

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA
CIVIL DIVISION

JAMES H. DURHAM, by and through
LUCINDA SNOWDEN, Attorney,

Plaintiff,

vs.

Case No: 51-2009CA4401ES
Section: Y

HEARTLAND OF ZEPHYRHILLS, FL,
LLC; MANOR CARE, INC.; and
PATRICIA AYETIN a/k/a PATRICIA
CHUKWUYEM AYETIN (as to
Heartland of Zephyrhills),

Defendants.

U.S. Legal Support
115 East 57th Street, Suite 1230
New York, New York 10022

Tuesday, April 12, 2011
11:07 a.m. - 1:49 p.m.

DEPOSITION of PERRY J. STARER, M.D., taken on
behalf of the Defendants and held via video
teleconference before Allison Howell, Certified Court
Reporter and Notary Public of the State of New York.

A P P E A R A N C E S

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ON BEHALF OF THE PLAINTIFF:

M.J. MCDONALD, Esquire
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(via video teleconference)

ON BEHALF OF THE DEFENDANTS:

GAIL F. MOULDS, Esquire
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(via video teleconference)

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1 PERRY J. STARER, M.D.

2 a witness, after having been first duly sworn by a
3 Notary Public of the State of New York, was
4 examined and testified as follows:

5 DIRECT EXAMINATION BY

6 MS. MOULDS:

7 Q Doctor, as we stated just before we started
8 today, my name is Gail Moulds. I represent the
9 Defendants in this case. I'm just going to be asking
10 you some questions today.

11 It's my understanding that you have been
12 retained to offer some expert opinions in this case; is
13 that correct?

14 A That is correct.

15 Q And would you state your full name, please?

16 A First name Perry, P-e-r-r-y, middle name Jay,
17 J-a-y, last name Starer, S-t-a-r-e-r.

18 Q And you're a medical doctor; is that correct?

19 A That is correct.

20 Q Dr. Starer, what is your professional
21 address?

22 A I have several. One of them is Elmhurst
23 Hospital Center, 79-01 Broadway, New York, New York
24 11373.

25 Q And you said you have several. What other

1 **locations do you work at?**

2 A I'm also on the faculty at the Mount Sinai
3 School of Medicine so that address would be different
4 than the Elmhurst Hospital address.

5 **Q Any others?**

6 A No, just my home address but I don't work out
7 of that.

8 **Q Doctor, you've given us a CV and I don't know**
9 **-- did you bring a CV with you today?**

10 A (Reviewing document) Yes, I did.

11 MS. MOULDS: Could we go ahead and
12 attach that to your deposition as Defendant's
13 Exhibit No. 1.

14 (Defendant's Exhibit No. 1 was marked
15 for identification.)

16 BY MS. MOULDS:

17 **Q Now, on that, Doctor, it talks about your --**
18 **what you listed as academic appointments on page 2:**
19 **July 1985 to present, assistant professor, department**
20 **of geriatrics and adult development at Mount Sinai**
21 **School of Medicine.**

22 Is that still correct information?

23 A Yes. I still hold that appointment.

24 **Q All right. Can you tell me, Doctor, what**
25 **that entails?**

1 A There is a department -- I guess to make it
2 as simple as possible, I am based out of a medical
3 school in New York City so I am considered to be part
4 of the school. I teach for the school.

5 And the type of teaching that I do is onsite
6 training. So currently, I am assigned to the public
7 hospital, Elmhurst Hospital, which is affiliated with
8 the Mount Sinai School of Medicine.

9 So when students or house staff, which would
10 be interns and residents, rotate through Elmhurst
11 Hospital, I will teach them geriatrics. I also teach
12 them internal medicine as well since I am in that
13 department as well.

14 Q Now, when -- just so I'm straight on this,
15 you don't do any teaching where you go to the medical
16 school and lecture; is that correct?

17 A Medical school after the first two years
18 sends the students out to the hospitals. So I don't
19 give lectures at the school itself. I give lectures at
20 the hospital.

21 Q Okay. And as I understand your testimony,
22 you are teaching both students who are still in medical
23 school as well as those who are either interns or
24 residents, correct?

25 A I also teach nurses and pharmacists as well.

1 Q Is that through Mount Sinai or is that
2 through some other entity?

3 A It's a joint effort between the Mount Sinai
4 School of Medicine and the City of New York, which runs
5 a public health system. So I actually in my mind don't
6 divide them.

