Dr. Guy 6 62 Teron

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CIVIL TERM: PART 19

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STEPHEN BROOKS,

Plaintiff,

ENTERED

-against-

CATHOLIC MEDICAL CENTER of BROOKLYN and QUEENS, INC. and JOHN ROE DENTON, M.D.,

Defendants.

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Index No. 11349/90

June 15, 1995
15 Willoughby Street
Brooklyn, New York 11201

B e f o r e:

HONORABLE JULES L. SPODEK, Justice

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Official Court Reporters

THE COURT: Good morning. Counsel, you want to call your witness?

MR. SPEVACK: Plaintiff calls Dr. Ali Guy to the stand.

THE COURT: Members of the jury, we're taking a witness out of turn to suit the convenience of the lawyers and the witnesses.

A L I G U Y, M.D., called as a witness by the Plaintiff, upon having been duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Your name, please?

THE WITNESS: My name is Dr. Ali Guy.

A-L-I G-U-Y.

THE CLERK: Home address, please.

THE WITNESS: Home address?

THE CLERK: Yes.

THE WITNESS: 7 Gramercy Park, New York, New York, 10003.

THE CLERK: You want his home address? You want the doctor's home address?

THE WITNESS: 14 Thomas Street, Scarsdale, New York.

THE COURT: So your mother was clairvoyant. She named you doctor.

Is that your first name?

THE WITNESS: That's what I call myself.

THE COURT: That's your real name?

THE WITNESS: My name is Ali.

THE COURT: When you were asked for your name you said "Doctor."

What's your name?

THE WITNESS: Ali Guy.

THE COURT: That's what we're interested in.

DIRECT EXAMINATION

BY MR. SPEVACK:

Q Good morning, Dr. Guy.

A Good morning.

Q Are you a physician -- well, I'll ask the question first.

Are you a physician duly licensed to practice medicine in the State of New York?

A I am.

Q When were you so licensed?

A 1985.

Q Dr. Guy, please tell the jury briefly a little bit about your medical training and your career in medicine.

A The undergraduate training, I attended Queens College.

Medical school I attended University of Northeast in the Dominican Republic.

I started my residency in the field of internal medicine at Mount Sinai School of Medicine.

In 1982, I did 18 months of internal medicine. I did one year of general surgery at Cabrini Medical Center. Three years of physical medicine and rehabilitation at Mount Sinai Medical Center.

I'm Board certified in the field of physical medicine and rehabilitation.

I'm on staff at Cabrini Medical Center and Hospital for Joint Diseases Orthopedic Institute. I'm the director of the Neuromuscular Department in the clinic at the Hospital for Joint Diseases.

Q Doctor, what is physical medicine and rehabilitation?

A The field of physical medicine and rehabilitation is a medical specialty started shortly

after World War II.

THE COURT: Is that a subspecialty of internal medicine?

THE WITNESS: No.

A It's a separate medical specialty. And it deals with various medical, orthopedic, neurological problems, such as birth defects, amputation, strokes, internal medicine problems, orthopedic and neurological problems.

The majority of the patients that a specialist in this field deals with are traumatic injuries.

We rehabilitate traumatically injured patients, whether the trauma is from a car accident, from a sports injury, from spinal surgery, from tumors, from polio, from low-back pain, et cetera.

We are not considered orthopedic surgeons, nor neurologists. Our title is called a physiatrist. And we don't do surgery. We try to prevent surgery, prevent patient from undergoing surgery, especially in lower-back problems.

Q And, Doctor, you said that you are -- what is your credentials in the area of physical medicine?

A I'm a diplomate and a fellow of the American

Board of Physical Medicine and Rehabilitation.

Q Very good, Doctor.

Doctor, did I ask you to examine Mr. Brooks?

A Yes.

Q In connection with this lawsuit?

A Yes, you did.

Q And is it fair to say that you only examined him on one occasion for me?

A That is correct.

Q And did I ask you to examine him to give an assessment of his condition?

A Yes, you did.

Q Doctor, you're not here to testify with regard to any aspect of the quality of care that he received from any of the defendants or anyone; is that correct?

A That is correct. Strictly to comment on his physical condition, present condition.

Q Before or contemporaneous with the examination, did you have an opportunity to review any medical records?

A Yes.

Q What did you review?

A I reviewed medical records from Columbia Presbyterian Hospital and medical records from the Helen Hayes Hospital.

Q And just very briefly, Doctor, can you just tell us what your understanding of that was of his past medical history as it pertains to your examination?

A Basically, he's a 64-year-old gentleman with no significant past medical problems. He presented with lower back pain, later found to be osteomyelitis of the seventh thoracic vertebra. And he became paraplegic, and then later became paraparetic. He regained some of his strength back.

Initially he was wheelchair confined. Later he was able to improve his ability to walk but only for short distance.

Q When did you see the patient?

A The first time I saw him was on 3/9/94.

Q And did you make notes of your examination?

A I did.

Q And did those notes accurately reflect your examination?

A Yes.

Q Can you tell us basically what your examination

consisted of?

A Basically the patient was disrobed. I examined his neck, his back. I took his blood pressure. I listened to his heart, listened to his lungs. I checked his range of motion. I checked his muscle power strength. I checked his neurological condition, his sensation, the way he walked.

Q What did you find?

A With reference to all of those above parameters?

Q Yes.

A That he had a few scars on his back right side, left side, left flank;

That his strength in the lower extremities was approximately 4 over 5, which is approximately three grades weaker than normal;

That he walked, was able to walk for a short distance, but only with a very spastic gait. Spastic means you have increased tone in your legs, so you don't have that fine movement and coordination. And he had some sensation in his legs. And there was some reflex abnormality, as well.

