I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

DANNY DOUGLAS, Next Friend	)	
and Personal Representative	)	
of the Estate of Betty Douglas,	)	
Deceased, and DANNY DOUGLAS,	)	
Individually,	)	
Plaintiffs,	)	
vs.	)	Cause No.
THE UNIVERSITY HOSPITAL,	)	91-1966-C-9
ST. LOUIS UNIVERSITY MEDICAL	)	
CENTER, CAMILO R. GOMEZ, M.D.,	)	
SAINT MARY'S HEALTH CENTER,	)	
SAINT MARY'S ON THE MOUNT,	)	
THOMAS REARDON, M.D., OTAKAR	)	
MACHEK, M.D., EDDIE PAULK, D.O.,	)	
and PAUL JONES, M.D.,	)	
Defendants.	)	

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DEPOSITION OF SHELDON MARGULIES, M.D., J.D.

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The deposition of **SHELDON MARGULIES, M.D., J.D.** was taken on Friday, April 16, 1993, commencing at 1:40 p.m., at the offices of Sheldon Margulies, M.D., J.D., 2411 W. Belvedere Avenue, Baltimore, Maryland, before Josett F. Hall, Registered Professional Reporter and Notary Public.

APPEARANCES

ON BEHALF OF THE PLAINTIFFS:

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ON BEHALF OF THE DEFENDANTS (ST. LOUIS UNIVERSITY MEDICAL CENTER AND CAMILO R. GOMEZ, M.D.):

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(Appearances continued on next page.)

(Appearances continued.)

ON BEHALF OF THE DEFENDANTS (SSMRI, OTAKAR MACHEK, M.D., THOMAS REARDON, M.D., AND EDDIE PAULK, D.O.):

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P R O C E E D I N G S

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Whereupon --

SHELDON MARGULIES, M.D., J.D.

a witness, called for examination, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WILLMAN:

Q. Would you state your name for the record, please.

A. Sheldon Margulies.

Q. Sir, my name is Phil Willman and I represent St. Louis University and Dr. Gomez. I am here today to ask you some questions.

I'm going to let you know that you need to answer out loud when you give an answer. So if the answer is yes or no, you need to verbalize that so the reporter can take that down. Will you do that?

A. Yes.

Q. I understand that you are a lawyer; is

that correct?

A. I have a law degree. I don't practice.

Q. Have you ever practiced law?

A. No. Once or twice when my wife's ex-husband had a replevin action I defended her.

Q. And you do have a license from the State of Maryland to practice law?

A. Yes. It's inactive. I passed the bar, so I'm a member of the bar. I have an inactive status.

Q. When was it that you took the bar examination?

A. '88.

Q. And you did clerk for a law firm at one time; is that correct?

A. No. In our law school courses we rotate through a law firm. I happened to rotate through a law firm. After law school, I went right back into neurology.

Q. The firm that you worked for when you were rotating was a plaintiff's personal injury firm; is that correct?

A. Yes. I think the answer to your question was it was a plaintiff's firm, yes.

Q. And how long did you work for that firm?

A. I don't recall. A number of months. I didn't work for them. It was a practicum I guess they called it.

Q. You did work at the supervision of the lawyers in that firm; is that a fair statement?

A. Yes.

Q. And that was full-time for several months?

A. No. It was just a course. It was a few hours -- it might have been an hour or two a couple times a week. It was just one of many courses that I was taking.

Q. Why is it that you decided to go to law school?

A. I was in the department of neurology in 1985 at the University of Maryland when a member of our department asked me to review a case because she couldn't do it. I said okay. And to make a long story short, I just got so involved in the case that a friend and the defense

attorney suggested that I go to law school, and it had never occurred to me, so I said okay. So I took the LSATs and applied.

I forgot about it actually until the week before school started in August and I accepted and discussed it with my boss and he said, Well, go ahead and see how you like it for a semester. After a semester, I said, Well, I've done one semester, I might as well do two, and once you've done one year, you might as well do two.

Q. Did you intend to practice law?

A. No.

Q. When you said you reviewed a case, that was as a medical expert witness; is that correct?

A. Right.

Q. And that was on behalf of a plaintiff filing suit against a defendant?

A. I was going to be the defense expert.

Q. You were going to be the defense expert.

You have acted as an expert witness in the past; correct?

A. Yes.

Q. When did you start reviewing cases with the intent of being an expert witness?

A. I had one patient in 1978 who was my patient and I was called to testify. It wasn't really reviewing the case. Then this 1985 case and I was -- it was really after I graduated from law school, '88.

Q. Since 1988 you have been reviewing medical-legal cases; is that correct?

A. That's correct.

Q. My understanding is that you review about 25 cases per year. Is that still a fair and accurate number?

A. That includes both personal injury and medical malpractice. I guess that's 20-25.

Q. You review both personal injury and malpractice cases?

A. That's correct.

Q. Out of how many of those 20-25 are medical malpractice cases?

A. Probably half, somewhere 40-50 percent.

Q. It's my understanding that two-thirds to three-quarters of all the cases you review are on behalf of a plaintiff bringing suit against a defendant?

A. Are we talking about both combined?

Q. Yes.

A. I would think that's probably true.

Q. Now, what is the percentage with respect to the cases that you review that involve a claim of medical malpractice?

A. I would say closer to three-quarters.

Q. For plaintiff?

A. Yes.

Q. Filing suit against a physician or a hospital; is that correct?

A. That's correct.

Q. You have advertised your availability as an expert; is that correct?

A. Yes.

Q. In the past you've advertised in the A.B.A. Journal; is that correct?

A. That's correct.

Q. Trial magazine?
A. That's correct.
Q. The National Law Journal?
A. I have.
Q. Any other publication where you have advertised your services?
A. No.
Q. Are you currently advertising your services anywhere in this country?
A. I think in the Trial magazine and in A.B.A. I think those ads are still running. I haven't looked.
Q. You do belong to some expert witness services; is that correct?
A. TASA.
Q. And that stands for what?
A. Technical Advisory Service something, Association. I don't know the last.
Q. You do receive cases to review by way of TASA; correct?
A. They will recommend or refer me or refer an attorney who's asked them for an expert in

neurology. They'll refer a case to me, yes.

Q. Approximately what percentage of cases that you review come to you by way of TASA?

A. I would estimate maybe 20 percent. Maybe 20 percent.

Q. In the past you have belonged to some other expert witness services, have you not?

A. I once belonged to an -- I've forgotten the name. I've never gotten a case from them. It was Forensic Medical Advisory Service, but they never called me or recommended me.

Q. Any other services that you've ever belonged to?

A. There is one and I can't recall the name of it. But there is one.

Q. Have you ever received any cases by way of that agency?

A. Yes.

Q. Where is that agency located?

A. I don't know.

Q. Any others?

A. I can't recall any.

Q. You do charge a fee for your reviewing a case; is that correct?

A. Yes.

Q. And what is your fee, first of all, for reviewing a matter?

A. I have a flat fee of $350 an hour.

Q. Is that the fee you charge for reviewing, giving a deposition and testifying at trial?

A. Yes.

Q. I understand that 20 percent of your income is derived from reviewing cases. Is that still an accurate --

A. 15-20 percent.

Q. Have you ever reviewed a case that arose out of care and treatment in the St. Louis metropolitan area?

A. No.

Q. Have you ever reviewed a case involving St. Louis University?

A. No.

Q. Have you ever reviewed a case in which Karen McDonald was the lawyer representing the

plaintiff?

A. Yes.

Q. I understand that it's one case?

A. Yes.

Q. And what was the name of that case?

A. I don't know. I don't remember.

Q. Order vs. Greater Southeast Community Hospital? Does that refresh your memory?

A. I don't remember it. It doesn't. The answer is no.

Q. Did you give a deposition in that case?

A. Yes.

Q. Did you testify live at trial?

A. I don't think so. I don't think so.

Q. Have you ever reviewed any other case for Karen McDonald other than that case and the one that we're here talking to you about today?

A. Not that I recall.

Q. You said not that I can recall. Is it possible that you've reviewed other cases for her and just don't recall?

A. Anything is possible. I just don't want

to be accused of saying something no when it's not correct. But I don't think I have. I can't remember any.

Q. Have you ever reviewed any cases for any members of her law firm?

A. Yes. There was one case for Mr. Holt that I looked at. And that was a Wilson. I remember the name of the case was Wilson.

Q. Mr. Holt was representing the plaintiff?

A. Plaintiff.

Q. And suit was filed against a doctor or hospital?

A. Federal government. It was a VA Hospital case.

Q. It was a medical malpractice claim; is that correct?

A. Yes.

Q. When was that?

A. Probably three years ago.

Q. Any other cases that you've reviewed for any members of Mrs. McDonald's law firm?

A. Not that I recall.

Q. Do you know how it was that she obtained your name as a potential expert?

A. For this case?

Q. For any case.

A. No.

Q. How about this case?

A. I assume because I had worked on a previous case that she knew me.

Q. Your special interest in neurology is neuroophthalmology; is that correct?

A. No.

Q. What is your special interest?

A. I don't have a special interest. I like neuroophthalmology, but I'm a general neurologist.

Q. Do you take care of stroke patients?

A. Yes.

Q. How many stroke patients do you see in a year?

A. Between 100 and 200.

Q. That's in a year?

A. Right.

Q. What's your patient load for a year typically?

A. How many patients do I see a year? Maybe a couple thousand.

Q. Have you ever administered subcutaneous heparin to any of those stroke patients that you've seen?

A. Yes.

Q. How many?

A. Maybe 30-40 percent.

Q. The reason you didn't administer subcutaneous heparin to the other 60 to 70 percent is because it was not indicated; is that correct?

A. Right. Many patients I'll give intravenous heparin or many patients who have suffered a stroke are fully ambulatory and don't need it.

Q. Your decision on whether you give a stroke patient subcutaneous or IV heparin is based on whether that patient is mobile?

A. No. The distinction between IV and

subcutaneous heparin has to do with the nature of the stroke. I tend to use intravenous heparin for very mild strokes in patients whom I think are at risk of progressing.

Q. Maybe my question wasn't clear.

When you give heparin, whether it's subcutaneous or IV, you do that when there is an indication to do so obviously; correct?

A. Yes.

Q. Why was it that you didn't give subcutaneous or IV heparin to the 60 or 70 patients who were stroke victims?

A. If I don't feel that they're at risk of progressing, then I don't give them intravenous heparin. If I don't think they're at risk of developing deep venous thrombosis in their legs, I don't give them heparin.

Q. Subcutaneous?

A. Subcutaneous heparin.

Q. By "progressing," you mean progressing in having another stroke?

A. Worsening of the stroke.

Q. You recognize that there are contraindications to the use of heparin either subcutaneous or IV in a stroke patient, don't you?

A. Yes.

Q. Isn't hypertension one of those contraindications?

A. I want to make sure we're talking about intravenous or subcutaneous.

Q. Let's talk about subcutaneous.

Isn't hypertension a contraindication to administering subcutaneous heparin to a stroke patient?

A. Are we talking about treated hypertension or someone who is untreated?

Q. Let's take both. First treated.

A. If somebody has normal blood pressure and they have a history of hypertension that's being treated and their blood pressure is reasonable, then there's no contraindication.

If they have severe hypertension, you know, blood pressure over 200, 220 or higher, for

subcutaneous heparin I'm not aware of a study saying that's contraindicated.

Q. If you have a patient who's had a 20-year history of untreated hypertension and that is being treated for the hypertension but the blood pressure is bouncing around, isn't that a contraindication to the use of subcutaneous heparin?

A. Bouncing around -- I'm not -- just only to clarify your question. Bouncing around between what and what?

Q. Do you understand what I mean by "bouncing around"?

A. No.

Q. Okay. Mrs. Douglas' blood pressure at St. Louis University, would you agree that was bouncing around?

A. I don't know what you mean by "bouncing around." It was varied. There were various blood pressures. It varied.

Q. You have reviewed the St. Louis University and Saint Mary's Rehabilitation Institute records

in this case; is that correct?

A. That's correct.

Q. And you saw that Mrs. Douglas' blood pressure was taken at St. Louis University; is that correct?

A. That's correct.

Q. And it varied; is that a fair statement?

A. Yes.

Q. Now, looking at her blood pressure and given her history of two years of untreated hypertension, isn't that a contraindication to administering subcutaneous heparin?

A. No.

Q. Why not?

A. Because I don't think the subcutaneous heparin poses unreasonable risk to her.

Q. Is there any study in the literature that supports your statement?

A. I've not seen any study that shows that subcutaneous heparin, low-dose subcutaneous heparin increases the risk of -- and I assume we're talking about intracerebral bleeding with

hypertension, that it raises the risk of intracerebral bleeding with blood pressures in the range that Mrs. Douglas was suffering.

Q. You agree that generally there's an increased risk of intracerebral bleeding associated with the use of subcutaneous heparin in a stroke patient; correct?

A. I'm not -- no, I'm not ready to accept that. Subcutaneous heparin has been used in surgical patients postoperatively. It's been used in pregnant women without proven rise in bleeding risk.

