1 VIRGINIA: IN THE CIRCUIT COURT FOR FAIRFAX COUNTY
2
3 PHYLLIS EPSTEIN,)
)
4 Plaintiff,)
)
5 v.) No. CL20063502
)
6 PHILIP D. GOLINSKY,)
)
7 Defendant.)
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11 DEPOSITION UPON ORAL EXAMINATION OF
12 SCOTT D. BANKS, D.C.
13 TAKEN ON BEHALF OF THE DEFENDANT
14 CAPE CHARLES, VIRGINIA
15 FEBRUARY 15, 2008
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19
20 Job No.: 24-122271
21 Pages: 1 - 55
22 Reported By: Kimberly A. Watrous

1 A P P E A R A N C E S
2
3 LAW OFFICES OF ROYA, PALMER, EWING
BY: KENNETH C. HIRTZ, ESQUIRE
4 3957 Westerre Parkway, Suite 214
Richmond, Virginia 23233
5 Counsel for the Plaintiff
6
7
HAMILTON AND HAMILTON, L.L.P.
8 BY: RICHARD E. JORDAN, ESQUIRE
1900 M Street, N.W., Suite 700
9 Washington, D.C. 20036-3518
Counsel for the Defendant
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1 I N D E X
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1 Deposition upon oral examination of
2 SCOTT D. BANKS, D.C., taken on behalf of the defendant,
3 before Kimberly A. Watrous, Court Reporter, a Notary
4 Public for the Commonwealth of Virginia at large, taken
5 pursuant to notice, commencing at 2:00 p.m. on February
6 15, 2008, at the office of Banks Chiropractic &
7 Nutrition, 117 Mason Avenue, Suite F, Cape Charles,
8 Virginia; and this in accordance with the Rules of the
9 Supreme Court of Virginia, 1950, as amended.
10
11 SCOTT D. BANKS, D.C., was sworn and deposed
12 on behalf of the defendant as follows:
13 EXAMINATION
14 BY MR. JORDAN:
15 Q Please identify yourself for the record by
16 stating your name and business address.
17 **A Scott D. Banks. My office address is 117**
18 **Mason Avenue, Cape Charles, Virginia.**
19 Q What is your occupation?
20 **A I'm a chiropractor.**
21 Q Are you in private practice?
22 **A Yes, I am.**

5

1 Q How long have you been in private practice?
2 **A Thirty-one years.**
3 Q What is the nature of your chiropractic
4 practice? How would you explain it?
5 **A I think pretty standard run-of-the-mill**
6 **chiropractic practice. Predominantly musculoskeletal**
7 **disorders. Somewhat specialize in headache. Also use**
8 **a lot of clinical nutrition.**
9 Q Do you do manipulations of the spine?
10 **A Yes.**
11 Q Do you have a sense for, among your
12 patients, what percentage of your patients are the
13 subject of spine manipulation?
14 **A Are subjective?**
15 Q Subjected to.
16 **A We use the treatment on probably 100 percent**
17 **of them, but different types of manipulation.**
18 Q Doctor, what, in your opinion, is the
19 standard of care in Virginia with respect to informed
20 consent with patients of chiropractic?
21 **A The standard of care is that you do informed**
22 **consent. It is not that it needs to be in writing. It**

6

1 **just needs to be done.**
2 Q What within the standard of care needs to be
3 said to a person in Virginia who is a patient in a
4 chiropractor's office?
5 **A They need to be informed of what you're**
6 **going to do, reasonable risks, which often is based on**
7 **who they are, their individual circumstances, and what**
8 **you are going to do individually with that patient. If**
9 **there are other significant treatment alternatives to**
10 **what you're going to do, they should be informed of**
11 **that.**
12 Q Would what you just said apply to a patient
13 who is about to undergo cervical manipulation?
14 **A Yeah, within the parameters I just**
15 **mentioned.**
16 Q In those circumstances, what would be the
17 reasonable risks that you mentioned would be disclosed
18 to a patient?
19 **A Reasonable risks. Aggravation of neck pain**
20 **on occasion. Aggravation of a disk problem on**
21 **occasion. Whether or not you notify them of a risk of**
22 **stroke is controversial because of the rarity of it.**

7

1 **Some people say it's misleading because it is, in fact,**
2 **so rare that you actually skew their thinking in the**
3 **wrong direction.**
4 Q Who determines whether or not a patient is
5 informed of the risk of stroke?
6 **A I think the individual treating chiropractor**
7 **does.**
8 Q What other risks do you know of that are at
9 least alleged to be related to manipulation of the
10 spine other than you said a stroke being controversial
11 and aggravation of neck conditions, etc.?
12 **A Fractures have been alleged. They're pretty**
13 **much confined to people that have underlying bone**
14 **disease. Aggravation of preexisting pathologies.**
15 **Those are about the extent of it.**
16 Q How about neurological injuries?
17 **A Well, they can be a sequel of some of the**
18 **things I mentioned.**
19 Q How about trauma to the spinal cord?
20 **A Outright trauma to the spinal cord for**
21 **manipulation. I think there's cervical spine. Last**
22 **time I looked, one ever recorded case of that being in**

8

1 **the literature of someone suggesting that that**
2 **happened. So that doesn't qualify something that you**
3 **would reasonably expect to happen with any frequency**
4 **enough to disclose it. The qualification on that is**
5 **somebody with a significant disk herniation. If you**
6 **aggravate a disk herniation, that can injure the spinal**
7 **cord.**
8 Q How would a chiropractor know if a patient
9 has a disk herniation?
10 **A History. You can often tell significant**
11 **stuff from history. Examine them. There are some**
12 **fairly frank signs of that that are highly suggestive**
13 **of it. You can use imaging like MR or CT scan.**
14 Q Is the risk of vertebral artery dissection a
15 risk of manipulation?
16 **A That topic is highly controversial. It is**
17 **probably an extremely rare risk.**
18 Q Have you ever seen a vertebral artery
19 dissection in your practice?
20 **A Me individually? No.**
21 Q How about in terms of your consulting work?
22 Have you reviewed cases involving vertebral artery

