doctor, is it fair to say that --

[3]withdrawn--

[4]You based a portion of your

[5]testimony on Dr. Butler's Operative Report; correct?

[6]A Correct.

[7]Q After every surgery you prepare an

[8]Operative Report?

[9]A Yes.

[10]Q I'm going to withdraw that. Let me got

[11]back to something, doctor.

[12]Today, do you as a surgeon as

[13]captain of the ship, prior to surgery, would you

[14]like to have -- is it helpful for you to have an

[15]updated white blood count performed prior to you

[16]performing surgery?

[17]A If I felt it was clinically necessary, if

[18]I had a reason to want it, then I would get it.

[19]Q Let's then assume **[*42]** that your patient who

[20]you are about to do surgery on has an elevated

[21]temperature, would you want to run some blood to see

[22]if anything is going on?

[23]A I think again I've been answering this

[24]question about the clinical situation. I don't think

[25]1 can alter that answer.

47

[2]In this case I think the information

[3]available allowed me to feel it was appropriate to go

[4]ahead with surgery.

[5]Q You are aware that Dr. McCormick, whom

[6]you know, performed surgery in October after this?

[7]A Yes.

[8]Q And you are aware that Dr. McCormick

[9]decompressed the same nerve root that was

[10]decompressed, supposedly decompressed by Dr. Butler?

[11]A Correct.

[12]Q Your opinion is that the reason Mr. Furey

[13]had to undergo that surgery because there was a

[14]recurrent disc, is that your opinion?

[15]A Yes.

[16]Q When you say "recurrent disc" you are

[17]saying a disc fragment lodged itself against the

[18]nerve root?

[19]A Correct.

[20]Q Now, doctor, given the fact that Mr.

[21]Furey's symptoms did not change significantly, would **[*43]**

[22]you agree that Dr. Butler did not decompress the

[23]nerve root?

[24]A I don't think there is information that

[25]says the symptoms didn't change significantly. If

48

[2]you ask me hypothetically, I could answer it

[3]differently.

[4]Q Did you read Mr. Furey's chart?

[5]A Yes.

[6]Q And did you look at the Progress Notes

[7]from the chart?

[8]A In the hospital chart, yes.

[9]Q Did you look?

[10]A And Dr. Butler and all the consults I

[11]mentioned earlier as well, yes.

[12]Q Did you look at any other doctors

[13]reports?

[14]A I believe I looked at Spivak (phonetic).

[15]I think we mentioned Cammisa. You are testing my

[16]memory. I'll tell you.

[17]I looked at Dr. Gudesblatt's

[18]consult. I looked at Dr. Casden's consult. He is

[19]working and not taking any medication.

[20]I looked at Dr. Cammisa's consult

[21]who said he does feel his pre-op did improve

[22]postoperatively. I think those were the major ones.

[23]That tells me that the pain was

[24]better postoperatively than it was when it started,

[25]which is not consistent with the **[*44]** fragment never

49

[2]having been removed from the nerve root.

[3]Combining that with Dr. Butler's

[4]operative description of what he did, which was

[5]appropriate in my opinion as I think I stated

[6]earlier, that this is a recurrent fragment rather

[7]than a fragment that was left there at time of

[8]surgery.

[9]Q So, if Dr. Butler decompressed the nerve

[10]and the disc recurs, now disc recurrence can occur-

[11]What's your experience with a disc

[12]recurring after surgery time wise?

[13]A It can recur within a day or two, in a

[14]week, it could recur in a month or two years later.

[15]Q One reason a disc could recur in this

[16]particular case is if Dr. Butler didn't thoroughly

[17]remove all the fragments from the operative field?

[18]A That's not a recurrence. If there is a

[19]fragment in the operative field meaning against --

[20]I'll stop answering it.

[21]You will have to define what you

[22]mean. I shouldn't have started to answer it.

[23]What do you mean by "in the

[24]operative field"?

[25]Q Let's say the disc space?