And I don't think there is a higher risk in a stroke patient like Mrs. Douglas with use of subcutaneous heparin.

Q. Are you familiar with any studies reported in the literature that support that last statement that you made?

A. I could find them. I'd have to look for them, but I'm sure --

Q. My question to you today is: Can you tell me that you are familiar with any studies in the

literature that support that statement you made sitting here today?

A. I'd have to answer no except for my general knowledge of the literature.

Q. Now, when was it that you were contacted about being an expert in this case?

A. I don't recall, but it was more than a year ago.

Q. Can you give --

A. Excuse me. I didn't answer your question properly. I was contacted about this case, not about being an expert in the case, but just contacted about this case more than a year ago.

Q. When were you contacted about this case?

A. I don't recall. I know it was a long time ago.

Q. Can you give me your best estimate?

A. More than a year.

Q. And you were contacted by Karen McDonald?

A. Right.

Q. Did she speak with you on the phone about the case?

A. Yes.

Q. And what information did she give you on the phone?

MS. McDONALD: Objection. I'm going to claim attorney work product privilege regarding all communications between me and Dr. Margulies about this case, particularly those communications that were done in anticipation of litigation.

THE WITNESS: Do I answer the question?

MR. WILLMAN: Yes. Go ahead.

MS. McDONALD: I don't have a problem with you saying we talked on the phone or we communicated in writing, but I'm claiming the privilege as to what was said.

THE WITNESS: Now, your question is?

BY MR. WILLMAN:

Q. What information did she give you on the telephone?

A. I'm not sure if I answer this question.

Q. It's your choice. Go ahead and answer as far as I'm concerned.

A. I mean, she told me about the case.

Q. Do you recall specifically what she told you about the case?

A. No.

Q. And did she then send you some written materials?

A. Yes. There were some written materials.

Q. And what written materials did you review?

A. There were some of the medical records.

Q. What medical records did you review?

A. I don't recall. I don't recall which ones.

Q. Do you have those with you today?

A. I have more than what she sent me. But I didn't jot down which ones she had sent me. I didn't divide them up.

Q. After that first contact did you form some opinions in this case?

A. We just communicated about the case. I don't know if I'm supposed to -- I don't know if that's under call of the privilege of what we

communicated.

MS. McDONALD: I object.

BY MR. WILLMAN:

Q. I'd like you to answer the question.

Did you form some opinions after you first reviewed whatever materials were sent to you?

MS. McDONALD: Same objection. I'm going to object to any testimony coming from Dr. Margulies about anything that he's not basing his -- I don't have a problem with him answering what his opinions are in this case, but in terms of our preliminary discussions leading up to his review of the entire case, I'm claiming it's work product privilege.

I don't have a problem and I think the law is that opinions that he has formed in this case, he can testify to the basis for those opinions, what information he was provided and what his opinions are, but you're talking about before the suit was filed, discussions that he and I had, and I'm claiming that as work product privilege.

MR. WILLMAN: I don't know when it was and

he doesn't know either because he testified he can't recall. So I'm asking him what his opinions were after he first reviewed the case. I'm entitled to find that out, and if he doesn't answer it, we're going to be in court in St. Louis and coming back here to get his deposition. So I think you need to let him answer the question.

MS. McDONALD: But the question now is different. You're saying reviewed the case. I don't have a problem with him once he has reviewed the case. Obviously after he's reviewed the case, he's going to give you his opinions. But you're talking about our preliminary discussions before he reviewed the case.

MR. WILLMAN: I'm not going to argue my position here --

MS. McDONALD: Me either.

MR. WILLMAN: -- at this time. I'll ask the question again.

BY MR. WILLMAN:

Q. Did you form any opinions after you first

looked at this case?

MS. McDONALD: Same objection. In terms of looking at the case, I don't have a problem. If you want to talk about the case, in terms of all of the medical records once I had given you the case, obviously you have to discuss those opinions. But anything before you received the case I do claim as work product privilege.

MR. WASSERMAN: How are we defining the case? Karen, obviously you have some definition of the case --

MS. McDONALD: When he got the medical records.

BY MR. WILLMAN:

Q. Let me back up.

The first set of materials you received contained some medical records; correct?

A. I believe that's correct.

Q. And you were asked by the attorney representing Danny Douglas to review that to see whether you had any expert opinions; correct?

A. Well, it was our -- I know it's a long

time ago. I don't exactly know what the question was at the time. But obviously it had to do with the use of heparin.

Q. She wanted you to look at the case because of your medical training, experience and background; correct?

A. I think so. You'd have to ask her.

Q. She did not want you to look at the case because of your training as a lawyer; is that correct?

A. You'd have to ask her.

MS. McDONALD: Objection. Objection. My objection is to your question to him asking why I contacted him.

BY MR. WILLMAN:

Q. What was your understanding as to why she contacted you at the very beginning?

A. It would be more of my medical opinion.

Q. And after she made that contact by telephone, she then sent you some medical records; correct?

A. Yes.

Q. And you don't recall what medical records you were sent; correct?

A. Right.

Q. But you did review some medical records?

A. Right.

Q. Now, after reviewing those medical records, whatever those were, did you then form some opinions related to this matter?

A. I had some preliminary opinions.

Q. Okay. And do you recall when it was that you formed those preliminary opinions?

A. No.

Q. Now, since forming those preliminary opinions have you received some additional information either by way of documents or statements from the plaintiff's lawyer?

A. Yes.

Q. What additional documents have you received since you formed your preliminary opinion?

A. Well, as I said, I didn't segregate what was sent to me after, but there were additional

medical records sent to me.

Q. What additional medical records were sent to you?

A. I don't -- I'm -- I can say it again. But since I didn't write down which ones came to me first, I can't tell you what records were sent to me after that.

Q. Other than medical records, what additional documents have been provided to you by the attorney representing the plaintiff?

A. That's it. I haven't seen the CAT scans. That's it.

Q. Were you provided any depositions?

A. No.

Q. Were you provided any medical articles or textbooks?

A. No.

Q. Do you have with you today the records that you have reviewed in this matter?

A. Yes.

Q. May I see those, please.

(Witness hands documents to counsel.)

MS. McDONALD: What did you do with our communications?

THE WITNESS: I don't know.

MS. McDONALD: You took them out?

THE WITNESS: There was a cover letter. I don't have any.

MR. WASSERMAN: Did you get all of that?

THE REPORTER: Yes.

MS. McDONALD: I'll state on the record that I have taken out or we have taken out communications between me and Dr. Margulies under the same privilege, attorney work product privilege. I'm claiming those as privileged. I haven't been given any authority to the contrary by either counsel and those have been extracted from the record.

MR. WASSERMAN: How about some authority supporting it?

MS. McDONALD: Well, you're objecting; right?

MR. WASSERMAN: No. I'm asking you what your authority is for --

MS. McDONALD: Attorney work product privilege.

MR. WASSERMAN: -- correspondence you're sending to him and I don't know that correspondence between you two is attorney work product.

MS. McDONALD: In anticipation of litigation? Communications between an expert and an attorney?

MR. WASSERMAN: Yes.

MS. McDONALD: All of the research I've ever seen -- I mean, that is the definition of attorney work product privilege. I'm not claiming attorney-client. Attorney work product privilege.

I can give you the Missouri law. I did pull it. I don't have it with me right now. But I'll be happy to send it to you.

MR. WASSERMAN: We'll see it in your brief.

MS. McDONALD: I mean, if you produce some authority to the contrary to me right now, I'll

be happy to reconsider my position. But until I see that I'm wrong, that's my position.

(Pause in the proceedings.)

BY MR. WILLMAN:

Q. I have reviewed the stack of documents which you have given to me and they consist of medical records from St. Louis University and SSM Rehabilitation Institute.

I understand that you had some correspondence sent to you by Mrs. McDonald that have been pulled out of your file; is that correct?

A. Right.

Q. And who has possession of those documents?

A. I think you do (indicating Ms. McDonald). I don't have -- I don't know.

MR. WILLIAMS: What I would like to do is have those marked as a group exhibit by the court reporter.

MS. McDONALD: I don't have them.

MR. WILLMAN: I will not look at them, but I want to ask him some questions about it so we

can when we bring this up before the judge have some basis for her to rule on whether they are protected and I want to do that as a convenience for the court.

MS. McDONALD: I don't have them. I don't know what you did with them, Dr. Margulies.

THE WITNESS: I think they're in my briefcase.

MS. McDONALD: But I object to having them marked. I'll say that there were letters that I wrote. I'm not going to produce them and I'm going to ask Dr. Margulies not to produce communications between us.

MR. WILLMAN: I understand you have an objection. I'm not asking you to waive that objection.

But what I want to do is have them marked and have this witness answer questions about those so that we can approach the judge and get a ruling on your objection and we cannot do that and it will be an inconvenience to the court if we don't have them marked so he can refer to

them.

MS. McDONALD: But once you have them marked, they have to stay in the possession of the court reporter.

MR. WILLMAN: No.

MS. McDONALD: Then I can identify them for the record, but I'm not going to produce them to have them marked because they become a part of the record once they're marked as exhibit.

MR. WILLMAN: I will agree that you can keep possession of them if necessary. I don't have a problem with that.

MR. WASSERMAN: I agree with that also. And I think it's clear if we're going to ask the court to decide the issue of whether this group of documents is covered by the attorney work product privilege, it will be helpful to the court to be able to identify those.

MS. McDONALD: I don't have a problem with giving a date and saying it was a communication between us.

THE WITNESS: I've got a lot of junk

here. Are you sure you don't --

MS. McDONALD: May I see the documents that he provided to you? Thank you.

They might just be in here. I believe it's the same --

MR. WASSERMAN: Karen, another reason I think it's important for the documents to be marked is that I think it's important for the court to be able to review them and determine what their content is before they can decide whether they are covered by the attorney work product privilege, not merely the dates --

MS. McDONALD: But once the court starts reviewing it, then --

MR. WASSERMAN: You can file things under seal.

MS. McDONALD: You can ask for in camera and all that.

MR. WASSERMAN: Well, in camera is before the court and not in front of the attorneys.

MS. McDONALD: If I produce them it's in the record.

MR. WILLMAN: We'll agree we will not see those today.

MS. McDONALD: Who is going to have possession of them?

MR. WILLMAN: You will. You have our agreement on that, we will not see them. You can hold on to them.

MS. McDONALD: Let me just double-check because I...

MR. WASSERMAN: And so we're clear, we will ask you to submit them to the court under seal so the court can decide whether they are work product documents.

MS. McDONALD: I object to that.

MR. WASSERMAN: Obviously you'll object. That's why we're not looking at them now.

MS. McDONALD: Okay. Here they are. I have them, Dr. Margulies.

There is a letter dated February 24, 1992. It's a communication from me to Dr. Margulies regarding this case.

And there's a letter dated May 26, 1991.

It's a communication from me to Dr. Margulies regarding this case. And I'm claiming attorney work product privilege as to both letters. And these came from Dr. Margulies' file.

MR. WILLMAN: Anything else?

MS. McDONALD: That's all.

MR. WILLMAN: Would you then give those to the reporter. We won't look at them. Have her mark those so I can ask some questions of the witness about those documents.

MS. McDONALD: No. Because he's not going to answer any questions about the documents and because I believe it is the law, whether you agree or not agree, that once you mark an exhibit it becomes a part of the deposition.

MR. WILLMAN: Let the record show that counsel is refusing to allow the court to have an opportunity to rule on whether these documents are protected by attorney-client privilege and the work product doctrine by not allowing us to question the witness about those documents for the court to decide whether in fact they are

protected by the privilege and by the doctrine.

MS. McDONALD: Let me state that that is incorrect. I'm not refusing to let the court -- I don't have a problem if the court orders for me to submit this in camera for a review.

I'm only saying that it's my belief that once I have this marked as an exhibit to the deposition, whether counsel agree or not, it becomes a part of the official record and I have waived some rights on the part of the plaintiff. I don't intend to waive those rights.

If I'm ordered by the court to produce them, I certainly will produce them.

But I object to Dr. Margulies testifying about the contents of these writings for us to decide here today whether or not it should be privileged and for him to try to make a record for the court's review.

I think that's properly arguable between us in the form of a brief. I'm claiming it as a communication about the case in anticipation of litigation relating work product, my opinions to

Dr. Margulies. And it's privileged.

BY MR. WILLMAN:

Q. Back to you, sir. Do you know what is contained in the letters dated February 4, 1992 and May 26, 1991?

A. I'd have to look at them.

Q. Do you know whether there is information in there that was provided to you as a potential expert witness in this case?

A. Whether there was information provided to me?

Q. Yes.

A. You mean like factual information about the case?

Q. Any information.

A. Yes, there was information.

Q. Was that information that you needed in order to form your opinions in this case?

A. No.

Q. Did you rely on any of the information that was contained in those letters?

A. No.

Q. Did you receive any other letters or documents or studies or anything else from plaintiff's lawyer in this case other than the medical records which you've reviewed and the two pieces of correspondence?