9

1 dissection?
2 A **Yes.**
3 Q Do you have a sense sitting here today about
4 how many such cases you've taken a look at?
5 A **Not an accurate sense. Not that many. It's**
6 **not a common problem.**
7 Q Do you advise -- what do you advise your
8 patients, new patients, in terms of your informed
9 consent?
10 A **Basically, the things I just went through**
11 **with you.**
12 Q Do you use a written form?
13 A **Yes, I do.**
14 Q Do you have your form handy?
15 A **Not handy. I have it somewhere in the**
16 **office here. It's provided to me on a clipboard when I**
17 **need to use it. I can get you one.**
18 Q If you could do that I'd appreciate it.
19 Do you obtain a written informed consent
20 from all of your patients?
21 A **Yes.**
22 Q How do you go about presenting your patients

10

1 with your informed consent?
2 A **They're presented the written form and asked**
3 **to read it thoroughly. If they're comfortable with it,**
4 **sign it. If they're not, discuss it with me before**
5 **signing it.**
6 Q Then do you talk to your patients after they
7 sign it?
8 A **If they have specific questions about it,**
9 **yes.**
10 Q Is the standard of care with respect to
11 informed consent different in Virginia than elsewhere
12 in the United States?
13 A **Only to the extent that certain states**
14 **mandate certain aspects of it. Most states don't, but**
15 **a few states mandate certain parts of it.**
16 Q Do you know whether Texas or Ohio mandate
17 certain parts of it?
18 A **I don't know specifically what they do.**
19 Q With respect to the issue of -- the
20 controversial issue, as you put it -- of stroke and
21 vertebral artery dissection, is there any standard of
22 care as to whether or not those risks should be advised

11

1 to a new patient in Virginia?
2 A **Standard of care is what the reasonably**
3 **prudent Virginia chiropractor would do. The reasonably**
4 **prudent, which is the basic minimum acceptable**
5 **behavior, would not be to disclose that because of its**
6 **rarity. Many people do, but many people don't.**
7 Q So it's the chiropractor's option as to
8 whether or not it's enough of a risk that the patient
9 should be told about it?
10 A **It's the individual chiropractor's option to**
11 **make their own decision about weighing that issue of**
12 **whether or not it's appropriate to disclose it.**
13 Q Aside from aggravation of certain conditions
14 that you talked about and muscle soreness, is there
15 anything else that, within the standard of care of
16 Virginia, a chiropractor should advise a new patient
17 about?
18 A **Again, you have to take each patient as they**
19 **are. An 80-year-old with significant osteoporosis, the**
20 **concerns are different than a 30-year-old with no known**
21 **disease. So you have to take each case as it's**
22 **applicable.**

12

1 Q You've had an opportunity to review the
2 documents regarding Phyllis Epstein and her treatment
3 by Dr. Golinsky, correct?
4 A **Correct.**
5 Q With respect to her individually, how would
6 you describe what, within the standard of care,
7 Ms. Epstein should have been told by Dr. Golinsky?
8 A **About the possibility of soreness,**
9 **possibility of aggravating disk disease, which is, in**
10 **her age demographic, disk disease is more common than**
11 **not.**
12 Q And it's your position that it was not
13 necessary, within the standard of care, for him to
14 advise her of the risk of stroke that is, as you said,
15 controversial?
16 A **Not to be within the standard of care. I**
17 **think it's preferred to do it, but I don't think it's**
18 **required within the standard of care.**
19 Q What is the basis of your opinion in that
20 regard?
21 A **Strokes specifically?**
22 Q Yes.

13

1 **A Looking at all of the literature on it, the**
2 **need to inform somebody of something is that it has at**
3 **least a reasonable chance of becoming an outcome. I**
4 **think the most reliable study suggests this is**
5 **something that may happen in one in about 30 to 40**
6 **entire practice careers. If everybody was doing that**
7 **for their entire practice life, 35 years, whatever that**
8 **is, they would inform every patient of something that**
9 **wouldn't happen until the 40th career. It's just not**
10 **something that's likely to happen, and it's misleading.**
11 **Just as it's misleading to imply to somebody by not**
12 **telling them something that has a reasonable**
13 **possibility of happening that it won't, it's misleading**
14 **to suggest to them that this is a possibility when it's**
15 **almost so remote as to not be a concern.**
16 Q What is the harm in informing a patient of
17 those possibilities?
18 **A You bias their treatment decision**
19 **inappropriately.**
20 Q And they might opt not to have treatment, is
21 what you're saying?
22 **A That's correct.**

14

1 Q Why, Doctor, is that the decision that the
2 chiropractor should make rather than the patient?
3 **A It's the whole essence of the informed**
4 **process. The informed process is to appropriately**
5 **inform them, not to mislead them. You can mislead them**
6 **by not informing them of certain things, and you can**
7 **mislead them by informing them of things that just do**
8 **not happen with enough frequency to be concerned about**
9 **it.**
10 Q In other words, the odds are not high enough
11 to warn the patient about the risk of stroke?
12 **A In my opinion and I think the opinion of**
13 **most practitioners, that's true.**
14 Q Are the odds such that it's not necessary to
15 warn patients about the possibility of neurological
16 injury?
17 **A Again, you use a broad term there. If you**
18 **aggravate a disk injury, and they have a pinched nerve**
19 **in their neck going to the upper extremity, you can**
20 **aggravate that. That is, in essence, a neurological**
21 **injury. When you say a disk problem, you encompass**
22 **that. There are many neurologic possibilities.**

15

1 Q If a chiropractor does not know whether or
2 not a patient has a disk problem, should that doctor,
3 within the standard of care, notify the patient of the
4 potential of aggravation of disk problems?
5 **A I think that's one of the items that's**
6 **routine in informed consent, the possibility of**
7 **aggravating that. The thought is that you can**
8 **aggravate a normal disk. Disk disease, whether it's**
9 **highly symptomatic or not, is so prevalent in**
10 **populations over 30 years of age that it warrants**
11 **reasonable disclosure about that.**
12 Q Do you know in the profession of other
13 chiropractors that do advise patients of the risk of
14 stroke?
15 **A Yes.**
16 Q Is it your position that those people, in
17 advising patients of that risk, are overly cautious in
18 dealing with their patients?
19 **A From a statistical standpoint, yes. From a**
20 **practical business standpoint or whatever, probably**
21 **not. There are many reasons we do informed consent.**
22 Q What, for instance, are those reasons?