50

[2]A **[*45]** There are always going to be fragments in

[3]the disc space and you can't get them all out. Some

[4]people feel it's appropriate to never enter that

[5]space. There have been articles recently, within the

[6]last six months, describing just removing fragments

[7]out of the disc space, than chasing into the disc

[8]space. There are always fragments in the disc

[9]space. There are fragments today.

[10]Q Your job as a neurosurgeon on this

[11]surgery is to remove any material that you can to

[12]prevent compression on the nerve root; correct?

[13]A I have to answer it again by saying that

[14]when one does the operation standards of care

[15]literature supports either just removing the fragment

[16]that's currently actively pressing on the nerve root

[17]or entering the disc space and removing any other

[18]fragments that you can retrieve.

[19]When you enter a disc space you are

[20]doing it blindly, you are reaching in with an

[21]instrument, you are moving it forward and moving it

[22]to sideways, and you are trying to retrieve whatever

[23]will come out. There is no way, even with the

[24]microscope, you can look into the disc space and say

[25] **[*46]** there are no more fragments that might come out in

[51]

[2]five minutes or an hour or three days. You are

[3]obligated to be sure that the nerve root is

[4]decompressed when you are done.

[5]If you choose to enter the disc

[6]space you're obligated to remove what you can

[7]retrieve, but there is no way that you can be sure

[8]that another fragment is not just sitting there and

[9]ready to pop out.

[10]Q Dr. Butler testified his custom and

[11]practice was to go in, into the disc space, pull any

[12]material that could come out and then when he's

[13]satisfied all the material is out that's when he's

[14]finished with the disc space. You are aware of that?

[15]A Yes.

[16]Q Now, doctor, is there any other area

[17]that a disc fragment can be, other than the disc

[18]space or compressing on the nerve?

[19]A It can be herniated very far toward the

[20]middle, away from your field. It could be herniated

[21]very, very far laterally which is out of your field.

[22]Q Which this was a lateral herniation?

[23]A Yes.

[24]Q It was far lateral?

[25]A It was a far lateral component. **[*47]** This was
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[52]

[2]a lateral disc herniation.

[3]Q A lateral disc herniation.

[4]You could have a disc fragment

[5]that's not compressing on the nerve and not in the

[6]disc space that is not taken out?

[7]A Correct.

[8]Q The longer that that -- in assuming that

[9]that fragment that is left in eventually decompresses

[10]--

[11]MR. DEMARIA: Objection.

[12]THE COURT: Overruled.

[13]Q (Cont'g) eventually compresses the

[14]nerve, the longer the compression, the more chance

[15]of permanent damage to the nerve?

[16]A I don't understand the statement.

[17]Q Let's assume a surgeon goes in, surgeon

[18]does a removal of the fragments, not the disc space

[19]but from an area not disc space and not compressing

[20]on the nerve, okay, that disc, that fragment then

[21]compresses after the surgery is over, shifts, moves,

[22]migrates and now compresses the nerve root. Okay?

[23]A Yes.

[24]Q The longer that compression, the longer

[25]the chance, the higher the risk of permanent damage

[2]to the nerve?

[3]A **[*48]** I would have to answer it the same way as

[4]I did before, yes.

[5]Q Now you are aware that Dr. McCormick in

[6]1997 used a microscope during the surgery?

[7]A Yes.

[8]Q Is it your testimony that at Columbia

[9]Presbyterian back in '97 that wasn't the standard of

[10]general practice?

[11]A I don't think I could answer that

[12]question with any personal knowledge.

[13]Q You had testified to an opinion with

[14]respect to prophylactic antibiotics?

[15]A Yes.

[16]Q You indicated that there are important

[17]factors in determining whether or not to administer

[18]antibiotics prophylactically?

[19]A There are factors. I'm not sure what

[20]important means.

[21]Q One of the things you had indicated were

[22]the circumstances and/or the condition of the

[23]patient?