A. No. That's it.

Q. Have you generated any written statement of your conclusions at any time in this case?

A. No.

Q. Did you generate a written statement of your conclusions after you first reviewed this matter?

A. No. No.

Q. I take it that you have formed some opinions in this matter; correct?

A. Yes.

Q. I would like you to in a summary fashion tell me what your criticisms are in this case, in a very summary fashion, and then we'll go back and talk about it some more, but if I can get a summary of those, I would appreciate that.

A. Okay. Betty Douglas faced a significant

risk of a deep venous thrombosis and pulmonary embolus subsequent to her stroke.

Or the failure to administer subcutaneous heparin exposed her to that significant risk in that that significant risk culminated in a pulmonary embolus and her death.

Q. Do you have any specific criticisms of Dr. Gomez in this case?

A. Simply the failure to administer subcutaneous heparin to a woman who was virtually hemiplegic.

Q. And you don't have any other criticisms of Dr. Gomez other than that; is that correct?

A. Right.

Q. Do you know Dr. Gomez?

A. No.

Q. Do you know him by reputation?

A. No.

Q. Do you know any of the physicians at St. Louis University?

A. No.

Q. You don't have any other criticisms of

anyone employed by St. Louis University other than what you have just stated; is that correct?

A. Right.

MR. WILLMAN: Let's go off the record.

(Discussion off the record.)

(Recess)

MS. McDONALD: I would like to -- I have refreshed during a break -- Dr. Margulies had forgotten that he wrote me back at some time before the suit was filed in response to a letter I had written him.

He doesn't have a copy of the letter, but I can represent that it was a letter from him sent back to me prior to filing this suit that I'm also claiming as part of our work product, attorney work product and communications between me and Dr. Margulies.

BY MR. WILLMAN:

Q. Sir, is it correct then that you did send a written statement of conclusions that you reached in this matter to Karen McDonald?

A. No. They were not conclusions because I

didn't even have all the medical records.

Q. Did you make some statements as to your opinions in that letter?

A. I had some thoughts on the issues, yes.

Q. Were these thoughts opinions of a medical doctor?

MS. McDONALD: I'm going to object to that because if we start describing what they were, it's going to tell you exactly what the nature of our communication was. It has nothing to do with this case. I mean in terms of what his medical opinions are in the case.

So I mean, I don't think it's appropriate for us to hedge around what was in it and what wasn't in it. I'm claiming it as work product. You can identify it, just as we did the others, and let the court decide.

BY MR. WILLMAN:

Q. Go ahead and answer the question, would you please.

MS. McDONALD: I would ask Dr. Margulies not to describe the communications because it's

waiving my privilege and I'm claiming the work product privilege.

MR. WILLMAN: Would you read the question back, please.

(The record was read as requested.)

MS. McDONALD: You can answer that. I don't have a problem with that question.

THE WITNESS: Every opinion that comes out of my mouth is the opinion of a medical doctor because I am a medical doctor.

BY MR. WILLMAN:

Q. So the answer is yes?

A. The answer is yes.

Q. And earlier I had asked you if you had had any written -- if you had prepared any written statement to Karen McDonald and you told me no; is that correct?

A. You have to read back what you asked me. I don't know if you can find that.

MS. McDONALD: I think he said reports. I recall the question being reports.

BY MR. WILLMAN:

Q. Well, is it fair to say that after we took a break and you talked with Mrs. McDonald that your memory was then refreshed? Is that right?

A. Right. This had to do with the preliminary letter that I wrote her when she first contacted me about this case.

Q. All right. You stated that Mrs. Douglas was at a significant risk of developing deep venous thrombosis; is that a fair statement?

A. Yes.

Q. Isn't it true that the incidence of DVT in stroke patients is about one-third?

A. Somewhere between a third and 40 percent, right.

Q. And that of those stroke patients who develop DVT, about one-third of those suffer a pulmonary embolus or emboli?

A. I think that's a roughly accurate figure.

Q. And approximately one-fourth of the pulmonary emboli turn out to be fatal pulmonary emboli?

A. I think that's fair.

Q. So that 2 to 3 percent of stroke patients actually experience a fatal pulmonary embolus?

A. Yes.

Q. And you agree that heparin doesn't prevent fatal pulmonary emboli from occurring; correct?

A. You mean doesn't prevent all of them?

Q. Yes.

A. That's correct.

Q. That heparin is known to reduce the risk?

A. Correct.

Q. Now, given the percentages that we just discussed and that you agreed to, what is your opinion as to what her risk was of developing a fatal pulmonary emboli, first of all?

A. I accept the figures you just stated.

Q. And what is your opinion as to what the reduction in the risk of her having a fatal pulmonary emboli was if she had been placed on subcutaneous heparin?

A. Maybe half, maybe more.

Q. A half of?

A. In other words, you might reduce it by 50

percent or more.

Q. And that would be of the 2 to 3 percent risk category?

A. That's correct.

Q. Do you believe she was at a low or moderate or high risk for developing DVT?

A. She was in a moderately high risk. You know, she had a plegic leg, a virtually plegic leg. She was not in heart failure. That would have been another risk failure.

But the fact that she was plegic made her a moderately elevated risk.

Q. Any other risk factors other than those that you just mentioned?

A. She had mild diabetes, but -- or modest diabetes. Other than that, I'd say no.

Q. Have you ever discussed whether the use of subcutaneous heparin in this case was appropriate with any other physicians?

A. No.

Q. Do you know whether internists here at Sinai Hospital use subcutaneous heparin in their

stroke victims?

A. We, the best I can tell, routinely use it.

Q. I'm talking about internists.

A. Yeah. The way it's set up here at Sinai is that the neurologists act as consultants. We don't -- we're not the primary physicians on the ward.

Q. Is it your statement that -- let me back up.

There is a rehabilitation center here at Sinai Hospital; correct?

A. Right.

Q. Is it your belief that internists at the rehabilitation center here use subcutaneous heparin on their stroke victim patients?

A. It depends on, you know, what their status is and what their ambulatory status is. If they're plegic and therefore at risk of deep venous thrombosis, I would say yes. If they're ambulatory, probably not.

Q. You don't believe that subcutaneous heparin is indicated in all patients who suffer

an ischemic stroke, do you?

A. No.

Q. And why is that?

A. Because not all of them are at elevated risk of developing deep venous thrombosis.

Q. Now, you said that she was plegic, hemiplegic?

A. Plegic really means no movement. She had a little flicker of movement. She had minimal movement.

Q. So would it be fair to say she was hemiparetic?

A. Well, hemiparetic -- we're getting into semantics here, but hemiparetic -- if hemiparetic covers everything from a flicker of movement to minimal weakness, I would say she's hemiparetic.

Q. Did you see any evidence in the medical records that you reviewed that she was hemiplegic?

A. Yes. Let me back up. If we're going to no function whatsoever, she was not completely hemiplegic. She was virtually hemiplegic.

Q. She had suffered a mild stroke; correct?
A. I don't know what you mean by "mild."
Q. What don't you understand about that?
A. Well, mild can be referring to the severity of the palsy, of the weakness, or it can refer to the size of the infarct.
Q. You would agree that there is evidence in the chart that Mrs. Douglas was ambulatory at times; correct?
A. She was vertical sometime before her death. She was up on the parallel bars. She had no useful function of her left leg. As I understand it, they had to lock her knee to get her to bear any weight on it. She had no use of her left leg, no reasonable use of her left leg.
Q. She was in physical therapy both at St. Louis University and Saint Mary's Rehab; correct?
A. I know she was at physical therapy at Saint Mary's. I'm not sure what she was doing in physical therapy at St. Louis, but just for the moment I'll accept that she was in physical

therapy at St. Louis.

Q. And she was walking with assistance at both institutions; correct?

A. She was able to bear weight on her right leg with -- by locking her knee she could -- I mean, she would not collapse. She could bear weight on her left leg. But she was not ambulatory or walking. She wasn't using the muscles of her left leg.

I mean, that's the critical issue. It's not just simply that you're vertical and that you can swing your leg with maybe people helping you and you're on the parallel bars.

What reduces the risk of venous thrombosis in a leg is the ability of the muscles to pump the veins and to keep blood from being stagnant in the leg.

Q. You're referring to stasis; correct?

A. Stasis, yes.

Q. Do you see any evidence in the charts from either institution that she was not using the muscles in her left leg?

A. Yes.

Q. Where?

A. On 9-6-88 there was a department of physical therapy evaluation in which they said that -- they were discussing strength in the left leg, they put down: Quads, trace? Hamstring, trace? Dorsiflexion of the foot, zero. Plantar flexion of the left foot, zero.

Q. If in fact there is evidence that she was using her left leg, then you would not see -- you would not believe that there would be an indication to use heparin in this case; correct?

A. No. Because unless we agree on what you mean by using the left leg -- I mean, if she was walking on the leg without assistance, she was using the muscles, contracting the muscles of her left leg?

Q. Yes.

A. If she was contracting the muscles of her left leg, and then we have to agree about when that occurred, if it occurred the day before -- if suddenly she got remarkably better the day

before her pulmonary embolus, it doesn't relieve the doctors of the responsibility to give her subcutaneous heparin prior to that.

Q. I want you to assume that the evidence will be that she was exercising the muscles in her left leg while she was at St. Louis University and at Saint Mary's Rehab. Doesn't that eliminate the indication for subcutaneous heparin in this case?

MS. McDONALD: I'm going to state an objection because I don't see any foundation for that in the record. If you want to ask that as to what you think the evidence is going to show, then I object because I don't see a factual basis in the record for that.

MR. WILLMAN: We'll prove it. Go ahead.

THE WITNESS: Let me just see if I understand how much -- what do you mean by "exercising." You mean that she was able to lift her left leg up and pump her ankle and use her calves and stand on her toes, for example?

I mean, that's the kind of -- it's got to

be more than just a flicker of movement. It's got to be some real active contraction.

BY MR. WILLMAN:

Q. Are you unable to answer the question that I just posed to you?

A. Ask it again. Give it to me one more time.

Q. The evidence will be that Mrs. Douglas was exercising the muscles in her left leg -- and I'm using your phrase -- while she was at St. Louis University Hospital and at Saint Mary's Rehabilitation Institute.

In your view doesn't that eliminate any indication to consider using subcutaneous heparin?

A. All we have to do is agree on what the exercise was. What do you mean by "exercising"?

Q. I'm using your phrase, Doctor.

MS. McDONALD: Objection.

THE WITNESS: Then let's use my phrase -- I mean, I don't -- let's talk in just one word. I mean, it's not even a phrase. It's a word.

But exercising to me means walking on the leg in such a state that the patient is bearing weight, pressing off, using the gastrocnemius, using the tibialis anterior, contracting the quads and the hamstring walking without people swinging their leg, either the assistants not swinging the leg or the patient herself not just swinging her leg and having somebody just lock the leg.

If she was actively contracting the muscles in a significant -- I mean not just a mere trace, that if she was really using the leg, I would say that there would be -- up until the time that she was starting to do that, there would still be a requirement for heparin, subcutaneous heparin.

But once she started to do that, after a couple of days if it appeared that the one could infer that the venous blood flow was no longer stagnant in that leg, then I think you could reduce the heparin.

BY MR. WILLMAN:

Q. The description that you just gave us is your definition of mobility for purposes of making the decision as to whether to use subcutaneous heparin?

A. Well, I'm sort of fleshing out what people mean by ambulating.

Q. Is that your definition of mobility?

A. Yes.

Q. And if in fact she was mobile in the way that you described it, then there would not be an indication to use subcutaneous heparin. Do you agree?

A. Other than what I've just said a couple times already in that up until the time that she gets to that point, she has -- there's a requirement for heparin.

Once she starts using the leg, every other day or two -- I mean, no one has studied this particular issue as to when you are safe to stop the heparin, but I'd give it a day or two. I think that would be reasonable. Once she started walking around on the leg, then she wouldn't need

the heparin.

Q. And you agree that even if she were mobile in the way that you believe she should be mobile, she could still develop a DVT and subsequently a fatal pulmonary embolus; correct? If she were walking around, could she still develop a pulmonary embolus?

A. Yes. Just like you and me could, yes.

Q. And she could also develop a DVT which could precede the fatal pulmonary embolus; correct, even if she were mobile in the way that you described it?

A. Anybody can develop a fatal pulmonary embolus, so the answer to that would be yes. But just I note it's extremely rare.

MR. WASSERMAN: I move to strike the last part of the doctor's answer as nonresponsive to the question.

MS. McDONALD: I object to that.

I was going to make sure that you got it down. Did you get it down?

THE REPORTER: Yes.

MS. McDONALD: Okay. Thank you.

BY MR. WILLMAN:

Q. Is it your testimony that all immobile patients, and using your definition of mobility and immobility, suffering a stroke should be treated with subcutaneous heparin?

A. These are not post-stroke patients?

Q. Yes.

MS. McDONALD: Objection as to vagueness as to type of stroke.

THE WITNESS: Not taking any cues, these are ischemic strokes?