16

1 **A Number one is to inform the patient. The**
2 **other is that it's a risk management issue. We live in**
3 **a society where there are a lot of other issues you**
4 **have to consider.**
5 Q When we talk about stroke, is the vertebral
6 artery dissection a different problem from stroke, or
7 do you see those as a combined condition?
8 **A One can be a sequel of the other. Vertebral**
9 **artery dissection can be an event that can lead to a**
10 **stroke, although in most cases it doesn't.**
11 Q In terms of vertebral artery dissection, are
12 the odds there low enough that it's not within the
13 standard of care to require a chiropractor to advise a
14 patient of that risk?
15 **A Yes. Simply because we don't know how**
16 **common it is. Unless someone gets to the point where**
17 **they have a stroke, they're never diagnosed with a**
18 **vertebral artery dissection. So I guess it's possible**
19 **that some people could have a vertebral artery**
20 **dissection that would be misdiagnosed because they**
21 **never had a stroke. It's the stroke that leads to the**
22 **diagnostic cascade. It's hard to separate the two**

17

1 **issues.**
2 Q You don't have statistics on just strictly
3 vertebral artery dissection?
4 **A Nobody does, no.**
5 Q In this case, Dr. Golinsky, as I recall --
6 and correct me if you've got a different understanding
7 -- advised Ms. Epstein of one potential harm from
8 treatment, and that was that she might have muscle
9 soreness afterwards. Is that your recollection of the
10 records of what he advised her?
11 **A I don't have anything in the records of what**
12 **he advised her. That, I guess, is the whole issue**
13 **here, that it's not in the records. It was verbal.**
14 Q You haven't reviewed Dr. Golinsky's answers
15 to interrogatories, his answers to plaintiff's
16 interrogatories?
17 Maybe we can short circuit this. Is it your
18 understanding that Dr. Golinsky advised Ms. Epstein
19 that she could have muscle soreness after treatment?
20 **A I don't remember reading anything specific**
21 **as to exactly what he advised her of.**
22 Q If he advised her that she might have muscle

18

1 soreness, and if that's the only thing that he advised
2 her, is that sufficient for him to satisfy the informed
3 consent standard of care?
4 **A In an ideal sense, he should have informed**
5 **her of the possibility of the aggravation of the disk**
6 **problem, something like that, you know, the ones I**
7 **mentioned, but those are probably the reasonable ones.**
8 Q I believe you said that whatever informed
9 consent information is provided to a patient, that it
10 does not need to be in writing to be within the
11 standard of care?
12 **A That's correct.**
13 Q Meaning it can just be oral. So is it
14 within the standard of care to give that information
15 just orally but not record anything about the fact of
16 giving that information to the patient?
17 **A Is that within the standard of care to do it**
18 **that way?**
19 Q Yes.
20 **A Yes. Based on what the reasonable**
21 **chiropractor does.**
22 Q Is it within the standard of care to advise

19

1 the patient of the risks, whatever they are -- and
2 let's say it's just muscle soreness -- after the fact
3 of treatment as opposed to before the fact of
4 treatment?
5 **A To be an effective informed consent, it**
6 **should be before treatment.**
7 Q Do you have an understanding -- well, you
8 don't have an understanding of what Dr. Golinsky did
9 advise Ms. Epstein; is that correct?
10 **A That's correct.**
11 Q Doctor, I'm going to review with you
12 information we've gotten about your designation as an
13 expert witness. I'm going to show you this, and we'll
14 mark it as Exhibit 1.
15 (Designation marked as Exhibit No. 1.)
16 BY MR. JORDAN:
17 Q Have you seen that before?
18 **A Yes, I have.**
19 Q Do you have a copy in your file?
20 **A Somewhere in here.**
21 Q Down toward the bottom or at the bottom of
22 the page, the last paragraph, it states specifically:

20

1 Dr. Banks is expected to testify to a reasonable degree
2 of certainty in the field of chiropractic that failure
3 to obtain a signed written consent to treatment form
4 detailing every imaginable risk involved in
5 chiropractic treatment does not constitute a breach of
6 the standard of care by Dr. Golinsky.
7 Is that an accurate statement?
8 **A Yes.**
9 Q Are there any other imaginable risks of
10 treatment other than what we've already talked about
11 today?
12 **A Well, anything is an imaginable risk of**
13 **treatment. A car could come off the road and go**
14 **through the wall here and crush them on the table.**
15 **That's an imaginable risk of treatment. I think the**
16 **question is reasonable risk of treatment.**
17 Q So to put that maybe in the positive sense,
18 you would say that -- this is in the negative. It's
19 not necessary to advise everything imaginable. You
20 would say, turning that around, that -- let me put
21 aside the written versus oral and not be specific as to
22 that. But that it is the standard of care that a

1 chiropractor must advise a patient of the reasonable
2 risk involved in chiropractic treatment?
3 **A That's correct.**
4 Q Your statement goes on in the next sentence
5 to say: The verbal explanation of the treatment and
6 the potential risks provided by Dr. Golinsky to the
7 plaintiff prior to treatment was within the standard of
8 care for chiropractors in the Commonwealth of Virginia.
9 But you do not know what Dr. Golinsky
10 provided to the plaintiff in terms of information about
11 potential risks, correct?
12 **A Well, I assume that -- what I thought the**
13 **intent was referring to was the fact that it could be a**
14 **verbal informed consent.**
15 Q That assumes that he did give a verbal
16 explanation of potential risks?
17 **A That's correct.**
18 Q But you don't know today what that verbal
19 explanation of potential risks was?
20 **A I haven't seen anything to that effect, no.**
21 Q With respect to the phrase "the standard of
22 care for chiropractors in the Commonwealth of