Q Doctor, did you, at that time, did you describe how he was able to ambulate; and by that I mean, did he

need any devices?

A Yes, he did.

THE COURT: What was the date of this examination?

THE WITNESS: 3/9/94.

A He was able to walk very slowly -- his gait was slow and antalgic, spastic -- with the use of a straight cane.

Q Did you form an impression as to what his condition was at that time?

A I did.

Q What was your opinion?

A He was suffering from a condition known as osteomyelitis of the thoracic spine with a paraparesis.

He was suffering from traumatic myofascial pain syndrome, which means destruction to the muscle fibers.

He was suffering from a bilateral lumbosacral radiculopathy. That's damage to the nerve roots in the lower back.

And also he was status-post decompression surgery with vertebrectomy.

THE COURT: You want to tell us what that is, sir?

MR. MARULLI: Judge --

A Removal --

MR. MARULLI: May we approach?

THE COURT: You may.

THE COURT: Definitely sustained. The jury will disregard the part about the radiculopathy. The objection is sustained.

Q Doctor, you can finish, with the Court's permission, the rest of your findings.

A That he was status-post neurogenic bowel and bladder with complete recovery. And status-post spinal osteomyelitis.

Q What is status-post neurogenic bladder?

A It means -- the condition "neurogenic" is when the nerve endings to the bladder which controls the voiding mechanism -- the bladder is where the urine is connected -- that mechanism has been damaged so there is no proper nerve supply to the bladder to make you void urine.

That was ~~later~~ improved with complete recovery.

Q So he can --

THE COURT: That's like he never had any problem?

THE WITNESS: That's correct.

Q Doctor, other than that, that you said cleared up completely, did you have an opinion as to what his prognosis was?

A With reference to his overall functional ability?

Q His overall functional ability, yes.

A My opinion is that he's left with a permanent partial disability. He's totally disabled for any type of a gainful occupation.

Q Did you have an opinion as to a prognosis specifically with his ability to walk?

A Yes. When I examined him, it was in 1994. The problem started sometime in '87. So I examined him approximately seven years later.

So my opinion is if any further improvement was going to come in, would have come in by that time. So whatever you see now, he's left with that permanent disability.

Q Doctor, can you explain for us briefly just physiologically what causes his difficulty in ambulating?

A Well, he has the spasticity which means increased tones in the lower extremities. His muscles

are still weak. He has also a tremendous amount of rigidity from the surgeries that were done, taking all those three conditions together preventing him from normal ambulation having normal strength.

If he stands for any prolonged period of time, his knees begin to buckle and he fatigues easily, especially because of the spasticity.

MR. SPEVACK: Thank you, Doctor.

THE WITNESS: You're welcome.

CROSS EXAMINATION

BY MR. YANKOWITZ:

Q Good morning, Doctor.

A Good morning.

Q My name is Arthur Yankowitz. I'm the attorney from the firm of Shaub, Ahmuty, Citrin & Spratt. We represent Catholic Medical Center in this action.

Doctor, you examined the patient back in March, 1994, correct?

A Correct.

Q And you examined the patient pursuant to the request of Mr. Spevack's office, correct?

A That's correct.

Q And when you examined the patient, did you

review any bill of particulars?

A I did not.

Q When you examined the patient, isn't it true that Dr. DeAngelis and Dr. Linkoff were still defendants in this action?

A I have no idea. That was not the scope of my evaluation.

Q You didn't know who the defendants were in this case?

A No, I did not.

Q Doctor, did you review the Mary Immaculate Hospital records before testifying here today?

A Briefly.

Q Did you review Dr. Linkoff's record before testifying here today?

A No.

Q Did you review Dr. DeAngelis' record before testifying here today?

A Partially.

Q Did you review Dr. Denton's record before testifying today?

A I did not.

Q Okay.

Doctor, how much are you being compensated for being in the courtroom today?

A For canceling my patients, including pre-trial conference and time and court today, altogether $4,000.

MR. MARULLI: Move to strike.

THE COURT: The motion to strike is granted. The jury will disregard the entire answer. The reporter will read back the question.

Doctor, listen to the question and just answer the question.

If you don't understand the question, please tell me.

(Reporter read back the requested portion of testimony.)

A A total of $4,000.

Q And when you examined the patient back in March of 1994, how much were you paid then?

A 550.

Q Doctor, did you bring with you any records?

A I did.

Q May I too take a look at them?

A Sure.

MR. YANKOWITZ: May I approach the witness, your Honor?

THE COURT: You may.

(Mr. Yankowitz approaches the witness.)

Q Doctor, you testified before in a courtroom?

A I have.

Q And you reviewed cases before and did physical examinations for attorneys?

A I do.

Q Doctor, did you ever give copies of these records to Mr. Spevack's office?

A I do.

Q You did?

MR. YANKOWITZ: Your Honor, defense counsel never received any of these. I was only able to look at it this morning.

May I have a moment to take a look at it?

THE COURT: You may.

Q Doctor, when Mr. Brooks went to your office in March of 1994, he signed some documents for you; is that correct?

A Assignment of benefits.

Q Yes. Did he sign that?

A Yes.

Q Did you go over that with him?

A I did not.

Q Did someone in your office go over that?

A Usually the office manager goes over that with the patient.

Q And you would not let someone in your office let someone sign something unless he read it; isn't that correct?

A That's the normal pattern, yes.

Q And you also have here a document which -- with the signature -- can you tell me what this document is?

A This is standard lien policy to protect any medical bills unpaid in case there are any outstanding medical bills. But there were no outstanding medical bills.

Q So, Doctor, when you examined Mr. Brooks, you had a monetary interest in the outcome of this case; isn't that correct?