BY MR. WILLMAN:

Q. Ischemic stroke.

A. And they have no bleeding disorder, bleeding diathesis?

Q. Correct.

A. They're not allergic to heparin?

Q. Yes.

A. I would have to think of some reason not to give them heparin.

Q. Are paraplegics given prophylactic

heparin?

A. They should be. I mean, if they suffer spinal cord injury?

Q. Yes.

A. It does reduce the risk of pulmonary emboli.

Q. Do you treat spinal cord injury patients?

A. Not too often.

Q. Do you treat Parkinson's patients?

A. Yes.

Q. That's akinesis; correct?

A. I'm sorry?

Q. Akinesis?

A. Akinesis.

Q. Yes.

Are patients who have Parkinson's disease put on heparin?

A. If they are really rigid. If they just don't move at all and they are lying in bed, the answer is yeah.

Q. Say you have a patient with Parkinson's disease who is unable to move her left lower

extremity, do you place that patient on subcutaneous heparin?

A. They are bed-bound patients?

Q. I've given you my question. Are you unable to answer the question?

MS. McDONALD: I'm going to object.

BY MR. WILLMAN:

Q. Do you understand what I mean when I say a patient with Parkinson's disease who is unable to move the left lower extremity?

MS. McDONALD: Let me state my objection. My objection is that the question is vague. It lacks a complete factual foundation. If the doctor can answer it based on those facts.

THE WITNESS: I'm not sure I -- the difference between that and a stroke patient is that in a stroke patient, the limb is flaccid, and in a Parkinsonian patient, the patient has a lot of tone in the muscle, tone in their leg. And I don't know whether or not they need to have subcutaneous heparin.

I don't know whether or not a patient who

has an immobile leg with muscles that are still capable of contracting and in fact are contracting need subcutaneous heparin. Just the mere fact that the limb is not moving or whether it's the absence of muscle tone makes it necessary for the heparin to be used.

BY MR. WILLMAN:

Q. Have you ever prescribed subcutaneous heparin to a patient of yours who's been diagnosed with akinesis and that akinesis has affected that patient to the extent that they are unable to move one of their lower extremities?

A. I can't recall the last time I've had such a patient. You're asking as a pretty rare situation, a Parkinsonian patient that can't move whatsoever. I can't remember the last time that's ever happened.

Q. I didn't ask a patient who can't move whatsoever.

A. I understand. You're talking about the -- you're talking about Parkinson's disease in which one leg can't be moved. I just can't recall a

patient like that.

Q. How many Parkinson's patients have you prescribed subcutaneous heparin for?

A. Because they have Parkinson's or because they may have a medical illness that requires subcutaneous heparin?

Q. Just looking at the Parkinson's disease alone.

A. I can't recall -- I can't recall one. But just because, you know, I don't recall a Parkinsonian patient so bad that I had to hospitalize them and I just -- I mean, we're talking about maybe three, four, five years and I can't remember it before that.

Q. Have you ever used any pneumatic devices in treating stroke patients where you think there is a risk of developing DVT?

A. I haven't used them, but I've seen them used.

Q. By "pneumatic device" I am referring to what's called a moon boot.

A. Okay.

Q. Are you familiar with the moon boot?

A. I don't know if it's called a moon boot, but I'll accept the term. I mean, I've seen pneumatic devices on the leg.

Q. And you've never used that kind of device on a patient; is that correct?

A. As I say, I'm a consultant and it's usually the internists who have ordered it.

Q. Well, let's break it down.

Have you ever seen an internist who has used a pneumatic device on a patient?

A. Yes.

Q. And that was used in lieu of prescribing subcutaneous heparin?

A. I can't remember whether or not the patient was on subcutaneous heparin.

Q. The reason that the pneumatic device was being used was to prevent stasis in the lower extremity; correct?

A. I think that's true.

Q. Do you know whether pneumatic devices are preferred as a way of preventing or reducing the

risk of DVT over subcutaneous heparin?

A. Whether or not they're preferred, they're not used more commonly than subcutaneous heparin.

Q. My question is: Do you know whether they are preferred as a treatment of or as a way of reducing the risk of DVT in a stroke patient?

A. I would have to say that because subcutaneous heparin is used more commonly than these pneumatic devices that subcutaneous heparin is preferred.

Q. Have you read any studies in the medical literature which discuss the relative advantages and disadvantages of subcutaneous heparin versus pneumatic devices in reducing the risk of DVT in stroke patients?

A. Not that I can recall.

Q. Have you ever had a patient experience thrombocytopenia?

A. Sure.

Q. How many?

A. I've had patients who get thrombocytopenia. I've maybe had ten patients.

Q. You mean from heparin or thrombocytopenia first?

A. I maybe have had ten patients.

Q. And how many of those were on heparin either IV or subcutaneous?

A. Let me just back up here. Many patients will develop a thing called DIC in which they -- okay. And they'll be thrombocytopenic and they'll be given heparin as treatment. Maybe more than ten patients. Probably more than ten patients. Probably many more than ten patients who have been DIC and thrombocytopenia.

Then there are conditions like ITP where people get thrombocytopenic. And then there are patients who have allergic reactions to heparin and that get thrombocytopenic.

Now, given that background let's go back and re-ask the question.

Q. Let me ask it a different way.

Have you ever had a patient who has been prescribed heparin, either subcutaneous or IV, who has developed thrombocytopenia?

A. I've never had a patient, but I know of one patient that had that happen.

Q. You recognize that that is a risk of using subcutaneous heparin; correct?

A. I don't know if it occurs in subcutaneous. I know it occurs in IV. I don't know if you can -- I've never heard of a case happening with subcutaneous heparin.

Q. Are you aware of any studies in the literature which report thrombocytopenia occurring as a result of the use of subcutaneous heparin?

A. I'm not aware of a report.

Q. What percentage risk do you think -- strike that. We've already covered that.

Did you see that Mrs. Douglas' lower extremities were examined while she was at St. Louis University Hospital; correct?

A. I can't remember specifically, but I'll assume for the moment that is true.

Q. Did you see any evidence of any abnormal findings that would indicate that she had

developed a DVT while she was at St. Louis University Hospital?

A. No.

Q. And you agree that when you do a physical examination, it is important to report abnormal findings; correct?

A. Yes.

Q. And that if you do a physical examination and there are only normal findings, you don't write that down, do you?

A. I wouldn't necessarily agree with that. I mean, some people do. Some people don't put on every single normal finding. I mean, it's normal if it's a pertinent negative.

If it's relevant -- if there's an issue of a patient having a DVT, then you put down there's no evidence of a DVT, namely no swelling of the calf, et cetera.

Q. If Dr. Gomez and the residents of St. Louis University Hospital examined Mrs. Douglas' lower extremities and the examination was normal, you don't have any quarrel with them not

reporting that, do you?

A. It would have been nice, but it's not a breach of the standard if that's what you're asking.

Q. Correct.

A. No, I don't think it's a breach of the standard.

Q. So we're agreed that you find no evidence of a DVT while she was at St. Louis University; correct?

A. I think that is correct. I'm going to say yes.

I might just -- I happened to look and opened up the chart at St. Louis and on the 29th and 30th of August of '88 they're talking about left hemiplegia, and you had asked me before about was there any evidence that she was hemiplegic and the evidence is what the doctors wrote themselves.

On 8-29 they say, "Left hemiplegia persists." On 8-30 they say "left hemiplegia."

Q. If the evidence is that was a resident

that wrote that down and he was mistaken in describing it as hemiplegia but in fact it should be described as hemiparesis, you would have no reason to disagree with that, would you?

A. If he made a mistake -- if he made a mistake, he made a mistake. How could I disagree with the truth?

Q. Do you see any evidence that she was in fact hemiplegic as opposed to hemiparetic?

A. In --

Q. Any objective findings or subjective findings that indicate to you that she was hemiplegic as opposed to hemiparetic?

A. I would have called it hemiplegic. But, you know, if you get to real thin slices, because she had a flicker of movement, somebody might say she was not completely plegic. That's why I kept using the term "virtually plegic."

She was unable to move her leg, to lift her leg, for example, couldn't even plantar or dorsiflex her leg. That's a virtually hemiplegic leg.

The difference between the virtual hemiplegia and complete hemiplegia is a lot narrower than complete hemiplegia and hemiparesis.

Q. That statement by the resident is not an indication of DVT, is it?

A. That's correct.

Q. Now, you have reviewed the pathology report -- the autopsy report? Excuse me.

A. Yes.

Q. Do you agree that the findings in the autopsy report support the conclusion that the bilateral pulmonary emboli which she developed occurred within hours if not minutes before her death?

A. Yes.

Q. You have not reviewed any medical literature on any subject matters in this case; is that correct?

A. No.

Q. Do you plan on reviewing any of the medical literature between now and the time of

trial?

A. Probably.

Q. What do you plan to review?

A. Use of heparin in strokes prior to 1988. In hemiplegic patients.

Q. And why do you plan to do that?

A. I guess to refresh my memory on how many patients were used -- what was the exact reduction in pulmonary emboli, exact reduction of fatal pulmonary emboli.

Q. Had you ever reviewed any medical literature in this case?

A. I have in this case. I mean, I've reviewed the subject. I mean, it's come up before. It's come up before.

Q. I mean specifically in relation to having been called by Karen McDonald, have you gone back and looked at the medical literature?

A. I may have before -- I mean, all of these questions are -- I have not -- when she called me first and I looked up some stuff, I had not considered that part of the preparation for

this -- let me see how I can say this properly.

I did look up some articles when she first contacted me. And I did do some research on it.

Q. The reason you did that is because you were asked to tell her whether you thought there was any negligence in the care and treatment of Mrs. Douglas; is that correct?

A. No. No. It was for different reasons.

MS. McDONALD: Same objection as I stated before.

BY MR. WILLMAN:

Q. Have you ever reached any conclusions or made statements or given opinions about the subject matter of this lawsuit that are different from what you've told us here today in your deposition?

A. I can't answer that.

Q. Why not?

A. Your question was work product.

MS. McDONALD: I'm going to claim the same privilege, attorney work product privilege.

MR. WASSERMAN: His opinions are your

attorney work product?

MS. McDONALD: Communications. It falls under communications.

MR. WASSERMAN: His opinions are communications from you to him?

MS. McDONALD: You haven't established -- I mean, you want to use the word "opinions." He said that I contacted him. He did not have the complete chart.

I mean, if you want to -- I don't know where you're going to draw the line as to at what point is it a part of his file.

Did he rely on these articles that he looked up? I don't have a problem with him saying what articles if he can recall. It's not a part of the file.

If he knows what articles, I don't have a problem with that, but in terms of the discussion that took place between him and I and the issues discussed, I do claim that as work product.

MR. WILLMAN: That wasn't my question.

BY MR. WILLMAN:

Q. Do you want me to have the question read back to you? I can do that if you want. If that would help you out.

MS. McDONALD: He's answered the question.

MR. WILLMAN: He didn't. He said he's not going to answer it because of work product.

MS. McDONALD: That's his answer.

BY MR. WILLMAN:

Q. Is it your statement that whatever opinions or statements or conclusions that you reached that might be different from what you've told us today are protected by work product?

A. We had a communication. We discussed the case. And that's all I can say about it. I'm not going to say whether the opinions are different or the same as the ones I have today.

Q. Why aren't you going to tell me that?

A. Because it was --

MS. McDONALD: Because I've instructed him not to. I'm claiming it as attorney work product.

If the court rules that he has to, then he's free to. In the meantime, I've hired him as an expert to review the case. I'm claiming this as work product. I've asked for his cooperation. And he's not answering because of the privilege that I'm claiming.

BY MR. WILLMAN:

Q. Are you not going to answer the question?

A. Right.

Q. Is Karen McDonald your personal attorney?

A. No.

Q. And you're not invoking any Fifth Amendment privilege?

A. No.

Q. I need to ask these questions. Is that correct?

A. Right.

Q. And it is your position that you do not want to answer that question because your previous opinions, if you had any, are protected by work product; is that a fair statement?

A. Our discussions about the case. I mean,

the reason I'm not answering is because she doesn't want me to answer. She asked me not to answer.

Q. My question to you was not your discussions. I'm asking you, did you form any opinions or conclusions about what happened in this case that are different from what you've told us here today?

A. And my answer was I couldn't answer that.

Q. And the reason you can't answer is because you believe it's protected by work product; is that correct?

A. I'm not answering because I've been instructed not to answer.

MR. WILLMAN: Okay. We'll be back here.

MR. WASSERMAN: Why are you taking her advice on the subject?

THE WITNESS: I don't know. That's what I've -- if she's been instructing me not to answer, I guess I won't answer until the judge tells me I have to answer.

MR. WASSERMAN: But why are you taking

instructions from her?

THE WITNESS: I don't know. I'm not sure I can answer that.

MR. WILLMAN: Let me just ask one other question and then I'll turn it over to you.

MR. WASSERMAN: Okay.

BY MR. WILLMAN:

Q. Do you anticipate testifying as a witness at trial in this matter?

A. If it goes to trial, yes.

MR. WILLMAN: I don't have any other questions at this time.