1 Virginia," how do you discern what the standard of care
2 is in that regard in Virginia?
3 **A Several ways. I teach chiropractic**
4 **postgraduate education. I have for 28 years.**
5 **Basically how the standard of care is determined is the**
6 **reasonable educational understanding of the profession,**
7 **how we learn, how we're taught to do things. I've been**
8 **very involved in that process. I've taught in Virginia**
9 **many times. I'm very familiar with it.**
10 Q Is there any codification of law or
11 chiropractic associations that you would be able to
12 point to that would support that view?
13 **A Support?**
14 Q The view of what the standard of care is.
15 **A I think in Virginia the definition is as**
16 **determined by the reasonably prudent chiropractor.**
17 Q What I'm getting at -- and I don't know if
18 there is. This isn't a trick question. Is there
19 something that we can kind of open up and look at?
20 **A Not in Virginia, no.**
21 Q So it's really what you perceive -- your
22 testimony is based upon what you perceive to be what a

1 reasonably prudent practitioner would do under the same
2 and similar circumstances?
3 **A I think that's the definition by law. Yes,**
4 **that is my perception. I agree with what the law**
5 **suggests what we need to do.**
6 Q There's no actual citation to written
7 authority that you would point to in that regard; is
8 that correct?
9 **A Just wherever it is that that's written in**
10 **the code as the definition of standard of care in the**
11 **Commonwealth.**
12 Q More specifically with respect to informed
13 consent information if that's written anywhere.
14 **A Not to my knowledge.**
15 Q Is it written anywhere that you know of that
16 the odds of stroke or other risks that aren't necessary
17 to be given are low enough or, depends on how you look
18 at it, high enough, remote enough that they don't need
19 to be advised to a patient? Is there anything in
20 writing you can point to that supports that position?
21 **A Typically those things aren't committed in**
22 **writing. When they do research and talk about these**

1 **issues, they're talking about the technical aspects of**
2 **the condition, the disease, statistics of likelihood.**
3 **Academic venues like that don't deal with legal issues**
4 **like what the definition of standard of care is. Those**
5 **are typically two separate issues.**
6 **No, I can't point you to a reputable source**
7 **that discusses that.**
8 Q Taking it somewhat out of the pure standard
9 of care context, given what you said a reasonable
10 practitioner has to provide information about the
11 reasonable risks, you would agree that a patient is,
12 flip side of that, entitled to information about the
13 reasonable risks before submitting to treatment?
14 **A Yeah. I think the informed consent process**
15 **has valid reasons.**
16 Q Have you read Ms. Epstein's deposition
17 transcript?
18 **A Yes, I have.**
19 Q Do you recall that she said that
20 Dr. Golinsky advised that she would be an appropriate
21 candidate for chiropractic care because she did not
22 move her a head all the way to, I believe, the right

25

1 side?
2 **A I believe it was the left side.**
3 Q You read carefully. And that was not a
4 trick question. The fact he said she couldn't turn her
5 head all the way to the left is what she says what he
6 said triggered the appropriateness of chiropractic
7 care.
8 **A Correct.**
9 Q If her relating that information is correct,
10 is that sufficient basis to provide chiropractic care?
11 **A Yes, it is.**
12 Q Presented with a patient with that symptom,
13 if you want to put it that way, what kind of
14 examination should be done to the patient, if any,
15 prior to manipulation of the spine?
16 **A History and whether most people incorporate**
17 **that as part of the examination process. Need to take**
18 **a history about it. Range of motion exam. Some**
19 **orthopedic or mechanical tests of the region that**
20 **you're concerned about. If there's an issue of**
21 **neurologic involvement, such as somebody having**
22 **numbness or pain radiation to the arm in the case of**

26

1 **the cervical spine. Some neurologic exam in the upper**
2 **extremities.**
3 Q Have you read the radiology reports on
4 Ms. Epstein?
5 **A Yes.**
6 Q Based upon what you've seen in those reports
7 and with the benefit of hindsight, was she an
8 appropriate candidate for chiropractic treatment?
9 **A Yes, she was.**
10 Q Was there anything about those radiology
11 reports that you reviewed that would have, in
12 retrospect or hindsight, warranted a more thorough
13 examination or evaluation of Ms. Epstein before she was
14 manipulated?
15 **A Not anything from the radiologic reports.**
16 Q You did say that typically -- on paragraph
17 two of the second page of you identification --
18 typically it would be customary to examine an
19 individual's deep tendon reflexes in light of a spinal
20 complaint. Can you explain what that examination would
21 be?
22 **A Relative to the area of complaint, cervical**

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1 **spine would be checking the deep tendon reflexes in the**
2 **upper extremity. Innervation of the upper extremity**
3 **comes from the cervical spine. Rarely, but very**
4 **rarely, you can have someone with nerve involvement in**
5 **the cervical spine but no numbness or pain. That's**
6 **just another way of screening that area.**
7 Q What did you discern from the radiology
8 reports was the nature of the what's referred to as
9 mild to moderate degenerative changes in the
10 plaintiff's cervical spine?
11 **A She has some disk space narrowing, disk**
12 **bulging, pretty generic stuff in someone her age.**
13 Q Further down that same page it says:
14 Dr. Banks is expected to testify regarding the
15 interpretation of all diagnostic tests including, but
16 not limited to, all X-rays, CT scans, MRI films, EMG's,
17 and/or nerve conduction studies.
18 What do you understand to be your expected
19 testimony about the interpretation of those diagnostic
20 tests?
21 **A I guess whatever I'm asked about them.**
22 Q Do you have an opinion as to whether or not

28

1 any of those tests were inaccurate?
2 **A Well, the test can't be inaccurate. The**
3 **interpretation of the test can be inaccurate. There's**
4 **conflicting interpretations in some of those tests.**
5 Q What in particular would you point to in
6 that regard?
7 **A The listhesis or slippage that Dr. Fink, I**
8 **believe, talks about, which Dr. Powers disagrees with,**
9 **and which I disagree with.**
10 Q So is it Dr. Fink's interpretation of the
11 tests that you say is incorrect?
12 **A Well, I'm saying I disagree with it. I**
13 **don't think there's significant listhesis or**
14 **hypermobility there, nor did Dr. Powers.**
15 Q Would significant displacement -- is that
16 the word you used?
17 **A Listhesis means slippage, and then when you**
18 **stress it, excessive motion, hypermobility.**
19 Q If that were, in fact, her condition, again
20 in hindsight, would she have been an appropriate
21 candidate of spinal manipulation?
22 **A Depends on the degree of it.**