7 Q And again, you teach both geriatrics and
8 internal medicine?

9 A That is correct.

10 Q The patients that your medical students,
11 interns, residents are seeing at that Elmhurst
12 Hospital, are they all in an acute-care setting?

13 A Yes, they are.

14 Q Is there any type of what we would consider
15 long-term care or skilled nursing at the Elmhurst
16 Hospital Center?

17 A No, not at this time.

18 Q Are there any other positions that you hold
19 with the Mount Sinai School of Medicine?

20 A I might. I believe I also have an
21 appointment in the department of internal medicine at
22 Mount Sinai.

23 Q Okay. And are you still an assistant
24 professor within the department of geriatric medicine?

25 A That is true.

1 Q Now, you've also listed a hospital
2 appointment at the City Hospital at Elmhurst, and I'm
3 assuming that's the same facility we've just talked
4 about?

5 A That's the more formal name, City Hospital
6 Center at Elmhurst.

7 Q And you've listed here that you're the chief
8 of the geriatric section; is that still correct?

9 A That is true.

10 Q And can you describe for me a little bit
11 your --

12 (Brief interruption with the video
13 teleconference signal.)

14 BY MS. MOULDS:

15 Q I think what I was asking, Doctor, is if you
16 could describe for me your responsibilities as the
17 chief of geriatrics at Elmhurst?

18 A Yes. Within the department of internal
19 medicine, the divisions are broken down according to
20 specialty.

21 So I am the chief of the geriatrics section,
22 which makes me responsible for the geriatric unit and
23 also education in the area of geriatrics to be provided
24 to students and employees at the hospital.

25 Q Are you then what we would call the attending

1 physician for those persons who are admitted to the
2 geriatric unit at the hospital?

3 A It will vary over the year. There are months
4 where I will be assigned as the attending physician.
5 On the months where I'm not the attending physician, I
6 will act as a consultant.

7 Q And what is it that has a person admitted to
8 what you have deemed the geriatric unit?

9 That's probably not a great question. What
10 I'm trying to figure out is like does everybody over 65
11 go on a particular unit or is it specifically for
12 dementia patients? How do they make that
13 determination.

14 A Well, the determination would be based upon
15 not just age but also other conditions the patient may
16 have. So we do the best we can and there are
17 guidelines but also it's based on bed availability.

18 So it's roughly people over 62 or 65. But if
19 there's a younger person with pressure ulcers or has
20 had a stroke or malnutrition, we certainly can take
21 those patients as well.

22 Q How many beds are in the geriatric unit?

23 A Roughly 35.

24 Q Have you ever served as a medical director at
25 a long-term care facility?

1 A Yes, I did.

2 Q And when was that?

3 A Prior to 2000. It would have been roughly, I
4 guess, the late 1980s and 1990s.

5 Q What was the name of the facility?

6 A The facility actually was contained within
7 Elmhurst Hospital. There were two floors that were
8 designated as a skilled nursing facility.

9 Q And did they close that down?

10 A Yes. They closed it down.

11 Q And do you know approximately when it was
12 closed?

13 A I don't remember the exact year but I believe
14 it was in the 1990s.

15 Q Did you ever work as a medical director at
16 any other long-term care facility?

17 A No, not as a medical director.

18 Q Do you currently have any patients in
19 long-term care or skilled nursing facilities?

20 A Although I have discharged patients to
21 long-term care facilities, once they go there I am not
22 the attending physician.

23 Q Have you ever been the attending physician of
24 anyone in a skilled nursing facility or a long-term
25 care facility?

1 A Yes, I have.

2 Q And when was that?

3 A That would have been in the late 1980s and
4 1990s.

5 Q Is that Elmhurst or was that in another type
6 of facility?

7 A That was a separate facility.

8 Q What was the name of that facility?

9 A The Jewish Home and Hospital for Aged.

10 Q Have you ever had any type of like an office
11 practice?

12 A Well, I've worked in an office seeing
13 outpatients if that's what you mean, yes.

14 Q Was that associated with one of the hospitals
15 or was that you hung your shingle and set up a
16 practice?

17 A No. I had a private practice within Mount
18 Sinai Hospital and I worked in the clinic at Elmhurst
19 Hospital but always affiliated with the medical school.