Do you want to take a break?

MR. WASSERMAN: Sure.

(Recess)

EXAMINATION

BY MR. WASSERMAN:

Q. Doctor, my name is Steve Wasserman and I represent SSMRI, which is the rehabilitation facility that the decedent was admitted to at the time of her death, plus Dr. Machek, who is a physiatrist, and Dr. Reardon, who is an

internist. Both doctors treated the decedent while she was at the rehab facility.

Before I ask you any questions, I just want to make something clear from the questions that Mr. Willman asked you.

You have stated on the record that some of your opinions are subject to the attorney work product privilege; is that correct?

A. I don't think I said that. We had some communications.

Q. Were your opinions communicated to Mrs. McDonald in these allegedly protected discussions?

A. We discussed -- we discussed parts of the case.

Q. But not your opinions?

A. And I advised her. But my opinions -- if there were any opinions, they might be preliminary thoughts on the matter, but final opinions are only after she asked me if I was interested in serving as an expert on the case.

Q. Do you recall what those preliminary

thoughts were?

MS. McDONALD: Objection. Same objection. Same privilege I'm claiming.

BY MR. WASSERMAN:

Q. So you're not going to answer, Doctor?

A. Correct.

Q. Are you distinguishing between your opinions and your preliminary thoughts, saying they're not the same thing?

A. Right. I didn't even have all the medical records.

Q. And you don't recall what medical records you had?

A. That's correct.

Q. When did you receive additional records? Do you know that?

A. I don't recall exactly, no.

Q. Can you narrow it down somehow? I know you said you received the additional packet of information more than a year ago.

A. This must have been a couple months ago.

Q. Are you stating that you did not have

sufficient records until a couple of months ago to form any opinions in this case?

A. I don't normally form opinions, final opinions, until I get all the records.

Q. And what you've referred to as your preliminary thoughts are not the same thing as what you'd refer to as preliminary opinions?

A. Right.

Q. Can you tell me what criticisms you have of the -- well, of Dr. Machek's role in the care of the decedent?

A. I didn't pick out -- distinguish among the doctors, the two doctors that you mentioned.

Q. Okay.

A. I only have one criticism, and that is that when a person is hemiplegic, they need to be on subcutaneous heparin until they regain enough strength that they're using the muscles sufficiently to pump blood out of the leg, I guess is one way of putting it, but so that the blood is no longer stagnant in the leg.

Q. Is that the identical opinion that you

hold as to Dr. Gomez?

A. Yes.

Q. Any other criticisms of the care the decedent received at the rehab facility?

A. No. With one -- let me just back up on -- I said no. Let me just mention one small thing. It's just a criticism. I'm not sure it really rises to the level of a breach.

But I think she complained of some leg pains on the day that she died. I can't remember where I saw that. And I don't believe that -- I don't believe a doctor ever examined her for those leg pains.

It's just a criticism, but I'm not going to call it a breach of the standard.

Q. Do patients who develop DVT develop pain in the leg where the DVT develops?

A. They can.

Q. Not all patients develop that pain?

A. Right.

Q. Do patients who develop DVT in one leg have pain in the other leg?

A. I --

Q. I mean related obviously to the DVT.

A. Yes. I don't have enough experience to answer that question. Common sense would say no. But people with grayer hair than me might contradict me and say that they might have some referred pain, but common sense to me would say if you have bilateral leg pain it would not at first blush indicate a DVT in one leg.

Q. What's the incidence of having DVT in both legs?

A. I don't know.

Q. Simultaneously?

A. I think that would be unlikely, pretty unlikely.

Q. Any other opinions?

A. No.

Q. Doctor, we talked a little bit earlier about whether hypertension is a contraindication to the use of DVT.

A. Use of heparin?

Q. I'm sorry. To the use of subcutaneous

heparin.

Can you tell me your opinion on that again? I don't want to misstate your opinion, so I'll ask you to repeat it.

A. I'm not aware of any study that says that use of subcutaneous heparin increases the use of intracerebral hemorrhaging with hypertension at this level.

Q. Would a patient who had untreated hypertension for 20 years be a candidate for a hemorrhagic stroke?

A. Yes.

Q. Can you tell me what level of risk that person would be at having a hemorrhagic stroke?

A. I don't know how to answer your question. I don't know what to put in the denominator. You have all patients who have sustained hypertension for 20 years?

Q. Untreated.

A. What percentage of them will go on to have a hemorrhagic stroke?

Q. Are they at high risk of developing or

having a hemorrhagic stroke?

A. They are at higher risk than people who don't have hypertension. I mean, this woman had sustained hypertension. Her blood pressure wasn't too bad at the time she was in the hospital.

So the fact she had sustained hypertension in the past and had mildly elevated hypertension while in the hospital would not be a contraindication to giving her subcutaneous heparin.

Q. Could 20 years of untreated hypertension damage the blood vessels in the brain?

A. Yes.

Q. Does damage to blood vessels in the brain make a person susceptible to suffering a hemorrhagic stroke?

A. It raises the -- it does raise the risk. Not very much but I think it raises the risk.

Q. Why do you say "not very much"?

A. Because we're talking about a relative shortest period of time -- short period of time.

I'm talking about a month maybe, maybe two months depending on how soon -- how long it's going to take her to regain the strength in her leg.

Q. I don't understand your last answer so let me ask you a question.

A person who has hypertension for 20-odd years that goes untreated you said will likely sustain damage or is likely to sustain damage to the blood vessels in their brain?

A. Yes.

Q. And that makes them at an increased risk of having a hemorrhagic stroke than the general population?

A. It does.

Q. Can you tell me what would happen to a patient who suffered a cerebral hemorrhage while under heparin therapy?

A. You mean subcutaneous heparin?

Q. Yes.

A. If they suffered a hemorrhagic stroke under subcutaneous heparin? I don't know. It's a -- I can't remember a patient that's ever

happened to.

Q. Based on what you know about the contraindications to heparin, do you think if a patient suffered a hemorrhagic stroke while being administered heparin would increase the amount of the cerebral bleed?

A. I don't think subcutaneous heparin alters the bleeding parameters, the coagulation parameters.

Q. Then does it follow that if a patient has a hemorrhagic stroke that that is not a contraindication of the use of subcutaneous heparin?

A. My understanding of your question was that would the use of subcutaneous heparin make a hemorrhagic stroke worse I guess than if you weren't on heparin and I don't think that's necessarily true at all.

If somebody had a hemorrhagic stroke, would I -- and was hemiplegic from that, would I use subcutaneous heparin? That's a different story. I probably would.

Depending on the level of consciousness, how soon I can get them mobilized, I don't know of any study that says that if you have a hemorrhage, cerebral hemorrhage and use subcutaneous heparin that that raises the risk of worsening.

Q. So you're aware of no studies that say subcutaneous heparin is not contraindicated in patients with internal bleeds?

A. The difference between a hemorrhagic stroke and obviously not continuing to bleed if they do not have a subarachnoid hemorrhage -- you're talking about an intracerebral bleed. I'm not saying there isn't a study of that.

I'm just not aware of a study that says that if you have a hemorrhagic stroke that the administration of subcutaneous heparin will make that bleed worse.

Q. When you were discussing the matter with Mr. Willman earlier, you talked about muscle tone and how you weren't clear on how a person's muscle tone would affect a person's need for

anticoagulation therapy; is that correct?

A. What did I say?

Q. Well, let me ask you this: Does a person who is hemiparetic who has muscle tone in the leg with lessened ability, does that state of muscle tone affect the need for that person to have administered to them subcutaneous heparin?

A. Yes, I think so. I think if they have enough strength in the leg to stand on it and walk on it that they much reduce the need for heparin.

Q. Do you know what type of exercises the decedent did while in physical therapy at the rehabilitation institute?

A. Eventually at some point prior to her demise she was up -- her best activity was up on the parallel bars with major assistance. People were locking her leg for her. I think they were locking her leg for her.

Q. Are you aware of any other exercises she did during that two-week admission at SSMRI?

A. She was up in a wheelchair. They rotated

her. I assume they did some range-of-motion exercises.

Q. Are you aware of any other exercises that were done during therapy at SSMRI?

A. No. I can't recall right now.

Q. Let me ask you this: When people have pain in their legs after exercise, can you tell me what causes that pain?

A. You mean hemiplegic weakness?

Q. Just any people. You and I go out and play basketball for an hour and, boy, our legs are sore afterwards. What causes that pain medically speaking?

A. I'm not sure. Maybe lactic acid may have a role. Maybe small tears in the muscles. Small tears in the ligaments. Tendons. Overstretching of muscles.

Q. When muscles are stretched, does that increase the blood flow to them?

A. You mean passively stretched?

Q. Either way. I mean, if you need to make a distinction, then go ahead.

A. Does it increase the -- I don't know if it does, and if it does, it's not going to be very much because what's going to increase the blood flow to a muscle is the metabolic demand of the muscle and just passively flexing a muscle is not going to increase the metabolic demand of a muscle.

Q. So in other words, if the decedent received exercises during therapy at the rehabilitative center that passively moved her hemiparetic leg, you're saying that would not increase the blood flow to the muscles in her left leg?

A. What we're talking about -- I mean, you're talking about arterial blood. I'm talking about venous blood.

Q. That's not a distinction that you made earlier.

A. I think it -- I mean, if you want to increase the blood flow to the leg, really what's important is how stagnant is the venous blood, how are you going to get the venous blood out of

the leg.

Q. Can you tell me the difference?

A. Arterial blood is blood that's pumped from the heart to the leg. Venous blood is blood that's pumped from the leg to the heart. And it's the stagnant venous blood that poses a risk to the patient.

And passive stretching doesn't do enough -- it probably doesn't do very much at all for venous return.

As I recall, she slept a great deal and just, you know, a little bit of passive stretching I don't think is going to be enough. At least I've never seen a study where that's been shown to reduce the risk of pulmonary emboli enough to make heparin unnecessary.

Q. I'm sorry. And I'm going to ask you to repeat the answer to a question you were asked earlier.

How many stroke patients generally are put on anticoagulation therapy? I believe you said 20 -- well, I won't restate your answer.

A. It all depends on where the stroke is in the brain. It depends on what happens to the patient. If you estimate that 20 percent of them are hemiplegic, and there's no contraindication to the use of subcutaneous heparin, 20 percent.

Q. Is that what your figure is? I mean, don't assume that's the figure because that's what I said.

A. There is no figure. I mean unless you know what the percentage of strokes is that cause hemiplegia.

Q. Let me look at my notes. I think earlier you testified that subcutaneous heparin is administered to 30 to 40 percent of stroke patients. Is that true?

A. Let me clarify that. If that's how many patients get plegia, that's probably a little high. I don't think 30 or 40 percent of patients who have a tougher stroke are hemiplegic. It's probably closer to -- maybe closer to 10 percent. But it's all a question of who becomes hemiplegic from the stroke.

Q. I understand. That's another issue, Doctor. I'm just asking you how many or what percentage of patients you believe are administered subcutaneous heparin following a stroke, and your answer is 10 percent?

A. What you're essentially asking me is what percentage of patients who suffer a stroke become hemiplegic from a stroke because only those are going to get subcutaneous heparin.

Of course, there are the patients who are administered IV heparin to prevent progression of a stroke, but let's leave them aside. Those who become hemiplegic from a stroke, if I had to estimate, it would be about closer to 10 percent. 10 percent of strokes being hemiplegic. Maybe 20.

Q. Did the medical records of SSMRI show any clinical signs of DVT in the decedent?

A. I didn't see any.

Q. Earlier you agreed with Mr. Willman when he said the autopsy revealed that the DVT that subsequently embolized or detached, if I'm using

that phrase correctly, developed in the decedent within minutes or hours of her death?

A. I'm sorry. I heard him say that the pulmonary --

MS. McDONALD: That wasn't the question.

BY MR. WASSERMAN:

Q. Do you know what I'm talking about? Can you tell me what your response was?

A. I think he asked about whether the pulmonary embolus occurred within minutes, within minutes of the death.

Q. Do you have any idea when the DVT developed that subsequently detached and became the pulmonary embolus?

A. I can't tell.

Q. Does the autopsy report reveal where the DVT developed?

A. No.

Q. Does anything in the medical record indicate where the DVT developed?

A. Not that I saw.

Q. Have you ever followed patients in a

rehabilitative setting?

A. Yes.

Q. What percentage of your stroke patients have you followed in a rehabilitative setting?

A. Maybe 20 percent of them have gone to rehab.

Q. Do you know what percentage of those patients were placed on subcutaneous heparin?

A. They're usually on subcutaneous heparin from being on the ward, on the medical ward. So the answer is usually a hundred percent of those who are hemiplegic.

Q. Have you ever followed a patient who was not administered heparin at the acute care facility who was later transferred to a rehabilitative center and subsequently began heparin therapy without showing any signs of DVT?