29

1 Q The degree that Dr. Fink interpreted it to
2 be, would that have rendered her not an appropriate
3 candidate, that is Ms. Epstein, not an appropriate
4 candidate for chiropractic treatment?
5 **A No, it would not have rendered her an**
6 **inappropriate candidate. It's very common in people**
7 **her age, and they respond very well to treatment.**
8 Q So the fact that -- your disagreement
9 doesn't really have any ultimate effect upon any of the
10 issues that we're talking about here in terms of
11 whether she should have been treated?
12 **A Not with regards to the decision to initiate**
13 **treatment, no.**
14 Q Do you have an understanding of what
15 injuries she sustained if any?
16 **A I think that's the whole issue. I don't**
17 **think anybody's having good success in pinning down**
18 **exactly what injury she has.**
19 Q Do you have an opinion as to whether or not
20 she had an injury?
21 **A One of the things we try to base that on is**
22 **objective testing and trying to document what we hear**

30

1 **subjectively. There's a really difficult time here**
2 **documenting why she has all of these symptoms she has.**
3 **I think I'm left in a lot of the same dilemma even the**
4 **treating physician are. They're having a hard time**
5 **documenting objectively proving anything.**
6 Q You would agree that subjectively
7 Ms. Epstein reported significant pain?
8 **A Yeah. That's obvious.**
9 Q And in terms of evaluating a patient, is it
10 fair to say that an important part of evaluating a
11 patient is to obtain a history from them?
12 **A That's correct.**
13 Q And the history is, by its nature,
14 subjective; would you agree?
15 **A For the most part, yes.**
16 Q And the fact that her pain or subjective
17 reports you perceive as not being documented by
18 objective tests, does that lead you to conclude that
19 she did not sustain any injury from the chiropractic
20 treatment?
21 **A Well, it makes it very difficult for me to**
22 **conclude what any injury might be. She kind of has --**

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1 **her subjective symptoms are kind of disconnected from**
2 **any diagnostic entity we can put on it.**
3 Q What do you mean by that, that they're
4 disconnected?
5 **A At one point, someone used the term "spinal**
6 **cord contusion." There are tests to evaluate that.**
7 **Some of them were done such as the MR didn't document**
8 **it. Others that could have helped document it like the**
9 **sensory evoked potentials were not used.**
10 Q Doctor, do you have any neurological
11 training?
12 **A Yes.**
13 Q Is it possible to become a chiropractic
14 neurologist?
15 **A Yes.**
16 Q Are you a chiropractic neurologist?
17 **A No. I've taken some of that training, not**
18 **all of it.**
19 Q Have you had any of that training since
20 graduating from chiropractic school?
21 **A Yes.**
22 Q What's the extent of that training?

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1 **A I think to become board eligible to sit for**
2 **board certification requires 300 hours. I've taken**
3 **approximately 100 hours of it.**
4 Q Do you treat patients for neurological
5 problems?
6 **A Yes.**
7 Q What is your focus area, if any, or areas in
8 treating patients for neurological problems?
9 **A Meaning specific conditions?**
10 Q Conditions, more areas of the body, I guess,
11 would be --
12 **A Well, typically things that relate to the**
13 **spine. Headache is a neurologic condition. That's a**
14 **particular area of interest to me. I treat a lot of**
15 **headache patients. Anybody with a spine complaint with**
16 **radiation into the nervous system has a neurologic**
17 **problem. So maybe as many as half or a third of the**
18 **patients have some sort of neurologic problem.**
19 **If you're referring to neurologic diseases**
20 **like MS and Alzheimer's, no, I don't treat those**
21 **things.**
22 Q When you have patients with a neurologic

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1 problem, do you perform or request objective diagnostic
2 studies?
3 **A It's situationally specific. Sometimes I**
4 **do. Sometimes I refer them to other specialists to get**
5 **those things done. Depends on the situation.**
6 Q Do you ever treat patients for neurological
7 issues based solely on their subjective reports to you
8 of a neurological problem?
9 **A No. You always have to get some objective**
10 **information, examine them.**
11 Q And objective information can be by way of
12 your examination of the patient?
13 **A Yes.**
14 Q Does not require testing along the lines of
15 MRI's, EMG's, etc., correct?
16 **A It's a continuum. You can arrive at a**
17 **diagnostic decision sufficient to institute treatment**
18 **any way along the continuum. Sometimes it does.**
19 **Sometimes it doesn't.**
20 Q So you can arrive at a point with your
21 examination and the patient's subjective reports where
22 you can come to a conclusion that results in your

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1 provided chiropractic treatment to the patient?
2 **A On occasion, yes. On occasion, no.**
3 Q Let me get back to what we were talking
4 about before about Ms. Epstein's complaints of pain.
5 Do you not believe her subjective reports of pain?
6 **A I don't think my job here is to believe**
7 **either way. It's to look at records and then come to**
8 **the most logical explanation I can.**
9 Q Have you come to a conclusion as to whatever
10 the cause was that Ms. Epstein was, in fact, in pain a
11 short time after undergoing chiropractic treatment?
12 **A No, I don't think you can or anyone has at**
13 **least with the objective testing that's been done.**
14 Q My question is really -- I'm not sure you
15 answered it, and maybe I didn't ask it right. Have you
16 come to a conclusion as to whether or not she was in
17 pain as a result of the chiropractic treatment?
18 **A I don't think anybody -- that's the great**
19 **dilemma in pain. It's an entirely subjective**
20 **phenomena. We try to associate findings that then**
21 **correlate with why we expect to see a certain pain**
22 **pattern. That's the difficulty here. There's not any**