A That's true.

Q Well, Doctor, were you paid up front for the physical examination?

A Yes.

Q When were you paid for the physical examination?

A I believe the same date.

Q Well, Doctor, when you examined Mr. Brooks in March of 1994, you took a history from him; is that correct?

A That's correct.

Q And you also took a history from your review of the record; is that correct?

A That is correct.

Q And the first page and a couple of lines of your physical examination report discusses the history from the review of the various records you looked at, correct?

A That is correct.

Q And in the records that you looked at, it said somewhere that the patient had neurogenic urinary bladder and bowel with complete recovery; is that correct?

A That is correct.

Q What did Mr. Brooks tell you regarding the history concerning his bowel and bladder?

A The only history that I was interested in was --

Q My question is what did he tell you. Not what you're interested in; what did he tell you?

A That there was no problem with that area.

Q Where does it say he had no problem with that area?

A The mere fact that it's not listed.

Q Okay. Well, Doctor, if I told you that Mr. Brooks testified that he never had any problem with his bowel in the courthouse yesterday, that would be an incorrect history; would that be correct?

MR. MARULLI: Correction, three days ago.

Q Three days ago. I'm sorry.

A That he had no problem with his bowel ever?

Q Correct. That would be incorrect history?

A If that's what he said, and the records show that earlier there was a problem, yes, that would be inconsistent.

Q And doctors rely on histories from patients when they examine them; isn't that correct?

A For the most part, yes.

Q I'm not talking about coming into the courtroom and giving testimony. I'm talking about --

A That's what I'm talking about.

Q Let me finish the question. I'm talking about when you're examining the patient, someone walks into the office and tells you A, B, C, D, the doctor is relying on

what the patients tell them; isn't that correct?

A To a degree, yes.

Q Well, Doctor, your note indicates regarding some portion of the history that the patient began having the complaints of pain in the summer of 1987.

Isn't it true that the complaints of pain in the patient's back began around June of 1987?

A Could be. That's what I have in my record. June, July. Summer. In my opinion, close enough.

Q So you don't have the exact date of when it began in this record, do you?

A I do not.

Q So the summer could have been at the end of May, too, potentially?

A In my opinion, summer. At the end of summer is sometime in August.

THE COURT: I always learned when I went to school that summer began June 21st, and it ended on September 21st. And spring was before June 21st, at least according to the way the sun and the earth reacted to each other.

Q So summer is sometime, with his Honor's judicial notice, sometime in the end of June of 1987; is that

correct?

A Yes.

Q So the patient had complaints concerning his back since the end of June of 1987; isn't that correct?

MR. SPEVACK: Objection to the form.

THE COURT: Sustained.

Q Doctor, in your report, you come to certain opinions in the end; isn't that correct?

A Yes.

Q And part of your opinion was that the patient needs physical therapy; isn't that correct?

A On an as-needed basis.

Q To prevent contractures and further weakness of the lower extremities?

A Yes.

Q Did you tell that to Mr. Brooks?

A I believe I did. I also put it in his report.

Q Did you tell that to his lawyers?

A It's in his report. His lawyers got it.

Q Did you speak to his lawyers on the phone?

A At the same time I saw the patient that particular day or later?

Q Or a couple of days later, or a couple of weeks

later?

A It may have been a few days, a few months later.

Q So it was your recommendation that this patient, who potentially improved his condition, should undergo physical therapy?

A On an as-needed basis.

Q Are you aware if Mr. Spevack told Mr. Brooks to go for physical therapy to improve his condition?

MR. SPEVACK: Objection.

THE COURT: Overruled.

A No, I have no knowledge of that.

MR. YANKOWITZ: Thank you, Doctor.

THE WITNESS: You're welcome.

THE COURT: Mr. Marulli.

CROSS-EXAMINATION

BY MR. MARULLI:

Q Good morning, Doctor.

A Good morning.

Q My name is Gerard Marulli. I represent Dr. Denton who is sitting here in the courtroom, and I'm going to be asking you some questions. If you don't understand the question, let me know. Okay?

A Sure.

Q Now, Doctor, you testified to this jury that as part of the things that you do is to prevent, quote "prevent surgery." And I mean you know, as a doctor, that sometimes surgery is necessary, correct?

A That is correct.

Q But you try to manage patients conservatively?

A That is correct.

Q So that they don't have to undergo the risks and complications of surgery, correct?

A That is correct.

Q Because, Doctor, would you agree with me that even if you have the most skillful surgeon doing the most skillful surgery, right, you can still have risks and complications, correct?

A That is correct.

Q And sometimes even when surgery is done correctly, a patient dies, correct?

A That is correct.

Q A patient can die, a patient can be rendered paraplegic; correct?

A That is correct.

Q There is a whole panoply of complications and risks that can occur to a patient during surgery even

when it's done most skillfully, correct?

A That is correct.

Q And so you try to do your job, you try to prevent surgery if possible so these patients don't have to face the risks, and some of those risks are terrible, correct?

A That is correct.

Q Now, you were paid to do a physical examination $550, and they paid you the same day as the exam, correct?

A Yes. That's pretty much correct.

Q Now, you got $4,000 on June 13th, and if you can't remember, look at your chart?

A That sounds -- That's correct.

Q You got that last week?

A That's correct.

MR. YANKOWITZ: Two days ago.

THE COURT: Two days ago. This week.

MR. MARULLI: Two days ago.

Q Doctor -- withdrawn.

Doctor, Mr. Spevack spoke to you either in person or on the phone and discussed what you were going to say to this jury before he paid you that money,

correct?

A No. That's not correct.

Q Are you saying --

A I spoke to Mr. Spevack yesterday for the first time regarding this case.