A. I can't recall.

Q. You can't recall ever following a patient like that or --

A. Right.

Q. So the answer is no?
A. Right.
Q. To the best of your knowledge?
A. Yeah.
Q. Would you have any idea of why that is?
A. Why what is?
Q. Why a patient who is transferred from an acute care facility to a rehabilitative setting and while at the acute care facility was not on heparin therapy was not later started on heparin therapy at the rehab setting.
A. I don't know if that's -- I don't know if that's true. I just don't recall. I mean, you're giving me a hypothetical that -- is that a hypothetical question?
Q. Well, no. But all of the patients that you've followed from an acute care facility to a rehab setting, all of those patients were not placed on heparin, subcutaneous heparin, at the rehabilitative center if they were not placed on heparin at the acute care facility?
A. I don't think that's what I said. I said

I just don't recall a situation where a patient has not been on heparin and was later put on heparin at the rehab center.

Q. And I'm asking you, do you know why the patient was not placed on heparin?

A. Oh, I'm sorry. At the --

Q. At the rehab center?

A. I don't know that they were or weren't.

Q. Well, I'm sorry. I thought you told me that you have no recollection of following a patient who went from the acute facility to the rehab facility who was not on heparin at the acute facility but was subsequently put on heparin at the rehab facility even though that patient showed no signs of DVT.

A. Right. I don't -- you know, it's a -- I just don't recall.

Q. And again, you don't recall that ever happening?

A. Right.

Q. In other words, the answer is: No, I have not followed any patients like that?

A. I just don't recall one way or the other.

Q. Okay. That's what I wanted to make clear. You're saying it may have happened; it may not have?

A. Right. It's really almost an internist -- the internists are the ones who are usually dealing with this issue and, you know, it's not something that I -- that just sticks out in my mind.

Usually there are other issues when the neurologist is called to consult on a case, you know, some neurologic, specific neurologic question, and I just can't remember whether or not patients were started on heparin or were not started on heparin.

Q. You're not a physiatrist?

A. Right.

Q. And you're not an internist?

A. I am an internist.

Q. You're an internist with a specialty in neurology? Is that a proper characterization of your medical practice?

A. When I went into neurology, you had to be an internist and then you had to go through neurology. There's not as much emphasis on doing that these days.

Q. Were there any neurological issues involved in the decedent's care at the rehab facility based on your review of the records?

A. I don't think there was a --

MS. McDONALD: I'm going to object to the term neurologist issues. I don't understand what that means.

BY MR. WASSERMAN:

Q. Do you think the decedent needed any neurological care or any consultation from a neurologist when she was at the rehab facility?

A. I don't think so. I think that if I had been in those shoes or even if I wasn't in those shoes, I think it was reasonable to carry out what they were doing without a neurologist's opinion about some issue.

Q. Do you think it's an internist's decision to decide whether a post-stroke patient needs

heparin?

A. An internist can make the decision.

Q. If a patient is followed by both a physiatrist and an internist, do you feel that one physician has the responsibility of determining whether that patient needs anticoagulation therapy over the other physician?

A. No. No. They're both looking at the same animal, the same problem. And both are qualified to make the decision.

Q. Have you discussed this matter with any physiatrists?

A. Before I was asked to be an expert. I haven't discussed this case, but I've discussed the issue with physiatrists.

Q. What issue?

A. About heparin.

Q. What did the physiatrist tell you about the use of heparin?

A. I can't recall whether or not we discussed hemiplegic patients.

(Telephone interruption.)

THE WITNESS: I think we were just talking about physiatrists and I don't know whether or not -- I just don't recall whether or not I discussed hemiplegic patients with the physiatrist.

BY MR. WASSERMAN:

Q. Do you recall what the physiatrist told you about the use of heparin?

A. No.

Q. Can you tell me who that physiatrist was?

A. Dr. Reinstein.

Q. Dr. Leon Reinstein?

A. Yes.

Q. Is Dr. Leon Reinstein the head of the rehabilitative center at Mount Sinai Hospital?

A. Yes.

Q. Do you respect his medical opinion?

A. Respect it? Every doctor respects every other doctor's opinion.

Q. Do you recall asking Dr. Reinstein if he put his post-stroke patients on heparin?

A. I don't know if I asked him about hemiplegic patients.

Q. Did you ask him about his general stroke patients?

A. I might have. I don't recall. It was a long time ago.

Q. So obviously if you don't recall if you asked him, you wouldn't recall any response he might have given you; is that correct?

A. On -- I think on general stroke patients. I'm not so sure he uses heparin in general stroke patients.

But I don't remember whether I asked him about hemiplegic patients and whether or not he would, you know, start heparin -- if a person was hemiplegic and hadn't been on heparin on the ward and came to the physiatry unit would he put them on heparin at that point. I'm not sure if I asked him those.

I mean, it wasn't specifically about this case. I didn't ask him the specific facts. I didn't give him the specific facts of this case,

so I don't know if I asked him those questions.

Q. When you talked to Dr. Reinstein, did you have any specific facts of this case -- did you know any facts about this case?

A. I probably did.

Q. But you don't recall?

A. Right.

MR. WASSERMAN: I don't think I have any other questions.

MS. McDONALD: I just have a couple questions.

EXAMINATION

BY MS. McDONALD:

Q. Doctor, have you ever asked Dr. Reinstein to review this patient's chart?

A. No.

Q. Have you ever asked any other doctor to review this patient's chart?

A. No.

Q. You saw that there was a CAT scan done on Mrs. Douglas at St. Louis; is that correct?

A. Yes.

Q. Did you see any evidence of any damage to the blood vessels either in the CAT scan report or in the autopsy report, cerebral blood vessels?

A. There was no bleeding in her head. That would be -- if one could construct a contraindication, which I'm not sure there is, to heparin, there certainly was no bleeding in her head.

She obviously had something wrong with her blood vessels because they occluded. But that certainly is not a contraindication to subcutaneous heparin.

Q. And I'm referring back to the question about evidence to damage of the blood vessels over a 20-year period of hypertension not being treated, the type of damage to the blood vessels.

Are you able to determine whether or not there was any damage to the blood vessels based on the autopsy report or based on the CAT scan?

A. From the CAT scan I think one could

conclude that because the vessels occluded that they're not normal, but that abnormality was not a contraindication to heparin.

Q. The opinions that you've rendered here today, have they been to a reasonable degree of medical certainty?

MR. WILLMAN: Let me just object to the form of the question. It's vague and it's not in the proper form. We've been here for over two hours and this witness has given a lot of statements and --

BY MS. McDONALD:

Q. The opinion about the failure of the doctors in this case to prescribe subcutaneous heparin to Mrs. Douglas --

MR. WILLMAN: Same objection.

MS. McDONALD: Let me finish my question, and, please, you can state your objection.

MR. WILLMAN: Fine. I thought you were finished.

BY MS. McDONALD:

Q. When you were asked about your major

criticism in the case and I believe you testified about the failure to prescribe heparin, the opinion regarding the failure to prescribe heparin, I'd like to know if that opinion -- whether or not you rendered that opinion to a reasonable degree of medical certainty.

MR. WILLMAN: And I object to the form of the question. That is not proper in its form under Missouri rules.

BY MS. McDONALD:

Q. Medical certainty or probability?

MR. WILLMAN: Same objection.

MR. WASSERMAN: I'll join in the objection.

BY MS. McDONALD:

Q. You can answer.

A. Yes. The answer is yes.

Q. I think I have one more question. Let me see if I can remember what it was.

The opinion that you rendered regarding the failure to prescribe subcutaneous heparin to Mrs. Douglas, do you have an opinion that that

failure was below the standard of care?

MR. WILLMAN: Let me object to the form of the question. That is not the proper form under Missouri law for opinions from this witness.

BY MS. McDONALD:

Q. Let me amend that.

Do you have an opinion to a reasonable degree of medical certainty or probability as to whether or not the failure of these doctors to prescribe the subcutaneous heparin to Mrs. Douglas was below the standard of care?

MR. WILLMAN: Same objection.

MR. WASSERMAN: And I'll join.

BY MS. McDONALD:

Q. You can answer.

A. I think it was. Yes, I do. I think it was.

MS. McDONALD: Thank you. I don't have anything further.

EXAMINATION

BY MR. WILLMAN:

Q. Sir, you're telling us today that you

believe Dr. Gomez and the other physicians were negligent for failing to prescribe heparin; correct?

A. Yes.

Q. Did you not in October of 1989 reach a different conclusion, that is, that Dr. Gomez and the other physicians were not negligent in the care and treatment of Mrs. Douglas in this case?

MS. McDONALD: I'm going to object. If you're referring to the communication between us.

MR. WILLMAN: I haven't mentioned any communication.

MS. McDONALD: I'm going to object to it.

MR. WILLMAN: I haven't mentioned any communication.

BY MR. WILLMAN:

Q. Sir, did you not reach an opinion in October 1989 that Dr. Gomez and the other physicians at Saint Mary's were not negligent in the care and treatment of Mrs. Douglas in this case?

A. Am I instructed not to answer?

MS. McDONALD: Yes. Same objection. Same basis.

MR. WASSERMAN: Karen, for the record, I would like to know why --

MS. McDONALD: Because he didn't have the medical records.

MR. WASSERMAN: Let me ask you a question. Why are some of Dr. Margulies' opinions subject to the work product privilege and others are not?

MS. McDONALD: Because communications that took place between me and Dr. Margulies --

MR. WASSERMAN: I'm not talking about communications.

MS. McDONALD: Well, you are.

MR. WASSERMAN: I'm talking about his opinions. I'm talking about some of them are not subject to the privileges, the ones he gave here today when you never objected, and others are subject to this privilege that you're alleging.

MS. McDONALD: Because he's never testified that he has arrived at any opinion

based on an incomplete medical chart.

Now, he said he had some preliminary thoughts and communications at the beginning of my review of this case with him, and I'm asserting the privilege. He was not in possession of the complete medical chart. He has testified that he did not rely on anything that I provided him at that time.

MR. WILLMAN: I'm going to object to you testifying for this witness. It's up to him --

MS. McDONALD: You asked for this discussion on the record.

MR. WILLMAN: I am not asking for it.

MS. McDONALD: I'm answering your question.

MR. WASSERMAN: You're not answering my question.

MS. McDONALD: Well, what's your question?

MR. WASSERMAN: My question is --

MR. WILLMAN: Let's not argue about it. I want to know from this witness whether he had an

opinion that Dr. Gomez and the other physicians were not negligent in the care and treatment of Mrs. Douglas.

MS. McDONALD: Same objection.

BY MR. WILLMAN:

Q. In October of 1989 did you not have an opinion at that time that the physicians taking care of Mrs. Douglas were not negligent in the care and treatment of her?

MS. McDONALD: Same objection.

I'm going to ask you not to answer.

I think it's unfair that you continue to ask him these questions knowing he did not have the complete medical chart. And he's already testified that he did not form any opinions about the case.

BY MR. WILLMAN:

Q. Okay. Are you going to answer the question that I just asked you?

A. Not under these circumstances.

Q. Why not?

A. Because I've been instructed not to answer

the question until the judge asks me to -- instructs me to answer it, and then I'll answer it.

Q. Just so the record is clear -- and I need to ask these questions --

A. I understand.

Q. -- Mrs. McDonald is not your personal attorney in this matter; correct?

A. That's right.

Q. And you're not invoking the Fifth Amendment in refusing to answer these questions; correct?

A. Right.

Q. And you are not a party to this lawsuit; correct?

A. Right.

Q. And the reason that you are not answering the question is solely because the attorney representing the plaintiff has instructed you not to do so; correct?

A. That's correct.

MR. WILLMAN: Okay. Just for the record,

we will take this up on a motion and we might be back here -- we should be back here to take the rest of your deposition. We will do so at the cost of plaintiffs if we're forced to do so.

Anything else we need to state on the record?

MR. WASSERMAN: No. I think that covers it.

MS. McDONALD: I want to put on the record, I am requesting counsel to give me some authority that provides that my claim of the privilege as I understand it is incorrect.

MR. WILLMAN: I will give you authority that I am entitled to inquire of this witness whether he has formed any opinions at any time that are different from or inconsistent with or are altered from the opinions he's giving today.

That is the question I have asked him and you have instructed him not to answer.. The question did not ask anything about communications. It had to do with whether he had any opinions before what he has told us today

that were different from what we've heard today and specifically asked him --

MS. McDONALD: About this case?

MR. WILLMAN: I've made my record.

MS. McDONALD: I'm making my record. It's based on opinions about this case.

MR. WILLMAN: Yes.

MS. McDONALD: My objection is to the fact that he did not have this case for review, that any preliminary thoughts about pieces of information that I may have shared with him that did not constitute this case are communications in anticipation of litigation and are privileged, not subject to discovery.

MR. WASSERMAN: Let me state for the record that this witness has not testified that he had insufficient information to form any opinions when he formed these initial opinions.

He has testified that he did not have the complete record, but he's unable to tell us what portion of the record he had and what portion he did not have. So we don't know whether he had

all but one page of the records or not.

MR. WILLMAN: Let's just -- I think we've --

MS. McDONALD: Well, I think the issue is on the record.

MR. WILLMAN: Let's go from there. We may be back.