20 Q And when was your private practice at Mount
21 Sinai?

22 A The practice would have been prior to 2000.

23 Q What about at Elmhurst?

24 A Elmhurst was continued into the early part of
25 the 21st century. I don't remember when I stopped

1 seeing clinic patients.

2 Q Okay. Now, as I look at your CV, Doctor, it
3 appears that you went to medical school at Mount Sinai
4 School of Medicine in New York; is that correct?

5 A That is correct.

6 Q And then following medical school, you
7 completed an internship and a residency?

8 A That is true.

9 Q And what was your residency in?

10 A Internal medicine.

11 Q As I look at this, it appears that you did
12 some additional fellowship work in geriatrics?

13 A That is correct.

14 Q Are you board certified?

15 A Yes, I am.

16 Q In what areas?

17 A I am board certified in internal medicine and
18 also I have certification in geriatric medicine.

19 Q Is that a separate certification in geriatric
20 medicine?

21 A Yes.

22 Q And when were you certified in geriatric
23 medicine?

24 A Originally, I was certified in 1988.

25 Q Have you had to recertify?

1 A Yes.

2 Q And how often is that?

3 A It's every ten years.

4 Q Is the same true for internal medicine?

5 A Not for my group, no.

6 (Brief interruption with the video
7 teleconference signal.)

8 BY MS. MOULDS:

9 Q Doctor, I apologize for all these delays
10 we're having today.

11 I think I was asking you about your internal
12 medicine certification.

13 Can you tell me when you were first certified
14 in internal medicine?

15 A In internal medicine, I was certified in
16 1983.

17 Q Is that a certification that you need to
18 recertify?

19 A No, I do not.

20 Q Doctor, do you have any other employment or
21 patient care relationships that we have not talked
22 about today?

23 A No, I do not.

24 Q And could you just briefly describe for me
25 then -- and I know this is a bad question because

1 nobody has a typical day but what kinds of things you
2 would do in a typical workday?

3 A And you are correct that the days are not
4 typical. It will change depending on my assignment.

5 When I am the attending physician for the
6 inpatient internal medicine service, I will start the
7 day by meeting with the house officers to hear about
8 the patients who have come in over the night, the new
9 admissions.

10 I will review that and then I will see these
11 patients, review their diagnostic studies, review the
12 treatment plan, write notes over the course of the day.

13 (Brief interruption with the video
14 teleconference signal.)

15 BY MS. MOULDS:

16 **Q Anything else in that regard, Doctor?**

17 A Yes. Then there are time periods which are
18 set aside for education. So at approximately eleven
19 o'clock, the team assigned to the unit in which I'm on
20 will meet for educational purposes. And then at twelve
21 noon there will be a general conference for all members
22 of the department.

23 And then the afternoon is really unscheduled
24 and problems are dealt with as they come up. We
25 continue to see the patients, take in some more

1 admissions who may have come in over the course of the
2 day and the cycle just continues. We do some
3 discharges.

4 So aside from the scheduled meetings in the
5 morning and the educational sessions, there is nothing
6 really on the schedule. It's just working in an
7 acute-care setting.

8 **Q Is this all on what you've described earlier**
9 **as the geriatric unit?**

10 A This occurs, yes, in that same space.

11 **Q Other than stroke patients, patients with**
12 **skin breakdown, are there any other types of patients**
13 **that would generally be assigned to the geriatric unit?**

14 A There is no specific type but we certainly
15 get many different kinds of patients.

16 We can have patients who have cognitive
17 impairment, patients who may have fallen and broken a
18 bone, patients who come in because they are dehydrated
19 or malnourished or both. We will have patients who are
20 admitted for pneumonia or cardiac disease.

21 There is no criteria as to what diseases we
22 will take. We really are treating medical illness in
23 an older population.

24 **Q Okay. Doctor, can you tell me what you've**
25 **reviewed in regard to this case?**

1 A Yes. I was sent records and I could list the

2 --

3 **Q If you would do that, thank you.**

4 A I received records pertaining to Mr. Durham's
5 stay at Florida Hospital Zephyrhills. This is in
6 February of 2008.

7 I received records for an admission to Pasco
8 Regional Medical Center in February of 2008. Actually,
9 it was just a very short stay.