Q They sent you a check, and then you just spoke to him about the case?

A That's correct.

Q Did they have any idea what you were going to say today?

A Who?

Q The plaintiff's attorney.

A It's in my record.

Q It's in your record?

A That's correct.

Q Let's talk about your record.

Now, Doctor, when you examined the patient -- now, you didn't examine this patient to treat him, to make him better; you examined this patient because a law firm asked you to, correct?

A That is correct.

Q And you knew, sir, that some day, sometime in the future you might be called upon to testify in a court

of law as you're doing before this honorable judge and before this jury?

A There is always that possibility, yes.

Q Yes. And you were prepared to do that when you took upon yourself the obligation and the responsibility to examine the patient, correct?

A That thought of testifying in court never crossed my mind. I was trying to render an impartial evaluation on the case.

THE COURT: I'm sorry.

MR. YANKOWITZ: Objection move to strike.

THE COURT: The motion is granted.

This Court never hired you?

THE WITNESS: No.

THE COURT: The defendants never hired you?

THE WITNESS: That's correct.

THE COURT: The defendants aren't paying your fee?

THE WITNESS: That's correct.

THE COURT: The plaintiff is paying your fee?

THE WITNESS: Yes.

THE COURT: You knew that the plaintiff is paying the fee?

THE WITNESS: Yes.

THE COURT: You knew that your report was in connection with a lawsuit that was pending?

THE WITNESS: That is correct.

THE COURT: The plaintiff's lawyer told you that?

THE WITNESS: That's correct.

THE COURT: He didn't tell you to do an impartial? He told you that he wanted a report?

THE WITNESS: I try to do an impartial.

THE COURT: That's what you try to do is one thing. But you were not hired to do an impartial, were you?

THE WITNESS: I call it impartial.

THE COURT: I'm not saying what you call. If a judge calls you to do a physical for the court, you're called to do an impartial.

THE WITNESS: Okay.

THE COURT: If the two lawyers agree for you to examine a patient, you do an impartial,

true?

THE WITNESS: Yes.

THE COURT: If one side and not the other side asks you to do an examination, that's no longer impartial so far as that lawyer is concerned; isn't that true?

THE WITNESS: Yes.

THE COURT: All right. Go ahead.

Q Doctor, you've testified before, have you not?

A I have.

Q And you've testified for plaintiffs' attorneys before?

A I testified for both sides.

Q Both sides?

A Yes.

Q You're sure about that?

A Yes.

Q How many times have you testified in the last five years?

A On the average, I testify about seven to ten times a year.

Q Seven to ten times a year?

A That's right.

Q So you testified from 35 to 40 times per year, correct?

A In '85, '86, '87.

THE COURT: I think your arithmetic is wrong, Mr. Marulli.

Sustained.

MR. MARULLI: I'm sorry.

Q You've testified 35 to 45 times over the last five years more or less?

A Yes, more or less.

Q Are you saying you testified for a defendant, on behalf of a defendant, in the last five years?

A I have.

Q Well --

MR. MARULLI: With the Judge's permission.

Q Do you remember testifying in the case of Crumes v. Santillo in Supreme Court, New York County before Judge Rose, and the plaintiff's attorney was Crispi, James Crispi, of Frank Mangiatordi's office?

And you testified and you were paid by the plaintiff in that case, were you not?

A Yes.

Q And do you remember the case of Moran v.Weiner?

It was before Judge Coppola in Westchester, and the plaintiff's attorney was Sweeney & Calabrese.

And you testified on behalf -- you were paid by the plaintiff and testified for the plaintiff?

A That is correct.

Q And --

MR. SPEVACK: Objection.

THE COURT: Overruled.

Q Doctor, the case of Perez v. Con Edison, that was before Judge Phyllis Gangel-Jacob, New York Supreme Court.

THE COURT: Gangel.

MR. MARULLI: Gangel. I'm sorry, Judge.

I mispronounced a colleague's name, I apologize.

Q And you testified on behalf of the firm of Dinkes & Morelli? That's a well-known plaintiff's firm?

A Is that the case where the man died because of carbon monoxide?

MR. YANKOWITZ: Motion to move to strike.

THE COURT: Motion to move to strike is sustained.

If you don't understand the question, tell

me.

If you understand the question, answer it if you can.

If it calls for a yes or no answer, and you can answer it yes or no, please do so.

If the answer would be misleading or for any other reason you can't answer it yes or no, please tell us.

The questions are put by the attorneys. They have the right to ask the questions the way they choose to.

A I don't remember the names of the cases.

Q If you don't recall it, it's okay. And I will show this to you. Okay?

A Fine.

Q Do you remember the case of Durante v. Logan Plaza Associates against -- this is in the Bronx, Supreme Court in the Bronx, for a Tod Fichtelberg.

And again you testified and were paid by the plaintiff?

A Yes. I remember the case.

Q The case of Sarah Sales Odilo and Angelina Arias, Queens Supreme Court, in Queens County.

Do you remember testifying on behalf of a plaintiff's firm by the name of Jeffrey A. Block? It's for Jeffrey Block of Block & Ferro?

A Yes.

Q Let me --

Doctor, I'm going to show you these papers. You can go through these papers.

MR. MARULLI: May I approach the witness, Judge? I'm sorry.

Q And to make it easier for you, at the end of every case, it says plaintiff's expert and defendant's expert.

I'd like you to point to the jury one case, one case in that chart, where you testified for the defendant and not for the plaintiff?

MR. SPEVACK: Objection, your Honor.

THE COURT: Sustained. Sustained.

Q Doctor, are you aware that there wasn't a case that I could find on record from 1990 to 1995 where you testified for anyone but the plaintiffs' attorneys?