MS. McDONALD: I agree.

MR. WILLMAN: Okay?

THE WITNESS: Okay.

(Reading and signature not waived.)

(Whereupon, at 4:05 p.m., the deposition was concluded.)

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STATE OF MARYLAND, to wit:

I, Josett F. Hall, before whom the foregoing deposition was taken, do hereby certify that the within-named witness personally appeared before me at the time and place herein set out, and after having been duly sworn by me, according to law, was examined by counsel.

I further certify that the examination was recorded stenographically by me and this transcript is a true record of the proceedings.

I further certify that I am not of counsel to any party, nor an employee of counsel, nor related to any party, nor in any way interested in the outcome of this action.

As witness my hand and notarial seal this _____ day of _____, 1993.

_____

JOSETT F. HALL

Notary Public

MY COMMISSION EXPIRES: 10/1/96

I N D E X

DEPOSITION OF SHELDON MARGULIES, M.D., J.D.

APRIL 16, 1993

EXHIBITS:	PAGE MARKED
None	

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

SHELDON MARGULIES, M.D., J.D.

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this _____ day of _____, 1993, and executed the above certificate in my presence.

_____

NOTARY PUBLIC IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

2ND STORY of Level 1 printed in FULL format.

The National Law Journal

August 30, 1993

SECTION: UPDATE; Medical Malpractice; Case of the Week; Pg. 35

LENGTH: 265 words

HEADLINE: Opinion of Physician-Attorney Wasn't Privileged

BYLINE: The Weekly Update is compiled by David Nadvorney.

BODY:

THE OPINION of a physician-attorney who had been designated by the plaintiff as a testifying expert witness was not privileged, the U.S. District Court for the Eastern District of Missouri held July 21.

In Douglas v. University Hospital, 91-1966-C(9) (CDP), Dr. Danny Douglas, a physician, filed suit against St. Louis University and other defendants, alleging that his mother's death was the result of negligence. The defendants moved to compel the completion of the deposition of **Sheldon Margulies,** a physician who is also an attorney.

Before filing suit, Dr. Douglas' counsel had provided Dr. Margulies with the decedent's medical records, and Dr. Margulies had provided a written opinion to counsel stating that a negligence action would fail. The plaintiff then designated Dr. Margulies as an expert witness who would opine at trial that the defendants were negligent. At his deposition, Dr. Margulies stated that he could not say whether he had rendered any opinion about the subject matter of the lawsuit because that was "work product."

Dr. Douglas' counsel argued that the letter, along with any communications she had with Dr. Margulies before suit, was protected from discovery on the grounds of both attorney-client privilege and attorney work product. She contended that she had sought legal, as opposed to medical, advice from Dr. Margulies, and that his opinion that the negligence claim would fall was nothing more than his opinion as a lawyer.

The district court ruled that the attorney could not withhold the prior inconsistent opinion from discovery.

LANGUAGE: ENGLISH

Danny DOUGLAS, Individually and Personal Representative of the Estate of Betty Douglas Deceased, and Danny Douglas Individually, Plaintiff,
v.
The UNIVERSITY HOSPITAL, St. Louis University Medical Center, et al., Defendants.

No. 91-1966-C(9)(CDP).

United States District Court, E.D. Missouri, E.D.

July 21, 1993.

Physician brought medical malpractice action against university hospital and physicians, claiming that his mother's death resulted from negligence. On variety of motions, the District Court, Perry, United States Magistrate Judge, held that: (1) letter by attorney/physician to plaintiff's counsel was not protected from discovery on grounds of attorney-client privilege or attorney work product; (2) plaintiff would be allowed to testify both as plaintiff and as expert; (3) court would not grant pretrial motion to limit scope of testimony by plaintiff's expert, much of which could reasonably be regarded as necessary background for his ultimate opinions; and (4) plaintiff would not be allowed to introduce evidence that defendant physician initially failed written board certification examination.

Ordered accordingly.

[1] FEDERAL CIVIL PROCEDURE ⇐ 1600(3)
170Ak1600(3)
Letter by attorney/physician to medical malpractice plaintiff's counsel was not protected from discovery on grounds of attorney-client privilege or attorney work product, particularly as commonsense reading of letter showed that attorney/physician was providing medical opinion whether defendants were negligent in failing to provide drug, rather than legal advice; while attorney/physician used term "negligence," he opined that claim would fail because many, if not most, doctors in defendants' situation would not have prescribed drug.

[1] WITNESSES ⇐ 204(2)
410k204(2)
Letter by attorney/physician to medical malpractice plaintiff's counsel was not protected from discovery on grounds of attorney-client privilege or attorney work product, particularly as commonsense reading of letter showed that attorney/physician was providing medical opinion whether defendants were negligent in failing to provide drug, rather than legal advice; while attorney/physician used term "negligence," he opined that claim would fail because many, if not most, doctors in defendants' situation would not have prescribed drug.

[2] FEDERAL CIVIL PROCEDURE ⇐ 1602
170Ak1602
Even assuming that plaintiff initially hired physician as nontestifying expert consultant whose opinions could not be discovered except upon showing of exceptional circumstances, plaintiff later waived any right to withhold that information by designating physician as testifying expert witness. Fed.Rules Civ.Proc.Rule 26(b)(4)(B), 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE ⇐ 1602
170Ak1602
Even if physician was originally retained as nontestifying expert, once medical malpractice plaintiff turned physician's letter over to trial expert, and expert reviewed letter in forming his opinion, letter became discoverable. Fed.Rules Civ.Proc.Rule 26(b)(4)(B), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⇐ 1278
170Ak1278
Medical malpractice plaintiff could not be heard to complain that letter from physician expert to plaintiff's counsel was improperly used to surprise expert, regardless of how

defendants came into possession of letter, as plaintiff should have knowingly produced letter in discovery.

[5] EVIDENCE ⇐ 546
157k546
Physician bringing medical malpractice action in connection with death of his mother would be allowed to testify as expert, despite claim that lack of impartiality should have barred him from stating expert opinion; defendants would have adequate opportunity to bring physician's obvious bias to jury's attention, they had not challenged his qualifications, and testimony did not show that he lacked basis for forming opinion immediately after learning of his mother's death. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[6] EVIDENCE ⇐ 558(9)
157k558(9)
Physician bringing medical malpractice action in connection with death of his mother, in which he was to testify both as expert and as plaintiff, would be subject to cross-examination regarding whether he made inquiries of defendants concerning their treatment of his mother before her death; that area of inquiry went not only to issues regarding his expert testimony, but may also have been relevant to his claimed damages for wrongful death.

[7] EVIDENCE ⇐ 566
157k566.
Physician bringing medical malpractice action in connection with death of his mother would not be barred from providing expert opinion beyond extent of his interrogatory response, despite claim that response prevented defendants from adequately preparing for cross-examined of physician at his deposition; defendant's extensively cross-examined physician at deposition and had not apparently been prejudiced and, moreover, physician's trial testimony would be limited to scope of his complaint. Fed.Rules Civ.Proc.Rule 26(e)(1)(B), 28 U.S.C.A.

[8] EVIDENCE ⇐ 566
157k566
Trial testimony of medical malpractice plaintiffs' expert would be limited to scope of complaint, regardless of how expert may have testified at deposition.

[9] EVIDENCE ⇐ 566
157k566
Court would not grant pretrial motion to limit scope of testimony by medical malpractice plaintiffs' expert, much of which could reasonably be regarded as necessary background for his ultimate opinions.

[10] EVIDENCE ⇐ 146
157k146
Medical malpractice plaintiff would not be allowed to introduce evidence that defendant physician initially failed written board certification examination, as question of whether physician was board-certified and whether he took more than one time to pass certification test were not relevant to dispute over whether treatment he rendered breached relevant standard of care, and any possible relevance was substantially outweighed by potential prejudice.

*166 Karen E. McDonald, Mundy and Holt, Washington, DC, for plaintiff.

Philip L. Willman, Partner, Moser and Marsalek, St. Louis, MO, for St. Louis University and Camilo R. Gomez, M.D.

Gordon Keith Phoenix, Managing Partner, Stephen J. Potter, Sandberg and Phoenix, St. Louis, MO, for St. Mary's Health Center, Thomas Reardon, M.D., O. Machke, M.D., Eddie Bulk, D.O. and Paul Jones.

MEMORANDUM AND ORDER

PERRY, United States Magistrate Judge.

This matter is before the Court on various matters following a hearing on all pending motions held on June 29, 1993. The case was referred to the undersigned for trial and all other purposes with consent of the parties pursuant to 28 U.S.C. § 636(c). It is set for trial before the undersigned and a jury on September 27, 1993.

On September 13, 1988, Betty Douglas died. Her son, Dr. Danny Douglas, has filed suit against St. Louis University, Dr. Camilo Gomez, St. Mary's Health Center, Dr. Thomas *167 Reardon, Dr. Otakar Machke, Dr. Edward Paulk, and Dr. Paul Jones claiming that his mother's death was the result of negligence. Dr. Douglas' primary theory is that defendants failed to administer subcutaneous heparin to his mother. Dr. Douglas seeks damages for negligence and wrongful death, and seeks to hold St. Louis University and St. Mary's Health Center liable on the theory of respondeat superior.

1. Deposition of Dr. Margulies

Defendants St. Louis University and Gomez have filed a motion to compel the completion of the deposition of Sheldon Margulies [# 62], as have defendants SSM Rehabilitation Center, Reardon and Machke [# 76]. Plaintiff has filed a motion for sanctions [# 86] which relates to the same issue, and defendants SSM, Reardon and Machke responded to that motion by filing their own motion for sanctions [# 96].

Dr. Margulies is a physician who is also an attorney, although it appears that he does not practice law, [FN1] but does practice medicine. Before filing suit plaintiff's counsel provided Dr. Margulies with certain of plaintiff's medical records, and Dr. Margulies on October 20, 1989, provided a written opinion to counsel, which states, among other things: "... negligence still fails because at least a sizeable minority (and perhaps a majority) do not use subcutaneous heparin, ..." Plaintiff has now designated Dr. Margulies as an expert witness who will opine at trial that defendants were, in fact, negligent for failing to prescribe heparin in this case.

FN1. See footnote 2 of plaintiff's May 21, 1993 response to defendants' motion to compel the completion of Dr. Margulies' deposition wherein plaintiff states that Dr. Margulies had only just passed the Maryland Bar when plaintiff contacted Dr. Margulies for advice.

Plaintiff's counsel did not provide the October 20, 1989 Margulies letter in response to discovery requests, but during the deposition of Dr. Kornfeld, another of plaintiff's expert witnesses, the document was provided to defendant's counsel along with other documents in Dr. Kornfeld's file, after plaintiff's attorney had reviewed Dr. Kornfeld's file and removed any papers she considered privileged communications. (Kornfeld Depo. at pp. 77-80.) Plaintiff's counsel did not know that this letter was included in the production. Dr. Kornfeld testified, however, that he did not agree with the conclusions of Dr. Margulies, apparently referring to the conclusions of non-negligence.

At Dr. Margulies' deposition, plaintiff's counsel indicated that she was withholding certain correspondence from production based on a claim of attorney work product, and specifically designated certain other correspondence of Dr. Margulies, but she did not initially list the damaging document as one she was withholding. When defense counsel inquired whether Dr. Margulies had ever rendered any opinions "about the subject matter of this lawsuit that are different from what you've told us here today," Dr. Margulies answered that he could not answer because that was "work product," and plaintiff's counsel subsequently ordered him to answer no questions concerning his former opinions and conclusions. Defendants did not disclose that they had the damaging letter, but plaintiff's counsel learned they had it either because Dr. Margulies saw it at the conclusion of his deposition (as plaintiff's motion for sanctions states), or because counsel simply surmised that defense counsel must have it from the line of questioning (as plaintiff's counsel stated at the hearing). After a recess in the deposition, plaintiff's counsel indicated that, in fact, there was an additional, pre-suit document that was being withheld from production based on work product claims. (Margulies Depo. at p. 44.)

Defendants seek to compel the resumption of Dr. Margulies deposition, and an order compelling him to answer questions concerning his prior opinion. They seek to have plaintiff pay all costs of this continued

deposition, including counsel's travel expenses in taking the deposition. Plaintiff seeks an order imposing monetary sanctions on defendants for their "abuse of the discovery process" in obtaining the document and failing to tell her that they had it. Plaintiff's counsel now maintains that the letter and any communications she had with Dr. Margulies before suit are protected from discovery on grounds of both attorney-client privilege and *168 attorney work product, and argues that Dr. Margulies should not be cross-examined on this prior opinion at trial.

Plaintiff's argument is that she sought legal, as opposed to medical, advice from Dr. Margulies prior to filing suit, and that the letter is no more than his legal opinion, as a lawyer, that a negligence claim would fail. She contends it is not in conflict with, or in any way relevant to, his current "medical" expert opinion that defendants were negligent in failing to prescribe heparin. In the opinion of the undersigned, these arguments do not pass the "straight face test", but if counsel wishes to present them to a jury in defending her expert witness at trial, she will have the opportunity to do so. What she may not do, however, is withhold the prior inconsistent opinion from discovery in this case, and Dr. Margulies must be presented for further deposition testimony, at plaintiff's expense. The reason for this ruling is as follows.