10 I have records from Heartland Regional
11 Zephyrhills. This is February and March of 2008.

12 I received material concerning the admission
13 at Pasco Regional Medical Center in March of 2008, an
14 emergency room visit at Pasco Regional Medical Center
15 in May of 2008.

16 I received some records which belong to a
17 Dr. John, J-o-h-n, who had seen Mr. Durham and this was
18 during 2007. It seems most of the material was at that
19 time.

20 There was also a report of a CT scan, which
21 was done in October of 2008.

22 **Q Is that it, anything else?**

23 A That's all I have. I believe I was also sent
24 a dearth certificate, but I don't have any notes on
25 that in front of me now.

1 **Q** Did you review all of these documents in
2 **formulating your opinion, Doctor?**

3 A Yes, I did.

4 **Q** Is there one or more document that you relied
5 **on more heavily or specifically than the others?**

6 A I don't know if I could actually make that
7 determination.

8 **Q** Why do you say that?

9 A I didn't think in that way. I look at them
10 all together to see if I can recognize any patterns as
11 far as Mr. Durham's health. So I don't really know if
12 I can give a percentage that one document informed me
13 in a greater fashion than another.

14 **Q** Did you review anything else in formulating
15 **your opinions?**

16 A I did also review the federal and state
17 regulations and also I did some reviewing on the
18 literature pertaining to patients with strokes.

19 **Q** Had Mr. Durham had a stroke?

20 A That is correct.

21 **Q** Do you know when?

22 A According to the records, it was many years
23 ago. I think it might have been 1958.

24 (Brief interruption with the video
25 teleconference signal.)

1 BY MS. MOULDS:

2 Q Doctor, I think my question was if whether or
3 not Mr. Durham's prior stroke had had any impact on
4 your opinions in this case?

5 A Well, it has an impact insofar as that he did
6 have residual effects of the stroke, yes.

7 Q And how did that play into your opinions?

8 A Because it is known that he had a stroke and
9 it is known to the caregivers that he had a stroke and
10 it's known to the caregivers the residual effects of
11 the stroke.

12 So my opinion is based on whether or not the
13 caregivers recognized Mr. Durham's needs secondary to
14 the stroke and whether they properly devised and
15 implemented a care plan for that.

16 Q And what were the residuals he had from the
17 stroke?

18 A Mr. Durham was known to have problems with
19 speaking, which was called an expressive aphasia. He
20 was also known to have weakness of part of his body.
21 It was the right side. And it was also known that he
22 had problems with swallowing.

23 Q Are these items that are addressed in the
24 affidavit that you prepared in this case?

25 A I believe that they are addressed.

1 **Q** When you say you reviewed some literature on
2 patients with strokes, can you tell me, Doctor, what
3 you reviewed?

4 **A** I'm always looking at the literature but I
5 specifically was reading again about dysphagia. And I
6 did bring some material here that I had looked at
7 specifically.

8 **Q** And can you tell me what that is?

9 **A** Yes. This is from the Agency for Health Care
10 Policy and Research and it is a clinical practice
11 guideline, which addresses aspects of post-stroke care.

12 **Q** And then you said, Doctor, that you reviewed
13 some federal and state regulations.

14 Did you bring copies of those with you as
15 well?

16 **A** No, I didn't. I made some notes but I didn't
17 bring any copies of that.

18 **Q** What federal regulations did you review?

19 **A** (Reviewing document) I was looking at the
20 regulations that pertain to the maintenance of
21 nutrition in a resident in the nursing home, the
22 maintenance of hydration of a resident in a nursing
23 home, and also the patient's right to received adequate
24 and appropriate health care.

25 **Q** Do you have any specific references to

1 **federal statutes or regulations that you looked at?**

2 A I didn't commit it to memory but I did write
3 down some of the numbers that are attached to that.

4 **Q Where did you write that down, Doctor? Do**
5 **you have like separate notes that you took while you**
6 **were reviewing this case?**

7 A (Reviewing document) Yes. I have a whole
8 collection of notes.

9 MS. MOULDS: Okay. Why don't we go
10 ahead and attach that collection of notes as
11 Defendant's Exhibit No. 2.

12 And then we'll go ahead and make the
13 article you talked about in regard to strokes
14 as No. 3.

15 (Defendant's Exhibit Nos. 2 and 3 were
16 marked for identification.)