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1 **strongly objective things that correlate with what's**
2 **going on clinically.**
3 Q My question is, have you come to a
4 conclusion as to whether or not Ms. Epstein was in pain
5 as she reported to be?
6 **A I can only answer it like I did or to say**
7 **that's not my job here to make that judgment.**
8 Q How does a healthcare professional learn
9 that a patient is in pain?
10 **A I'm a little stumped with the term "learn."**
11 **There's no way of learning whether or not patients are**
12 **in pain. We learn to correlate a specific pain pattern**
13 **with certain possible diagnostic entities. Then we go**
14 **through the diagnostic process to sort of prove whether**
15 **those things are there or not. We try to do it by**
16 **inclusion or do it by exclusion.**
17 Q So is it not possible to conclude that a
18 patient is in pain unless there is some objective
19 evidence of that pain?
20 **A Well, with the term "conclude," you can**
21 **conclude anything. There's no way of proving it. I**
22 **guess my job here is really not to conclude anything.**

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1 **It's to look at what evidence we have and talk about**
2 **what's supported and what's not.**
3 Q Have you in this process come to a
4 conclusion as to what was the cause of Ms. Epstein's
5 complaints?
6 **A Her initial presenting complaints or the**
7 **subsequent ones that have been alleged to have**
8 **happened?**
9 Q Let's separate the two if you see a
10 distinction.
11 **A Well, the initial presenting complaint was a**
12 **result of joint restriction in her neck. Subsequent**
13 **complaints, no, it's very hard from what information we**
14 **have here to tell exactly what might be causing her**
15 **problems.**
16 Q Did you come to a conclusion as to whether
17 or not Ms. Epstein was malingering?
18 **A That, again, is a -- on the other side of**
19 **the scale, that is also a fairly subjective evaluation,**
20 **and that was not my intent to evaluate that.**
21 Q So you don't have an opinion in that regard?
22 **A No.**

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1 Q There was a test, I believe it was the burn
2 test, that Dr. Golinsky said he utilized with respect
3 to Ms. Epstein. Do you recall that?
4 **A I don't recall him saying it, but I saw it**
5 **in the records.**
6 Q Does that report from him have any bearing
7 on any of your opinions in this case?
8 **A Not really. There's some people that say**
9 **that's a differential test for objective pain from**
10 **subjective psychological overlay, malingering,**
11 **whatever, but I don't think the test has any validity**
12 **to that extent.**
13 Q Doctor, the expert report also says:
14 Dr. Banks has also reviewed and analyzed all of the
15 opinions set forth in plaintiff's expert witness
16 designation. Set forth his disagreements with those
17 opinions as set forth above.
18 It strikes me that we may have covered your
19 disagreements so far in this deposition. Is there any
20 other matter in that regard that we haven't heard or
21 discussed today that would constitute a disagreement?
22 **A Do you want to go through them individually?**

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1 **By recall I can't make sure I'm not leaving out**
2 **something in one of them.**
3 Q How would you go about doing that if I were
4 to have you do that?
5 **A I guess you'd ask me about a specific point**
6 **they make, and I'd comment on it.**
7 Q Can you pull out of your pile the
8 plaintiff's expert report?
9 **A If you have a more organized copy, I've got**
10 **one that's all chopped up here. We can get through it**
11 **I guess.**
12 Q Doctor, if you'd take a look at that.
13 There's some introductory language there, but it does
14 get to the opinion first of Dr. Edwards. If you can
15 just review that and let me know if there's anything we
16 haven't covered that you disagree with.
17 **A First, Dr. Edwards' informed consent. We've**
18 **dealt with that. He says stroke, spinal chord injury.**
19 **We've discussed that. Fail to properly evaluate the**
20 **plaintiff. I'm not sure I agree with that. Standard**
21 **of care -- deviation from the standard of care was the**
22 **proximate cause of the injury sustained. I disagree**

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1 **with that. That's it on Dr. Edwards.**
2 Q That's fine. I think that covers Dr. Duvall
3 pretty well, as well.
4 The opinion about disagreeing with the
5 standard of care was breached and a proximate cause of
6 the injury, in your disagreement with that, is that
7 based upon the fact you believe it wasn't a breach of
8 the standard of care?
9 **A Well, that and the fact that we can't see an**
10 **objective injury here and certainly not one that you**
11 **can relate back to any of those issues about a standard**
12 **of care specifically caused that. It's impossible to**
13 **link together in my mind.**
14 Q Doctor, the reports of Ms. Epstein,
15 literally within hours of the chiropractic care, would
16 you attribute her subjective reports merely
17 coincidence?
18 **A I don't think that's the problem with**
19 **subjective reports. We don't know what they're from.**
20 **So you can't attribute them to any specific causation.**
21 Q Did you, in your review of the materials,
22 discern that Ms. Epstein had any neck or back problems

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1 beyond the issue of turning her head less in one
2 direction than the other?
3 **A At any time?**
4 Q Before the treatment.
5 **A Yes. She'd had a history of some problems**
6 **in her lower back and, I believe, left hip.**
7 Q Anything else in terms of history?
8 **A Specific spine?**
9 Q Yes.
10 **A Preceding the neck problems she had, I think**
11 **she said two or three minor motor vehicle accidents.**
12 Q Do you relate those motor vehicle accidents
13 to any of her subjective complaints?
14 **A At presentation for care in the first place?**
15 Q Or after.
16 **A Well, they may relate to her degenerative**
17 **changes in her spine, which may relate to some of the**
18 **issues she's having. There's no way of directly**
19 **linking it.**
20 Q Did you discern in your review of the
21 records that she had any symptoms of pain because of
22 the degenerative changes in her spine?