[24]A The local wound circumstances, and the

[25]condition of the patient, and the length of the

[2]surgery I think were the major ones.

[3]Q Doctor, would you agree with me that if a

[4]patient is bedridden, and the patient hasn't been up

[5]and walking around, and the patient **[*49]** has been in the

[6]hospital for a week, that that patient is more

[7]susceptible to infection, than a patient who would

[8]come in the day of the surgery, take the surgery, and

[9]be done, would that be fair to say?

[10]A I don't think I'm qualified to answer

[11]that question. I cannot agree or disagree. I don't

[12]think I can answer.

[13]Q Is it because of the way I asked it?

[14]A I don't think I have the knowledge to say

[15]that that's the case.

[16]Q Fair enough.

[17]You also gave an opinion with

[18]respect to Dr. Butler not performing an incision and

[19]drainage when Mr. Furey had developed the wound

[20]infection, right?

[21]A Yes, I did.

[22]Q Are you aware that prior to Mr. Furey

[23]being readmitted for the staph infection, that the

[24]wound had been oozing and there had been pus like

[25]discharge?

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[2]A That was observed by his wife, I believe,

[3]the day of or the day before surgery, yes.

[4]Q Would your opinion as to whether or not

[5]incision and drainage was indicated be based at all

[6]on the duration of oozing symptoms from the wound? **[*50]**

[7]A That would be one factor but not the only

[8]factor.

[9]Q The reason to do an incision and

[10]drainage, one of the reasons, would you agree, is to

[11]avoid having prolonged antibiotic treatment?

[12]A No.

[13]Q Is it fair to say when you do an incision

[14]and drainage successfully that you would be able to

[15]take antibiotic treatment that didn't involve

[16]intravenous?

[17]A No, I disagree with that.

[18]Q What about, doctor, when you perform

[19]these surgeries, do you use, when you are finished

[20]with the surgery, do you use, do you irrigate the

[21]area with antibiotic solution?

[22]A Usually, yes. I'm sorry 1997, no.

[23]Q You didn't do it in '97?

[24]A I wasn't doing that in 1997, no. We

[25]weren't routinely using antibiotic in a clean wound,

[56]

[2]in 1997.

[3]Q Doctor, if I told you that Dr. McCormick

[4]quote " the wound was then copiously irrigated with

[5]an antibiotic solution" when he performed his

[6]surgery, would that change your opinion?

[7]A No. People did it and I do it all the

[8]time now. I don't **[*51]** believe in 1997 I was doing it.

[9]Q Is that based on your memory?

[10]A Yes.

[11]Q You don't have any?

[12]A I can't give you an exact date but the

[13]point I'm making again, even today there is not a

[14]standard that requires it. I don't disagree with Dr.

[15]McCormick doing it. I do it. There is not a

[16]standard that you must irrigate with an antibiotic

[17]solution. When you do irrigation with saline to wash

[18]out any debris that may be in the wound is still felt

[19]to be adequate. I happened to use antibiotic

[20]solution. I have no idea if it makes any difference.

[21]Q If you use it now, you think it's better

[22]practice?

[23]A I don't think it's bad practice. I don't

[24]think it's wrong not to in a clean wound. We're

[25]differentiating between a wound that has been opened,
57

[2]a wound that has hardware in it like a fusion when

[3]you have a long operation because you are doing a

[4]fusion where you are concerned about infection.

[5]In a short operation, I doubt that

[6]there is any significant difference in irrigating

[7]with saline or antibiotic solution **[*52]** at the end of the

[8]case in terms of the outcome.

[9]Q Dr. McCormick's surgery was the same

[10]amount of time as Dr. Butler's surgery?

[11]A Yes.

[12]Q From reading of Dr. Butler's Operative

[13]Report, did Dr. Butler use any antibiotic solution

[14]prior to closing Mr. Furey?

[15]A I don't believe he did, not that I

[16]recall.

[17]Q Now, doctor, over your years of

[18]performing surgeries, you prepare Operative Reports?