A That's because you don't have the complete records.

MR. MARULLI: Move to strike.

THE COURT: The motion is granted. The jury will disregard the answer.

The reporter will read back the question, and the witness will answer the question

(The court reporter read back the requested question.)

MR. SPEVACK: Note my objection before, your Honor.

THE COURT: Objection is overruled.

A The answer is, the way the question is phrased, the answer is yes, that I'm aware that they were all plaintiffs.

THE COURT: Have you testified before on behalf of defendants?

THE WITNESS: Yes.

THE COURT: In the courts of this state or any other state?

THE WITNESS: Yes, your Honor.

THE COURT: How many times have you testified for plaintiff, and how many times for defendant, approximately?

THE WITNESS: Majority has been for plaintiff, because I was a treating physician.

THE COURT: As a treating physician, you would, of course, be testifying for your patients, your own patients?

THE WITNESS: That's correct.

THE COURT: Now, with regard to being retained for the purpose of doing examinations and evaluations for attorneys that are involved in litigation, you've done that you say for both plaintiffs and defendants?

THE WITNESS: That's correct.

THE COURT: Certainly for plaintiffs as a treating physician?

THE WITNESS: Yes.

THE COURT: How many times have you been called upon to testify in those situations for the plaintiff, and how many times for the defendant?

MR. MARULLI: In the last five years?

THE WITNESS: The majority has been for the plaintiff. For defense, maybe a couple of times.

THE COURT: About two?

THE WITNESS: Two.

Q A couple of times in five years?

A That's correct.

Q Now, Doctor, we know that you, and you've told us, you didn't examine this patient to make him better, to help him? You did it because you knew a lawsuit was pending, correct?

A Well, I can answer that question as basically.

Q You did it to make a report for the plaintiff's attorney, and you were paid for that; is that correct?

A That's correct.

Q Now, even so, did you have an obligation to elicit as complete and thorough and accurate a history as possible?

A To the best of my ability, yes.

Q And would you agree with me that it would be equally important to get as many of the hospital records and past treating records as possible, so that you would be as accurate as possible in your prognosis, correct?

A Yes.

Q Now, Doctor, you told this jury on direct examination when Mr. Spevack asked you what you reviewed, you said, "I reviewed records from Helen Hayes Hospital and Columbia Presbyterian."

That's it?

A That's it.

Q Was that a truthful and honest answer when you told that to Mr. Spevack?

A As far as I can remember, yes.

Q When Mr. Yankowitz asked you a question when he specifically asked you, well, did you review the Mary Immaculate chart, you said partially.

A This morning. This morning.

Q You reviewed that this morning?

A That's right.

Q Now, let me just -- okay. I got you. You reviewed that.

And you were speaking to Mr. Spevack this morning?

A Yes.

Q You were discussing what you were going to say on the witness stand?

A We were discussing many things. We were discussing my findings.

MR. YANKOWITZ: Objection. Move to strike.

THE COURT: The motion to strike is granted.

The jury will disregard the answer. The reporter will read back the question.

Doctor, listen to the question. If you don't comprehend the question, tell us. If you do, just let us know.

(Reporter read back the requested question.)

A Are you asking me to explain?

Q I'm asking for a yes or no.

A I can't answer that with a yes or no.

Q You can't answer that yes or no?

A No, I can't.

Q In any event, Doctor, we set aside what you discussed with Mr. Spevack in preparation for trial. Let's talk about what you had before you did your report. All right?

A Now, you're asking me what I had before me at the time when I was doing the report?

Q When you did the report, okay?

A All right. Fine.

Q Doctor, you wanted this report -- even though the plaintiff was paying you, you wanted this report to be as accurate and thorough as possible, correct?

A To the best of my ability, yes.

Q And you had the ability to review records, medical and hospital records?

A Right. Whatever records that were provided to me, yes.

Q Now, let me go again. When Mr. Spevack asked you what did you review, let me change the question and ask you.

What did you review before you did the report?

A Okay. Helen Hayes Hospital record and the record from Columbia Presbyterian.

Q You never looked at Dr. Denton's records, correct?

A That's correct.

Q You never looked at the plaintiff's examination before trial, correct?

A Plaintiff's examination before trial?

Q Yes.

A Is that a record?

Q Did you look -- it's not a medical record, Doctor. I mean -- you and I can agree that's not a medical record?

A Then I didn't look at it, no.

Q Doctor, you've been in court before. You know what an EBT is, correct?

A Correct. That's not something that I normally look at.

Q You know someone who claims an injury is examined by lawyers, and he tells them about his history, okay. Did you look at that?

A I did not.

Q Okay. And you didn't look at the Mary Immaculate Hospital, did you?

A I did not.

Q But, let me ask you this, Doctor: In your report you say, "I had the opportunity to evaluate the above patient for the first time on consultation on 3/9/94. I also had the opportunity to review past medical records obtained from the Helen Hayes Hospital." Correct?

A Correct.

Q Is there anything else in this report about any other record including Columbia Presbyterian in your report?

A Yes. On the bottom it says, "I also reviewed

hospital record from the Columbia Presbyterian Center.

Q Is that where you put where he refused further medical intervention, and you underlined that in your report, didn't you?

A That's where I put --

MR. SPEVACK: Objection, your Honor.

THE COURT: No, the objection is sustained. The objection is sustained.

The jury will disregard that.

Q Now, Doctor --

MR. SPEVACK: Your Honor, may we approach?

THE COURT: You may.

(Conference at the bench, off the record.)

Q Doctor, it's in your report, but may I approach the witness?

THE COURT: Don't read from a record in that fashion.

Q Doctor, you reviewed the Helen Hayes record, correct?

A Yes.