17 BY MS. MOULDS:

18 **Q While we're there, Doctor, we talked about**
19 **all the material that you've reviewed. We've talked**
20 **about the notes that you've made. We talked about the**
21 **article that you reviewed.**

22 **Do you have any anything else that you have**
23 **reviewed in conjunction to this case?**

24 A No, not that I recall. I think this is all.

25 **Q Have we discussed all of the items that were**

1 provided to you by Wilkes & McHugh?

2 A Yes, I believe we have.

3 Q Did they provide you anything other than the
4 medical documents that you delineated for me?

5 A No. I only received one package and that was
6 all that was contained in it.

7 Q Do you have any correspondence from Wilkes &
8 McHugh?

9 A (Reviewing document) I have one cover letter
10 which came with the initial package.

11 Q And what is the date of that?

12 A February 2, 2011.

13 Q Is that the first contact that you had with
14 Wilkes & McHugh in regard to this case?

15 A I probably had received a phone call prior to
16 that.

17 Q Do you recall when that phone call was?

18 A I would have to guess but it probably was a
19 week or two prior to the arrival of the materials.

20 Q Do you know who called you in regard to this
21 case?

22 A I don't exactly know who it was, no.

23 Q Who is the letter from?

24 A The letter is signed by A. Lance Reins.

25 Q And what does the letter ask you to do?

1 A It says that they would appreciate it if I
2 would call their office after receiving the records to
3 arrange a time to discuss my opinions.

4 Q And just so I'm clear, Doctor, you don't have
5 any other correspondence with Wilkes & McHugh?

6 A There might have been some e-mail messages
7 concerning the arrangement of this deposition.

8 Q Doctor, I notice that you have your computer
9 with you today.

10 Do you have items related to this case on
11 your computer?

12 A Just to be clear, this is not my computer. I
13 borrowed it from the good people here and the --

14 Q Okay. I apologize.

15 A -- only thing that belongs to me is the disk
16 that I put into the computer.

17 Q And what is on the disk, Doctor?

18 A The disk contains all the records that we
19 itemized.

20 Q Is there anything else on the disk other than
21 the records that you've discussed?

22 A If there is anything else on the disk, I have
23 been unable to access it or even be aware that it's
24 there.

25 Q Did you receive the disk from Wilkes &

1 **McHugh?**

2 A That is correct.

3 MS. MOULDS: Doctor, let me go ahead and
4 attach that letter from Mr. Reins as the next
5 exhibit, No. 4.

6 (Defendant's Exhibit No. 4 was marked
7 for identification.)

8 BY MS. MOULDS:

9 Q Doctor, other than the notes that you made
10 during your review, which we've already attached as an
11 exhibit, do you have any other notations that you've
12 made, any stickies, highlights, tabs, anything like
13 that that you have done in regard to your review of
14 these records?

15 A No. I do not have any paper records so
16 nothing of that nature.

17 Q What about on the disk itself, is there any
18 way that you could have highlighted things on the disk
19 or tabbed things on the disk, anything like that?

20 A I wasn't aware I could alter the disk so, no,
21 I did not.

22 Q Did you prepare any type of report for Wilkes
23 & McHugh following your review of this case?

24 A I've prepared no written report.

25 Q What about the affidavit that you prepared in

1 **this case, Doctor, did you draft that affidavit?**

2 A I did not write the affidavit.

3 **Q Do you know who wrote the affidavit?**

4 A I actually don't know who wrote it, no.

5 **Q How did you receive the affidavit?**

6 A I had called them and discussed my opinions
7 over the phone, which they then presented to me in
8 affidavit form. I just don't remember now how it was
9 delivered to me.

10 **Q Who did you talk to on the phone?**

11 A It might be Peggy Tyre.

12 **Q Did you make any changes to the affidavit**
13 **from the form in which it was originally presented to**
14 **you?**

15 A I don't recall making any changes.

16 **Q Did you receive anything in regard to this**
17 **case after you signed the affidavit?**

18 A No, I don't believe I have.

19 **Q Have you reviewed any depositions that were**
20 **taken in this case?**

21 A No, I have not.

22 **Q Have you had conversations with anyone else**
23 **other than -- I believe you said you thought it might**
24 **be Peggy Tyre?**

25 A Yes, that's who I had a conversation with

1 and, yes, I've had conversations with others.