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1 **A I think by her own admission she did.**
2 Q Aside from the arthritis in the lower spine?
3 **A I think on the initial intake she mentioned**
4 **that she had some difficulty turning her head and pain**
5 **in her neck.**
6 Q Do you recall reading that she put the word
7 "pain" down with respect to her neck after talking to
8 Dr. Golinsky?
9 **A I don't remember reading that specifically.**
10 **I remember reading something that there was an issue**
11 **about she didn't record certain information until after**
12 **she talked with Dr. Golinsky.**
13 Q With respect to Dr. Golinsky's records, do
14 you make an assessment as to whether or not the written
15 records were prepared contemporaneous or shortly after
16 the treatment rendered to Ms. Epstein?
17 **A There appear to be two sets of records. Not**
18 **two sets of records, but a handwritten daily note and**
19 **then a computer-generated-type note. The handwritten**
20 **ones certainly appear to be proximate to the time. The**
21 **service, you can't tell on the computer-generated**
22 **notes, but this whole era of electronic medical**

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1 **records, the whole basis is to not generate those**
2 **things at the time of service. It's to record them to**
3 **have them available for later use in circumstances like**
4 **this. So I don't find that unusual.**
5 Q Have you relied upon the computer-generated
6 records in formulating any opinions in this case?
7 **A I looked at them. I relied on all of the**
8 **records together.**
9 Q So the typewritten ones as well as the
10 handwritten ones?
11 **A Yes.**
12 Q Do you have any connection any longer with
13 Logan College other than being an alumnus?
14 **A Not officially at this point, no.**
15 Q Do you do any continuing professional
16 education in terms of being an instructor rather than a
17 student?
18 **A For anyone, yes. Not if you're referring**
19 **specifically to Logan.**
20 Q I was asking in general.
21 **A I've done a lot for Logan in the past. I'm**
22 **currently affiliated with New York Chiropractic**

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1 **College.**
2 Q When is the last time you did any work in
3 that regard for Logan College?
4 **A I can't be accurate on it. Might have been**
5 **five or six years ago.**
6 Q And the one you're affiliated with is New
7 York Chiropractic College?
8 **A Yes.**
9 Q Where is that located?
10 **A Main campus is in Seneca Falls, New York.**
11 **They also have a clinic and an educational facility in**
12 **Levittown, New York.**
13 Q What role do you play with the college in
14 instruction?
15 **A I'm a postgraduate instructor. Teach**
16 **continuing education hours for chiropractors.**
17 Q How much time does that entail?
18 **A Currently probably I do that maybe eight**
19 **weekends a year.**
20 Q Is that basically continuing education for
21 chiropractors?
22 **A Yes.**

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1 Q Is there a continuing education requirement
2 in Virginia?
3 **A Yes.**
4 Q What's the requirement in terms of hours?
5 **A 60 hours biannually.**
6 Q Is that pretty standard in terms of
7 nationally?
8 **A It varies widely. It's getting to be pretty**
9 **standard. Some states require 12 hours every year.**
10 **Like Virginia is 60 hours every two years. Some 30**
11 **hours every two years. I don't know of any state that**
12 **does not require continuing education for license**
13 **renewal.**
14 Q In what subject matters have you lectured on
15 continuing education?
16 **A Ever?**
17 Q To the extent that you can give me ever,
18 yes.
19 **A Well, about anything relative to spine**
20 **complaints. Most of what I lecture on is low back**
21 **pain, cervical spine. Headache is the great majority**
22 **of it.**

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1 Q Have you ever lectured on informed consent?
2 **A Not specifically on informed consent,**
3 **although if a question comes up, we talk about it.**
4 Q Has informed consent ever been, say, on your
5 outline or in whatever materials you use or follow to
6 give lectures?
7 **A I can't tell you for sure. It may have been**
8 **at some point. Not anything in recent memory.**
9 Q How about if I phrase it more generally such
10 as risk management. Have you included risk management
11 within your area of lectures?
12 **A In my opinion, all of continued education**
13 **deals with risk management. The whole essence of risk**
14 **management is higher levels or practice behavior and**
15 **academic knowledge. So to me it all blurs together.**
16 Q Have you ever advocated or suggested with
17 respect to informed consent what issues should be
18 covered by a chiropractor with new patients?
19 **A I've discussed the issue we talked about**
20 **here with vertebral artery dissection and stroke.**
21 Q Can you give me as good a flavor as possible
22 as to what you've lectured in that regard?

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1 **A We talk academically about the problem, the**
2 **relative risk and all that. And if the question comes**
3 **up about informed consent, typically what I do is ask**
4 **the group, How many of you do written informed consent**
5 **about that? How many of you don't? And then I take an**
6 **assessment of that and then explain to them, You've**
7 **just answered the question. Because, in essence, if**
8 **it's the behavior of a reasonably prudent chiropractor**
9 **in California, if the majority of chiropractors in**
10 **California, barring they have an actual mandate in**
11 **their statute to require it a board regulation, then it**
12 **is not the standard of care in California to do written**
13 **informed consent.**
14 **By definition, that's what it is. Everybody**
15 **wants somebody's written -- it's here, and that's the**
16 **Bible. But there is no Bible, and it's not what the**
17 **definition of standard of care is.**
18 Q A reasonably prudent practitioner that is --
19 it would depend from state to state as to whether or
20 not that reasonably prudent practitioner would advise
21 of the vertebral?
22 **A Not unless a certain state overrides common**

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1 **practitioner behavior by a specific statute. I don't**
2 **think it varies. What I'm getting at there, there are**
3 **a couple states to my knowledge that require a written**
4 **informed consent. It's written into the statute. The**
5 **standard of care is defined in the code, if you will,**
6 **regarding informed consent.**
7 Q Are all the lectures that you have done over
8 the last five years for continuing education, have they
9 all been affiliated with the New York Chiropractic
10 College?
11 **A Some are directly for state associations.**
12 **Some states don't require a college-affiliated -- the**
13 **speaker does not have to come through the school as**
14 **long as they're credentialed by a school. Some**
15 **associations call me directly in contract with them.**
16 Q Is any of your lecturing related to or
17 requested by chiropractic malpractice insurance
18 companies?
19 **A I don't know if it's requested by. NCMIC**
20 **provides a professional speaker program where basically**
21 **they fund the cost of the speakers.**
22 Q In that situation, would it still be through

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1 the New York Chiropractic College?
2 **A On or the association, yes.**
3 Q Can you give me a sense of how much of your
4 time is spent in doing continuing education lecturing?
5 **A As I mentioned, currently now it's probably**
6 **six, eight weekends a year.**
7 Q Is it more frequent than over the last, say,
8 three or four years before that?
9 **A Not the last three or four. Ten years ago**
10 **when I was with Logan College I was teaching a lot**
11 **more.**
12 Q Over the six or eight weekends, how many of
13 those are in any way affiliated with the insurance
14 company that you mentioned?
15 **A Maybe half of those.**
16 Q When you give those lectures, you're paid by
17 the insurance company?
18 **A Generally, yes. Sometimes they offset the**
19 **association cost and the association pays me.**
20 **Sometimes they pay me directly.**
21 Q Doctor, approximately how many times before
22 have you been identified in legal cases as an expert in