THE COURT: That's in evidence. I think that's in evidence.

THE CLERK: Not yet.

MR. MARULLI: I offer the Helen Hayes Hospital record in evidence. I'll offer them.

THE COURT: Any objection?

MR. YANKOWITZ: No objection.

MR. SPEVACK: Your Honor, I believe it is certified and, as such, I have no objection.

THE COURT: What if it's not?

MR. SPEVACK: As long as it conforms with my copies, I have no objection.

THE COURT: Take a look at it. Tell me if you have an objection or not.

MR. SPEVACK: If counsel wants to put the portion in, I have no objection at this time.

THE COURT: Let's mark it as Exhibit E in evidence. Defendant Denton's E.

MR. MARULLI: It's not a hospital.

THE COURT: It says hospital. I thought it was a rehabilitation facility.

MR. MARULLI: I agree with you. But it's called hospital.

THE CLERK: Counsel, do you have it?

MR. MARULLI: To save time, I would like to approach the witness with two pages.

THE COURT: In the meantime, would you mark the original that we have? Does somebody have the original?

Has the original come in? Do you have any objection to him proceeding this way?

MR. SPEVACK: No, your Honor. I don't.

Q Doctor, I ask you to look at this page. This page up here.

THE COURT: See if it's in the record.

A Okay.

Q Doctor, isn't it a fact that on two occasions at that hospital, the doctors there -- the patient was recommended for the surgery which is reflected in your report?

A Yes.

Q And you refused to do so?

A That's correct.

Q Now, Doctor, the patient refused to undergo the surgery, correct, Doctor?

A Just give me one second. Let me find out if there was a special procedure that he refused.

MR. YANKOWITZ: Objection. Move to strike, your Honor.

THE COURT: The objection is sustained. The jury is to disregard it.

Take a look at that document. The reporter will read the question back. Listen carefully to the question. Look at the document, and then answer the question.

A Yes, your Honor.

(Reporter read back question.)

THE COURT: That calls for a yes or no answer, Doctor.

THE WITNESS: Yes, that's correct.

A Yes.

Q Twice?

A I only see it once.

MR. MARULLI: May I approach, Judge?

THE COURT: You may.

Q 12/30/87?

A That's basically the same note. That's the summary. That's the note where the patient refuses.

Q Well, Doctor, what's the date on the summary?

A Let me look at -- there is no date on the summary.

Q Were you with Helen Hayes back in 1987 or 1988?

A There was no date on the piece of paper that you gave me.

MR. MARULLI: Move to strike.

THE COURT: Motion granted. The jury will disregard the answer. The reporter will read the question back.

MR. MARULLI: May I rephrase it?

THE COURT: We will get nowhere, Doctor, if you want to answer what you want to say.

You know any question that you feel warrants further comment, Mr. Spevack, who is a very competent lawyer, will have an opportunity to ask questions about it if Mr. Spevack thinks it's important.

I want you to listen to the question, and don't just tell us what you feel like telling us. We're here in a very formal proceeding. I expect you to listen carefully to the questions.

I think if you don't comprehend the questions, that's something else. But if you do, just answer it.

Q Doctor, let me ask you this: They offered --

would you agree after reviewing that record -- you reviewed that record carefully, correct?

A Yes.

Q Would you agree with me that they offered him the surgery because they felt it would help him improve?

A Yes.

Q And he refused it, correct?

A Yes.

Q And, Doctor, isn't it a fact that his refusal was a contributory factor to his incomplete recovery?

A I can't comment on that, because I'm not sure.

Q Is that because, Doctor -- withdrawn.

Now, Doctor, let me ask you this: You wrote in your report you examined the patient. You wrote in your report, "Manual muscle power testing is within normal limits for upper extremities."

A Yes.

Q Bilateral -- before we get to the next sentence, he has no bowel and bladder dysfunction now; does he?

A That's correct.

Q And he can feel in his extremities, can he?

A Yes.

Q He can feel down his lower -- his legs, down to

his feet to his toes, correct?

A Yes.

Q And that's an important -- that's an important ability, correct?

A Yes.

Q Because when we talk about the lower extremities in function, you talk about motor and sensory, correct?

A That's correct.

Q So he has full motor and sensory function of his upper extremities and he has full sensory function -- full sensation in his lower extremities?

A Not full.

Q He can feel down to his toes, can't he?

A He can feel, but not fully.

Q Sensation -- okay. "Bilateral lower extremities at 4-5."

Doctor, when you write 4-5, you're talking about the muscle strength, correct?

A Yes.

Q By the way, did you measure his thigh and his calves?

A I did not.

Q Doctor, you knew that for a period of time he

was paraplegic, did you not?

A Yes.

Q And you know that when a man is paraplegic, or a woman is paraplegic -- I know the judge is going to -- a man or a woman, a person is paraplegic for a period of time, they can't use their muscles; and they can't exercise their muscles; and they can't flex and extend the muscles as they would normally; correct?

A That's correct.

Q And when that happens, Doctor, doesn't the muscle strength weaken? That's because the muscle strength -- but don't the muscles atrophy?

A Yes.

Q And wouldn't an important consideration, an important thing for you to do would be to measure the muscles of his calves and his thighs?

A If the problem is unilateral, you're correct. If the problem is bilateral, it has no bearing.

Q It has no bearing?

A No.

Q Doctor, when you put 4-5 muscle strength, you know that --

First of all zero is paraplegic, right?

A That's correct.

Q One -- you got 1, you specialists call a trace, correct?

A Yes.

Q You can have a contraction of a muscle, but you can't move at all, correct?

A That's correct.

Q Two. When you have a 2, you're just about in a wheelchair, right, because you can't move against gravity? You can't move against gravity?