[19]A Yes.

[20]Q You prepared the Operative Report

[21]immediately after the surgery, right?

[22]A I try to, yes.

[23]Q The reason you do that, it's very

[24]important, right, to do that?

[25]A Yes.

58

[2]Q It's important because it's important for

[3]the continuity of the care of the patient, right?

[4]A I suppose you can put it that way. I

[5]wouldn't disagree with that.

[6]Q When you perform surgery, it's very

[7]important to know, it's crucial to the patient's

[8]health in some instances to note exactly what you did

[9]and exactly what you observed, correct?

[10]A Yes.

[11]Q And-- **[*53]**

[12]A It may be, yes. It may be crucial and

[13]may not make any difference.

[14]Q You don't know?

[15]A Right.

[16]Q You don't know what's going to happen to

[17]this patient after surgery and you don't know what's

[18]going to happen to you after surgery, knock on wood.

[19]I don't want anything to happen. God forbid

[20]something happened to you after the surgery, okay,

[21]you didn't dictate an Operative Report, something

[22]happens to you, no one will no what the findings

[23]were, what took place at the surgery, correct?

[24]A For the most part, yes.

[25]Q Any other treating doctor who may treat

59

[2]the patient down the road for the rest his life would

[3]have to know exactly what was found, it could

[4]potentially be important, right, down the road?

[5]A Correct.

[6]Q That's why you do the Operative Report as

[7]close to the surgery as you can, right?

[8]A Yes.

[9]Q And today you dictate those Operative

[10]Reports right after the surgery, right?

[11]A I always try to if I have the time and if

[12]I remember and there is no **[*54]** other extenuating factor

[13]like an emergency or something.

[14]Q Barring any emergency, if you performed

[15]the surgery, and you finish it, you tell me, what

[16]reason would you have not to do it right then and

[17]there?

[18]A None.

[19]Q Now, back in 1997, was the same thing?

[20]A Same answers, yes.

[21]Q Back in 1997 you dictated Operative

[22]Reports?

[23]A Yes.

[24]Q Now the Operative Report is also

[25]important because everybody's anatomy is different,
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[2]right, you just told us about?

[3]A To a certain degree.

[4]Q You go into someone's spine, everyone's

[5]spine will be different, they may have stenosis?

[6]A Yes.

[7]Q Or narrowing of their canal to a certain

[8]degree?

[9]A Yes.

[10]Q I may have great narrowing and you may

[11]not have as much?

[12]A Yes.

[13]Q Okay?

[14]A Yes.

[15]Q Fair enough.

[16]There may be other things with

[17]respect to the anatomy that would be very important

[18]to note. No one is the same, you would agree with

[19]that?

[20]A Yes. **[*55]**

[21]Q Even the people have different ligamentum

[22]flavum?

[23]A Yes.

[24]Q People have different size foramens?

[25]A Yes.

[61]

[2]Q You are aware here that Dr. Butler

[3]dictated this report months later?

[4]A Two months. I don't remember the exact

[5]date.

[6]Q The exact date, according to the record,

[7]is March 15.

[8]Knowing that, would--

[9]You have already told us that you

[10]based the majority of your opinions on what you read

[11]in Dr. Butler's Operative Report.

[12]MR. DEMARIA: I didn't hear "majority

[13]of opinion".

[14]Q I'll withdraw "majority".

[15]We went through the opinions. Is

[16]your opinion at all based on the fact Dr. Butler in

[17]his Operative Report stated that he removed all the

[18]fragments?

[19]A The major concern from the Operative

[20]Report is the statement that the nerve root was free

[21]and movable. I think he said as normal or something

[22]like that.

[23]Q That was the main-- that is the main
i

[24]portion of his Operative Report that you are relying

[25]on?

62 **[*56]**

[2]A I think that's the most important goal of

[3]the operation and that statement is appropriate,

[4]yes.

[5]MR. ODDO: I have nothing further.

[6]Thank you, Your Honor.