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1 the field of chiropractic?
2 **A Couldn't give you an accurate answer.**
3 Q You don't keep any record of that?
4 **A No.**
5 Q Can you give me an estimate over the last
6 five years of how many cases you've consulted?
7 **A Generally, I would say three or four a year.**
8 **There's been years where I haven't reviewed any and**
9 **maybe a year when I reviewed five. I would say two,**
10 **three, four a year, something like that.**
11 Q Is it fair to say the vast bulk of your
12 consulting work has been for the defense?
13 **A Overall, simply because much of what I do is**
14 **at the request of a doctor from my lecturing. I'm not**
15 **exposed to the patients or the plaintiff attorneys. I**
16 **don't advertise or do anything. It's just who I'm**
17 **exposed to. But I have done testimony on behalf of**
18 **plaintiffs.**
19 Q Do you recall the last case or last attorney
20 that you worked with on the plaintiff's side of a
21 chiropractic malpractice case?
22 **A I don't remember the attorney for the**

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1 **plaintiff. I remember the attorney for the defense,**
2 **which only simply because I had exposure to him before.**
3 Q Do you remember that person's name?
4 **A William Dupree (phonetic).**
5 Q From where?
6 **A Somewhere up around in Northern Virginia**
7 **where you are.**
8 Q How did you come to be involved in this
9 particular case?
10 **A I got a phone call from Mr. Hirtz asking me**
11 **if I'd review a case.**
12 Q Have you reviewed any cases before from
13 Mr. Hirtz?
14 **A No.**
15 Q How about for CNA insurance, Continental?
16 **A Not that I'm aware of. Could be many cases**
17 **I review I don't have any idea what the insurance**
18 **connection is.**
19 Q Any other cases for Mr. Hirtz's law firm?
20 **A Not that I'm aware of. I don't know all of**
21 **the attorneys in his firm, but I don't remember the**
22 **name of the firm itself.**

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1 Q Do you consult as an expert witness with
2 respect to cases outside of the state of Virginia?
3 **A Yes.**
4 Q Do you have a sense for percentage-wise of
5 how many of your consulting cases are outside of
6 Virginia as opposed to within Virginia?
7 **A It varies so much from time to time. I**
8 **guess there are times when everything is in Virginia**
9 **for a while, and then everything's out, and then half**
10 **and half. There's no way to get a good balance of**
11 **that.**
12 Q Have you ever had to turn down consulting
13 work in a case because it was in a jurisdiction that
14 you were unfamiliar with?
15 **A Not for that reason, no.**
16 Q Doctor, can we take a break, and can you see
17 if you can put your fingers on that form that you use?
18 **A Informed consent? Sure.**
19 **(Break.)**
20 **(Informed Consent Form marked as Exhibit**
21 **No. 2.)**
22 **BY MR. JORDAN:**

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1 Q Doctor, I'm going to show you what's been
2 marked as Exhibit 2. If you could identify that for
3 the record.
4 **A That's my informed consent document.**
5 Q Did you make that up, or is that something
6 you've procured from some other place?
7 **A Both. I think I procured it from somewhere**
8 **originally but then rearranged it.**
9 Q How long have you been using that particular
10 form?
11 **A In the general sense, I would guess a**
12 **decade. In that exact form, I don't know when the last**
13 **modification was made.**
14 Q So by that you mean the substance of what's
15 contained in there is about a decade old?
16 **A Yes.**
17 Q It does mention that you employ physical
18 tests advocated to screening for risks of stroke. What
19 are those physical tests?
20 **A That's about to come out of there based on**
21 **something we've debated for a long time, which is the**
22 **lack of reliability of those physical tests. They're**

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1 **basically positional tests that look for stress on the**
2 **vertebral artery.**
3 **The Association of Chiropractic Colleges**
4 **came out with a physician statement unanimously**
5 **supporting the abandonment of those tests because all**
6 **the chiropractic colleges have abandoned those tests.**
7 **So that's going to come out of there.**
8 Q Maybe it's basically because the tests don't
9 really help screen for that risk?
10 **A Yes. False negatives, false positives.**
11 MR. JORDAN: That's all I have.
12 MR. HIRTZ: I have nothing.
13 You have the right to read the deposition
14 transcript or waive the reading.
15 THE DEPONENT: I don't think there's
16 anything highly controversial. I waive.
17 COURT REPORTER: What would you like to
18 order?
19 MR. JORDAN: I need the transcript by two
20 weeks, prior to Wednesday or Tuesday. Original
21 and mini and e-tran, in Word preferably.
22 MR. HIRTZ: I'll take a regular-size copy

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1 and e-tran. I don't need a mini.
2 (Exhibits were kept by Mr. Jordan.)
3 (Whereupon, the deposition concluded at
4 3:12 p.m.)
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1 COMMONWEALTH OF VIRGINIA AT LARGE, to-wit:
2 I, Kimberly A. Watrous, Court Reporter, a Notary
3 Public for the Commonwealth of Virginia at Large, of
4 qualification in the Circuit Court of the City of
5 Norfolk, Virginia, and whose commission expires
6 September 30, 2009, do hereby certify that the
7 within-named deponent, SCOTT D. BANKS, D.C., appeared
8 before me at Cape Charles, Virginia, as hereinbefore
9 set forth, and after being first duly sworn by me, was
10 thereupon examined upon his oath by counsel for the
11 parties; that his examination was recorded in Stenotype
12 by me and reduced to computer printout under my
13 direction; and that the foregoing constitutes a true,
14 accurate, and complete transcript of such proceeding.
15 I further certify that I am not related to nor
16 otherwise associated with any counsel or party to this
17 proceeding nor otherwise interested in the event
18 thereof.
19 Given under my hand and notarial seal this 21st day
20 of February, 2008, at Norfolk, Virginia.
21 ________________________________
Kim Watrous
22 Notary Registration No. 195088

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