A That's correct.

Q So if it's 2 over 5, the only way you're going to be able to ambulate is in a wheelchair, correct?

A That's correct.

Q Three over five, you could just move against gravity, correct?

A No. Not yet. Not yet. Three plus over five.

Q 3-5?

A Three plus over five.

Q Three-five, you can resist gravity? Three plus five you can overcome it?

A No. Can I explain?

Q No, Doctor.

A Okay.

Q Let's get to 4.

4-5 means there is just some weakness there?

A That's correct.

Q Weakness?

A Yes.

Q And, Doctor, haven't you examined patients with weakness that can ambulate with a cane?

A Yes.

Q And 5 is normal?

A Yes.

Q Now, Doctor, you just told this jury that he was 4-5, and that was three grades weaker than normal. You know that is not correct?

A That is correct.

Q That is not correct, Doctor?

MR. SPEVACK: Objection, argumentative.

THE COURT: Don't argue, Counsel.

MR. MARULLI: I'm sorry, Judge.

Q Doctor, there are six grades, zero through five, aren't there?

A That is not correct. There is plus and minuses.

Q Let me ask you something, Doctor: Is that

something that a reputable expert would disagree with, or is that universal in plus or minuses? Is it universal or is it something that reputable experts can disagree on?

MR. YANKOWITZ: Objection. Move to strike. Yes or no question.

THE COURT: Motion denied. You can answer it.

A Yes, they can disagree with some of those findings, yes.

Q Have you ever heard of the Frankel's class of spinal cord function?

A Yes.

Q You've heard of that?

A Yes.

Q Now, if you're a class A, you have no motor and no sensory function, correct?

A I don't recognize that classification.

Q You don't recognize that classification?

A No.

Q You've heard of it?

A I've heard of it.

Q Are you aware of it?

A I'm aware of it.

Q So you know that "A" you can't move and you can't feel, correct?

A I'm not familiar with classification of A or B.

Q Doctor, are you telling this jury that I know something that you don't?

THE COURT: Sustained as argumentative.

Q And so, Doctor, you don't know that class B means no motor function and a little bit of sensory function?

MR. SPEVACK: Objection.

THE COURT: Overruled.

MR. SPEVACK: He says he's not familiar with it.

Q Do you know about class B?

A I'm not familiar with the Frankel's classification.

Q You just said you were familiar with it.

THE COURT: He's not familiar with it. Go onto something else.

MR. MARULLI: He initially said he's familiar with it.

THE COURT: He said he doesn't recognize it.

Do they teach it in medical school?

THE WITNESS: No.

THE COURT: Did they teach it while you were taking a residency program?

THE WITNESS: The Frankel's classification -- they taught us several classifications and told us why each one is not valid but it exists.

THE COURT: When you studied it, the school who taught you didn't like it?

THE WITNESS: At Mount Sinai School of Medicine, they did not use it.

THE COURT: Are there schools that do use it?

THE WITNESS: Not that I'm aware of.

THE COURT: Very good. Go ahead, Counsel.

Q Doctor, if you had taken the time to look at the Mary Immaculate record, you would have known, and you know about the surgery that was done at Columbia Presbyterian, correct?

MR. SPEVACK: Objection to form.

THE COURT: Sustained as to form as argumentative.

MR. MARULLI: I don't think I was argumentative. I'll rephrase it.

THE COURT: You can't help yourself, Counsel.

MR. MARULLI: I'll try to rephrase it.

Q You reviewed the Columbia Presbyterian record at some time?

A Yes.

Q Even though it's not in your report?

A Yes.

Q So you know what kind of surgery was done on September 26th, 1987, correct?

A Yes.

Q You know he was paraplegic before that surgery, correct?

A That's correct.

Q You know the condition of this gentleman now today?

A Yes.

Q You agree with me that given the condition that he was in at Mary Immaculate and Columbia Presbyterian, that the condition he is in today is remarkable?

A Yes.

Q He made a remarble recovery, correct?

A Yes.

Q Now, Doctor, just one other thing: You told this jury he's only partially permanently disabled, correct?

A Yes.

Q You told him he was completely disabled from work?

A That's correct.

Q Were you aware that he retired, not on disability, he retired February 1st, 1988? Were you aware of that?

A I was not.

MR. MARULLI: Thank you very much, sir. I have no other questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. SPEVACK:

Q Doctor, you said that counsel asked you some questions about atrophy. What's atrophy?

A Atrophy means muscle mass loss or a loss of the size of a muscle.

THE COURT: From disuse?

THE WITNESS: It could be from disuse or from nerve damage.

THE COURT: Okay.

Q And would there be atrophy if a person was paralyzed?

MR. MARULLI: Objection.

THE COURT: Overruled.

A Yes, there should be some atrophy.

Q In response to counsel's question, you said atrophy might be noted where there is a unilateral problem but not a bilateral problem.

Can you explain what you mean by that?

A Yes. If you have atrophy on both sides, by measuring it, you can't tell which has shrunk because they're both the same size. They both have shrunk. You have nothing to compare it with. You can't compare the right side to the left side to see what is normal. So you have no parameters. Therefore, there is no value in having to measure it.

Q Doctor, in the hospital records that you reviewed, that is the Columbia Presbyterian records and the Helen Hayes Hospital record, did they use your system of evaluation of motor strength or some other system?

MR. YANKOWITZ: Objection to what "they used."

THE COURT: Overruled.

A Yes. They used my system.

THE COURT: Not yours. Someone else's? Who designed it?

THE WITNESS: I don't know, your Honor.

Q Does it have a name of a system?

A It's called the manual muscle testing.

THE COURT: Did they use the manual method at the Helen Hayes?

THE WITNESS: Yes.