[7]THE COURT: Redirect?

[8]REDIRECT EXAMINATION

[9]BY MR. DEMARIA:

[10]Q A few questions, doctor.

[11]What is a re-operation?

[12]A Going back to do the same thing that you

[13]have done before.

[14]Q Was the surgery that was performed by Dr.

[15]McCormick on October 7, 1997, was that a

[16]re-operation?

[17]A Yes.

[18]Q And would a microscope be customarily

[19]used during performance of re-operation?

[20]A It's more likely that one, more likely

[21]that I might use a microscope in a re-operation.

[22]Q Why?

[23]A Because you would anticipate scar tissue

[24]there.

[25]Q Why does the presence of scar tissue --
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[2]withdrawn--

[3]Does the presence of scar tissue at

[4]a re-operation affect the ability of the surgeon to

[5]visualize certain structures?

[6]A It does because once you have had

[7]surgery, normal anatomy, normal landmarks you know to

[8] **[*57]** look for as a surgeon aren't there and your goal is

[9]to find normal anatomy and occasionally it requires

[10]more magnification. If I'm doing a re-operation and

[11]I just don't feel comfortable, I'll bring in the

[12]microscope. It's sitting in the room and I can roll

[13]it in.

[14]Q Now you told Mr. Oddo that elevated

[15]temperatures may be related to infection and that

[16]would be a concern of yours as a surgeon. I would

[17]look at other pieces of information to determine

[18]whether the temperature elevations were significant.

[19]What other pieces of information?

[20]A The patient, the patient's condition,

[21]whether there was any evidence on the chest x-ray of

[22]infection, which there wasn't, whether there was any

[23]other issue that would grab my attention.

[24]Q Would that information that you would be

[25]interested in determining, would that be information
64

[2]that would be noted and recorded by nurses and other

[3]doctors in the Progress Notes?

[4]A Among other things, yes.

[5]Q If Dr. Butler testified that he reviewed

[6]the Progress Notes in the hospital **[*58]** chart from

[7]admission to the time he saw Mr. Furey at the time of

[8]surgery, do you have an opinion whether that would

[9]provide him, would have provided him with the

[10]information he needed to determine whether or not the

[11]temperature elevations were significant or not?

[12]A I think it would have been an important

[13]components.

[14]Q Would you have approached whether the

[15]temperature elevation were significant or not in the

[16]same fashion?

[17]A Yes.

[18]Q Do you, as the surgeon, rely on the

[19]observations and monitoring of the patient done by

[20]others, when the patient is on the floor before come

[21]to the Operating Room?

[22]A Yes.

[23]Q Now on questioning you about the white

[24]blood count, you indicated, if I had a reason to get

[25]it, I would want to repeat the white blood count in
? 0
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[2]this case, the information available would lead me to

[3]conclude it was appropriate to go forward with the

[4]surgery.

[5]What information available?

[6]A What we've been talking in all the

[7]questions concerning the area. The clinical

[8]information, **[*59]** the chart information, the patient, all

[9]of that, and also the need for the surgery.

[10]Q Now you indicated that Mr. Furey's left

[11]leg pain got better postoperatively.

[12]That was not consistent with a

[13]fragment having not been removed along with wording

[14]in the Operative Report; correct?

[15]A Yes.

[16]Q What wording of the Operative Report?

[17]A There was specific mention by Dr. Butler

[18]that when he was done he was able to move the nerve

[19]root freely, I think the terminology was as normal,

[20]there was no more compression in the operative field

[21]of the nerve root.

[22]Q Doctor, in determining whether or not

[23]the goal of surgery had been accomplished, what

[24]significance, if any, was there about the straight

[25]leg raising examination that was performed on
66

[2]February 13?

[3]A Straight leg raising had been positive

[4]for leg pain at fifteen degrees on February 13. It

[5]elicited back pain but no complaints of leg pain.

[6]The back pain certainly was related to straight leg

[7]raising being positive but positive for back pain.