[1] First, any common sense reading of Dr. Margulies' letter shows that he is providing a medical opinion regarding whether the defendants were negligent in failing to provide heparin. Plaintiff's argument that because he uses the term "negligence" instead of "standard of care" in the letter does not change the fact that he opines that a claim would fail because many, if not most, doctors in the defendants' situation would not have prescribed heparin. That statement clearly refers to standards of care, not to a legal conclusion regarding the entire tort of negligence, and it directly contradicts the opinion he is expected to present at trial and has presented in his deposition. Plaintiff's argument that she hired him because he was a lawyer, and was seeking legal advice, is belied by the language of the letter itself.

[2] Second, even assuming that plaintiff initially hired Margulies as the type of non-testifying expert consultant contemplated by Rule 26(b)(4)(B), Fed.R.Civ.P., whose opinions may not be discovered except upon a showing of exceptional circumstances, she later waived any right to withhold that information by designating him as a testifying expert witness. Although it is true that discovery may not be had of expert consultants who are not hired to testify (barring exceptional circumstances), once such an expert is designated as a testifying expert, his opinions and the bases for those opinions are subject to cross-examination, and an obviously proper subject of cross-examination is whether he ever formed or expressed contradictory opinions.

[3] Moreover, even if Margulies was originally retained as a non-testifying expert, once plaintiff turned the October 20, 1989 letter over to Kornfeld, and Kornfeld reviewed the letter in forming his opinion, the letter became discoverable. See, e.g., Heitmann v. Concrete Pipe Machinery, 98 F.R.D. 740, 743 (E.D.Mo.1983). Documents prepared by a non-testifying expert which are "considered but rejected by the expert trial witness could be even more important for cross-examination than those actually relied upon by the [trial expert]." Eliasen v. Hamilton, 111 F.R.D. 396, 400 (N.D.Ill.1986). Thus, by analogy, if the Margulies letter is discoverable to promote the cross-examination of Kornfeld, Margulies himself should be obliged to justify his conversion.

[4] Heitmann and Eliasen resolve another aspect of this issue by their holdings. Since the Margulies letter was discoverable, it matters not how defendants came into possession of the letter. Plaintiff should have knowingly produced the letter in discovery. Plaintiff thus cannot now be heard to complain that the letter was improperly used to surprise his expert.

2. Scope of Plaintiff's Testimony

All parties have filed motions relating to the

scope of plaintiff's expected trial testimony, including plaintiff's two motions in limine filed on March 22, 1993 [49 & 50], SSM & Reardon's motion to bar [# 58, filed 4/27/93] and motion to strike the plaintiff from offering expert opinions at trial [# 59, also filed on 4/27/93], in which defendants St. Louis University and Gomez seek to join [# 68], and St. Louis University and Gomez's motion in limine to prohibit plaintiff from introducing into evidence opinion testimony by the plaintiff [# 70].

*169 [5] The issue presented by the parties' cross-motions regarding the scope of plaintiff's testimony at trial is whether plaintiff may testify as a passionate son on the one hand, and as a dispassionate expert on the other. Defendants contend that he should not be allowed to state expert opinions because he is not impartial. Plaintiff argues that he should not be cross examined about whether he made inquiries of the defendants concerning their treatment of his mother before her death.

The parties have cited only one case, Viterbo v. Dow Chemical Company, 646 F.Supp. 1420 (E.D.Tex.1986), aff'd, 826 F.2d 420 (5th Cir.1987) for the proposition that an expert must be "impartial" in order to provide opinion testimony. Viterbo is not persuasive authority in this case, because in that toxic tort case the court rejected the proffered expert testimony in large part because of the unreliability of the bases for the opinions; one opinion was based on unscientific testing, and the other was made by a psychologist with no training in toxicology or any other field of medicine. Although the court there stated that the "most important" factor was that the psychologist had sought out the plaintiff's attorneys and therefore had become an advocate for the case, it clearly appears that the expert was simply not qualified to render a causation opinion, whether he was an advocate or not.

Rule 702, Federal Rules of Evidence, does not contain a requirement that an expert be impartial in order to render an opinion. Rather, the rule allows opinion testimony wherever the specialized knowledge of the witness will "assist the trier of fact." Employees of a party are allowed to testify as experts, see e.g., Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1174, corrected in non-pertinent part, 645 F.2d 511 (5th Cir.1981); Rust Engineering Company v. Lawrence Pumps, Inc., 401 F.Supp. 328, 334 (D.Mass.1975), and law enforcement officers are frequently allowed to testify in criminal trials that, for example, a certain method of record-keeping is indicative of drug dealing, see e.g., United States v. White, 890 F.2d 1012, 1014 (8th Cir.1989), cert. denied, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 763 (1990).

A case directly on point but not cited by either party is Tagatz v. Marquette University, 861 F.2d 1040 (7th Cir.1988), where plaintiff was a specialist in statistical evidence in employment discrimination cases and was allowed to present his own statistical evidence in support of his own age and religious discrimination claims. The Court of Appeals did not specifically determine whether the practice was proper, because no objections had been raised below and because it affirmed the defendant's judgment for other reasons, but noted that no rule or case law had been found prohibiting a plaintiff from providing expert testimony. In discussing the issue, Judge Posner stated: "The trier of fact should be able to discount for so obvious a conflict of interest." The undersigned agrees with this reasonable conclusion, and defendants will have adequate opportunity to bring plaintiff's obvious bias to the attention of the jury for its evaluation.

Plaintiff, as a doctor, may be qualified to testify as an expert on the use of Heparin, and defendants have not challenged plaintiff's qualifications. They have challenged the basis for his opinion, because he has testified that he formed his opinion immediately after learning of his mother's death, and without benefit of any review of her medical records. The testimony provided, however, does not show that he lacked any basis for forming the opinion, and the evidence of his quick formation of his opinion is a matter for cross-examination. Defendants' motions to strike

plaintiff from offering expert opinions at trial will therefore be denied.

[6] Plaintiff's motion in limine will also be denied, however. Plaintiff opens the door to a wide range of questions which go to the weight and to the credibility of his testimony by testifying as an expert witness as well as a plaintiff. The areas that plaintiff seeks to exclude, including plaintiff's conversations with his mother's treating physicians, go not only to the issues regarding his expert testimony, but also may be relevant to his claimed damages for wrongful death.

[7] Defendants' motion to bar will be denied without prejudice. When plaintiff answered interrogatory No. 20 on February 25, *170 1993, he stated that the scope of his expert testimony would be limited "to the need for prophylactic anticoagulation to prevent deep venous thrombosis and subsequent pulmonary thromboembolism in stroke patients at risk for both as constituting the standard of care." Plaintiff never supplemented this interrogatory response. [FN2] See Rule 26(e)(1)(B), Fed.R.Civ.P. Defendants argue that plaintiff should be permitted to provide his expert opinion only to the extent of his interrogatory response. See Carter v. Moog Automotive, Inc., 126 F.R.D. 557, 559 (E.D.Mo.1989). Defendants contend that plaintiff should be so limited because they were unable to prepare adequately for plaintiff's cross-examination at his deposition. Defendants did, however, extensively cross-examine plaintiff at the deposition. It is therefore not apparent that defendants have been prejudiced. Moreover, plaintiff's trial testimony will be limited to the scope of plaintiff's complaint, so, to whatever extent plaintiff exceeded the scope of his complaint at his deposition, this testimony will not be admitted at trial.

FN2. On May 18, 1993, plaintiff's attorney sent the Clerk of this Court two copies of an amended answer to an interrogatory regarding Dr. Kornfeld, but there is no record of plaintiff's amending his answer with respect to his own testimony.

3. Scope of Dr. Kornfeld's Testimony

Defendants argue that the expert testimony of Dr. Kornfeld likewise should be limited to testimony:

> that the failure to administer heparin in this instance was below the standard of care and that said failure significantly reduced the chance of survival in this patient by increasing the risk of thrombosis in this patient.
> (b) The facts relied upon by this expert are the medical history of this patient as reflected in the patient's chart and the practical experience of this expert.
> (c) The grounds for the opinion are summarized in the article which plaintiff produced in discovery entitled: Effects of low-dose subcutaneous heparin on the occurrence of deep vein thrombosis in patients with ischemic stroke.
> (Interrogatory response # 20.)

[8][9] As with plaintiff's prospective trial testimony, Dr. Kornfeld will be limited to the scope of the complaint, regardless of how he may have testified at his deposition. Plaintiff's complaint alleges that every defendant breached the standard of care in treating plaintiff's mother. Plaintiff alleges that the breach "included, but was not necessarily limited to" defendants' failure to engage in "early heparinization of venous thrombosis." (Complaint at ¶ 26.) Defendants argue that Dr. Kornfeld ranged far afield from the complaint in testifying that defendants failed to properly examine the decedent, failed to ask the decedent questions, failed to properly ambulate the decedent, failed to examine the decedent for evidence of deep venous thrombosis ("DVT"), and failed to make proper treatment recommendations. Defendants further argue that Kornfeld should not be permitted to testify that defendants were negligent because a non-defendant nurse failed to contact a physician and that St. Louis University was negligent because it failed to have an internist follow up on the decedent's progress during her admission to St. Louis University Hospital.

The undersigned is not prepared to say, at this juncture, that the bulk of Kornfeld's testimony exceeded the scope of plaintiff's

complaint, or the scope of Kornfeld's interrogatory response, for that matter. Much of Kornfeld's testimony could reasonably be regarded as necessary background for his ultimate opinions. Plaintiff's whole theory rests on the fact that his mother was not given subcutaneous heparin, and she should have been. In order to defend against plaintiff's theory defendants will argue that heparin was not reasonably medically necessary. Plaintiff thus must counter that the use of heparin was necessary, and had defendants asked the right questions, properly examined the decedent and otherwise treated her properly, they would have prescribed the subcutaneous heparin. Much of Kornfeld's testimony appears relevant. Defendants' motion will therefore be denied, but defendants may, obviously, reraise these objections at appropriate times during the trial testimony.

*171 4. Gomez Motion in Limine

[10] Defendant Gomez seeks an order precluding plaintiff from eliciting evidence that defendant Gomez initially failed the written board certification examination [# 69]. Defendant is a board certified physician who failed one portion of the written exam on the first test, but passed it on his second attempt, and passed the oral portion of the test on his first attempt. Defendant argues that this evidence is not relevant, and that any probative value it might have is substantially outweighed by the danger of unfair prejudice. This is a question commonly asked of physician expert witnesses, and a physician defendant's board certification or lack thereof is often also brought out in evidence.

The evidence is obviously relevant to the jury's assessment of an expert witness's competence to opine, but has little, if any, relevance to the issue whether the defendant complied with the standard of care required in his treatment of the decedent in this case. Were Gomez simply testifying as an expert witness, the question would be allowed, because his general skill and expertise would be relevant to the jury's determination of the weight to be given to his opinions. Here, however, the jury is not being asked to determine whether Gomez is a qualified physician or is competent generally, or whether he is competent to express an opinion, but rather must determine whether the treatment Gomez rendered in this instance breached the relevant standard of care. That is a question of historical fact, to be determined by the jury from the evidence of what Gomez did or did not do, and the evidence regarding the standard of care required. Whether he is board certified and whether he took more than one time to pass the board certification test are not relevant to this dispute, and any possible relevance is substantially outweighed by the potential prejudice from the evidence. Therefore defendants' motion in limine will be granted.

Accordingly,

IT IS HEREBY ORDERED that the motion of St. Louis University and Gomez to compel the completion of the Margulies deposition [# 62] and the motion of SSM, Reardon, and Machke to compel the completion of the Margulies deposition [# 76] are granted.

IT IS FURTHER ORDERED that plaintiff must bear the reasonable costs of defendants' having to file the motions to compel the completion of the Margulies deposition and plaintiff must bear defendants' reasonable all costs associated with the completion of this deposition, including the travel costs of defendants' counsel. Thus, to this extent, defendants' motion for sanctions [# 86] is granted; it is denied in all other respects.

IT IS FURTHER ORDERED that plaintiff's motion for sanctions [# 96] is denied.

IT IS FURTHER ORDERED that the motion to join [# 68] filed by defendants Gomez and St. Louis University Medical Center is granted.

IT IS FURTHER ORDERED that the motion to strike plaintiff from offering expert opinions [# 59] is denied.

IT IS FURTHER ORDERED that the motion to bar plaintiff from offering certain

expert opinions [# 58] is denied without prejudice.

IT IS FURTHER ORDERED that the motion in limine to bar plaintiff from offering certain expert opinions [# 70] is denied without prejudice.

IT IS FURTHER ORDERED that plaintiff's motions in limine [# 49 and # 50] are denied.

IT IS FURTHER ORDERED that defendant Gomez' motion in limine [# 69] is granted.

END OF DOCUMENT