THE COURT: How about at Columbia?

THE WITNESS: Yes, your Honor.

THE COURT: And when you looked at the Mary Immaculate, did they use one there, too?

THE WITNESS: I don't recall.

THE COURT: But those two places?

THE WITNESS: Yes.

THE COURT: Used the manual method?

THE WITNESS: Yes.

THE COURT: Using numbers and not letters?

THE WITNESS: That's correct.

Q Doctor, what was the surgery that Mr. Brooks declined to have?

A From the -- from my understanding of the records is any further -- any future surgical proceedings.

Q Okay. Does it say specifically what procedures those might be?

A I believe it was an anterior fusion.

Q Doctor, what's an anterior fusion?

A Well, a fusion is --

MR. MARULLI: Note my objection, Judge.

THE COURT: Overruled. You entered it, Counsel.

MR. MARULLI: I'm not objecting on that basis. He said he wasn't qualified as a surgeon.

THE COURT: He doesn't have to be qualified. He went to medical school.

They learn about anterior fusion in medical school?

THE WITNESS: Yes.

THE COURT: Could you tell us about it?

THE WITNESS: There are two types of fusions, anterior fusion which is a fusion

grafting from the front and posterior fusion.

The way a fusion is done, you take a piece of bone from the ileac crest, which is the hip bone and you use it to cement the two vertebrae so there is no movement.

There is an additional form of stabilization procedure. You sort of cement the bones together. You can do it from the front or you can do it from the back.

Q Doctor, is that kind of surgery -- does it have any effect on the spinal cord itself?

A Well, any kind of surgical -- it has some potential effect on the spinal cord, as well.

Q Doctor, you understand that I am the attorney for the plaintiff in this case, and I'm an advocate; is that correct? Is that your understanding?

A You're an advocate to whom?

Q For Mr. Brooks.

MR. MARULLI: He's leading the witness, Judge.

THE COURT: Sustained.

Q Doctor, when I --

THE COURT: Doctor, Doctor, there is a

lawyer who represents each side, right?

THE WITNESS: Yes.

THE COURT: The lawyer in each side would like it if the jury would find in favor of their respective side?

THE WITNESS: Yes.

THE COURT: An advocate, you know what an advocate is?

THE WITNESS: I understand, yes.

THE COURT: He's the advocate for the plaintiff, just as Mr. Marulli is the advocate for Mr. Denton, and Mr. Yankowitz is the advocate for the hospital.

THE WITNESS: Because I was confused because that was an obvious question.

THE COURT: But you have to listen.

THE WITNESS: I listened.

Q When I sent Mr. Brooks over to you, did I tell you what to say?

A You did not.

MR. MARULLI: Objection, Judge.

THE COURT: Overruled.

Q When we spoke this morning, did I tell you what

to testify to?

A No.

THE COURT: You discussed what was going to happen. You weren't talking about the Mets this morning?

THE WITNESS: We were.

THE COURT: You were talking about the Mets.

THE WITNESS: Not the Mets, the medicals.

THE COURT: Not "meds."

You weren't talking about baseball?

THE WITNESS: No.

THE COURT: You were talking about what was going to happen today?

THE WITNESS: To a degree, yes.

THE COURT: I mean, Mr. Spevack is a bright man and he would be a damn fool if he didn't talk to you about that?

THE WITNESS: Yes.

THE COURT: All right.

Q Doctor, is your testimony in any way to the best of your knowledge substantially different than what's contained in your report?

MR. MARULLI: Objection.

THE COURT: Sustained.

Anything else?

MR. SPEVACK: No.

THE COURT: Redirect -- recross, Mr. Yankowitz?

MR. YANKOWITZ: No.

THE COURT: Mr. Marulli, on the three areas.

MR. MARULLI: Two, Judge.

THE COURT: You could go over three areas, atrophy, manual method and the conversation this morning.

RECROSS EXAMINATION

BY MR. MARULLI:

Q Doctor, whatever surgery was proposed at the hospital, they proposed it to help this patient recover, correct?

A Yes.

Q And he refused it, correct?

A Yes.

Q Doctor, are you telling this jury that when you have cord compression in the thoracic spine, and then you

have the remarkable recovery that this man had, that the muscle strength in both legs are going to be the same?

A That the compression was even, yes.

Q Doctor, isn't it a fact that they don't know if it was even, number 1?

MR. SPEVACK: Objection. What do we mean by "they"?

Q That you don't know if it was even?

A It was when I examined the patient or before?

Q Doctor, let me ask you this: When function comes back after the kind of trauma that occurred to this man's spine from this osteomyelitis which occurred over a long period of time --

A Right.

Q Isn't it a fact that you can't predict, prognosticate about whether the left leg will be stronger than the right, the right leg will be stronger than the left or they'll be equal?

A With the way --

Q Isn't that a fact, sir?

A That's a fact.

Q And, Doctor, even if you measure the strength as four on the right and four on the left, in March of 1994,

you didn't know, you didn't know the condition of those legs, each and every day prior to that for the five years before he saw you, correct?

A No.

Q And so you don't know, unless you measure, if there was atrophy -- more atrophy on one side as opposed to the other or no atrophy at all; isn't that a fact, sir?

A No. That question cannot be answered with a yes or no.

MR. MARULLI: I have no other questions.

THE COURT: Thank you very much, Doctor.

We'll take a five-minute recess, members of the jury. And then we'll resume with further testimony.

Don't discuss the case during the recess.

(Jury exits the courtroom.)

(Witness excused from the stand.)

(Recess)

(Whereupon, the jury enters the courtroom, and the following takes place in the presence and the hearing of the jury:)

(Whereupon Dr. Denton resumes the stand.)

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