[8]In this **[*60]** case with infection more than likely related

[9]to that.

[10]The lack of positivity for the

[11]radiation of the pain down the leg is a good

[12]indicator there was no more compression of the nerve

[13]root by a disc fragment.

[14]Q You also indicated, in reference to the

[15]incision and drainage, that the length of the oozing

[16]was a factor in determining whether to perform an

[17]incision and drainage.

[18]What are the other factors?

[19]A What it looks like and how it responds to

[20]the antibiotics.

[21]Q Based upon your review of the charts and

[22]the entries made by Dr. Seymour, would you

[23]characterize for the jury how the wound progressed

[24]during the course of the admission?

[25]A It responded very rapidly to the
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[67]

[2]administration of antibiotics.

[3]Q To perform an incision and drainage under

[4]those--

[5]A It's not an indication to perform that.

[6]Q What antibiotic treatment would Mr. Furey

[7]have received, if an incision and drainage had been

[8]performed?

[9]A Exactly the same antibiotic treatment he

[10]had without having **[*61]** it performed.

[11]Q Why would that be?

[12]A You still have to deal with the infection

[13]and somewhere between two and four weeks of the

[14]combination of intravenous intramuscular and oral

[15]antibiotics is indicated whether he had an incision

[16]and drainage or whether it was treated without the

[17]incision and drainage.

[18]Q If you were to look at an Operative

[19]Report dictated by you from 1997 and if you had

[20]dictated that the nerve root was freely mobil, would

[21]you be able to testify in 2006 that the goal of that

[22]surgery was accomplished?

[23]A Yes, I would be able to.

[24]Q Why would you be able to do that?

[25]A If you asked me about a patient, Charlie
68

[2]Smith, I operated on in 1994, I couldn't remember the

[3]patient, couldn't remember. I could with an absolute

[4]degree of certainty state that in the Operative

[5]Report would be an indication the nerve root no

[6]longer was compressed when I completed the surgery

[7]because every operation I do on a disc to decompress

[8]a nerve root ends when I have achieved that.

[9]I can state with **[*62]** certainty on any

[10]disc operation I've done, that at the end of the

[11]operation that was the status. Whether I could

[12]remember the operation, the patient, or anything, I

[13]know that that's true.

[14]Q Did you have any reason to believe that

[15]the wording by Dr. Butler in his Operative Report was

[16]any less worthy of belief?

[17]A No, I would not.

[18]MR. DEMARIA: Nothing further.

[19]RECROSS EXAMINATION

[20]BY MR. ODDO:

[21]Q Doctor I'm trying to understand your last

[22]answer.

[23]MR. DEMARIA: Objection, Your Honor.

[24]THE COURT: Continue.

[25]Q It was your testimony that it wasn't your
69

[2]testimony you could remember everything you did

[3]during the surgery?

[4]A Correct.

[5]Q But it's your testimony that if you did

[6]the surgery properly, you would be able to tell what

[7]the results were?

[8]A If I did the surgery the nerve root would

[9]be decompressed. You don't need the word "properly".

[10]MR. ODDO: Thank you.

[11]Nothing further, Your Honor.

[12]MR. DEMARIA: No further questions.

[13]THE COURT: You may step down.

[14]We've heard all **[*63]** the testimony we're

[15]to hear today. It's unexpected as to how

[16]long the questioning may take. It went

[17]relatively quickly, more so than we

[18]thought.

[19]We have a witness for tomorrow

[20]morning at 9:30. Please return tomorrow

[21]at 9:30 to hear the final witness of this

[22]case.

[23]Do not discuss the testimony you

[24]heard so far.

[25]Do not form any opinions. There is
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70

[2]still testimony to be heard. You have to

[3]hear the Summations and the Charge to you

[4]on the law from the Court.

[5]Please be back here at 9:30 tomorrow

[6]morning.

[7]Thank you very much.

[8](Whereupon, at this time, the jury

[9]was excused for the evening.)

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