2 Q Who else?

3 A The only other conversation -- aside from, I
4 guess, administrative personnel making arrangements, it
5 was with Mr. Wilander and that was yesterday.

6 Q And how long did you and Mr. Wilander speak
7 yesterday?

8 A Maybe about twenty minutes.

9 Q I'm sorry. I didn't hear you.

10 A About twenty minutes I think.

11 Q Okay. How did you receive the original
12 affidavit? Did you get it by e-mail, mail? Do you
13 know?

14 A Now I don't recall whether it was sent to me
15 by mail or hand delivered. I actually don't remember.

16 Q You indicated that you might have some
17 e-mails regarding scheduling your deposition; is that
18 correct?

19 A Yes.

20 Q Do you have any other e-mails from Wilkes &
21 McHugh that you are aware of?

22 A No, only e-mails about depositions.

23 Q As I understand your testimony today, you
24 don't remember the format in which you got the
25 affidavit that you signed?

1 A As of today, I do not actually recall how I
2 received it, no.

3 Q Just so I'm clear, you don't believe you made
4 any changes to the affidavit from how it was originally
5 submitted to you; is that correct?

6 A I don't recall making any changes.

7 Q Have we discussed all of the items that you
8 have reviewed in reaching your opinions in this case?

9 A Yes, I believe we have.

10 Q Have we discussed all of the documentation
11 either by mail or electronic correspondence or a disk
12 or whatever that you've received from the Wilkes &
13 McHugh law firm in this case?

14 A Yes, I believe we have.

15 Q And other than the conversations with
16 Mr. Wilander yesterday and Ms. Tyre previously, have we
17 discussed all of the communication -- verbal, oral
18 communication that you have had with Wilkes & McHugh in
19 regard to this case?

20 A I believe we have, yes.

21 Q Let's turn, Doctor, to the affidavit that you
22 prepared in this case.

23 Do you have it in front of you?

24 A No. I do not have a copy of the affidavit.

25 Q You didn't bring it with you?

1 A No, I did not.

2 Q All right. Let's talk then, Doctor about
3 your opinions in this case.

4 Have you formulated opinions in regard to
5 Mr. Durham's care?

6 A Yes, I have.

7 Q And are those opinions related to the care
8 that he received at Heartland of Zephyrhills?

9 A Yes.

10 Q Did you formulate any opinions regarding the
11 care that Mr. Durham received at any of the other
12 locations where he was treated?

13 A I did not formulate anything about the other
14 facilities formally.

15 Q So in regard to the Florida Hospital
16 admission on February 4, 2008, did you formulate any
17 opinions regarding that admission?

18 A Just to be clear, I didn't -- as I looked at
19 it, I did not find anything which indicated any
20 egregious deviations from the standard of care so that
21 might count as an opinion.

22 Q Now, you just said any egregious deviations.
23 Did you find any deviations from the standard of care
24 during the Florida Hospital residency in February of
25 2008 --

1 A No, I did not.

2 Q -- or admission?

3 A No.

4 Q No deviations?

5 A Nothing. I did not find anything as I was
6 looking at it.

7 Q And what about the stay at Pasco Regional
8 Medical Center in February of 2008?

9 A Once again, I did not find any deviations
10 while I was reviewing the records.

11 Q What about Mr. Durham's subsequent admission
12 to Pasco Regional Medical Center in March of 2008, same
13 question?

14 A I did not find, in my review, any deviations
15 from the standard of care.

16 Q And the emergency room visit on May 2, 2008,
17 to Pasco Regional, any deviations there?

18 A No.

19 Q What about Dr. John, any deviations there?

20 A The material there was not that
21 comprehensive. In what I had, I did not find any
22 deviations.

23 Q Do you believe you had Dr. John's entire
24 chart?

25 A I don't know what the entire chart would be.

1 I just know what I was provided with. And based on
2 that, I didn't find any deviations from the standard of
3 care.

4 Q As you looked at Dr. John's chart, did you
5 say to yourself, gee, I think there is probably more
6 that I didn't see here?

7 A I didn't probably say it in that way, but I
8 did wonder if there might have been something beyond
9 the year of 2007 or prior to 2007.

10 Q Do you know what dates you had in terms of
11 Dr. John's chart?

12 A According to my notes, the material that I
13 had began January 5, 2007, and the last material was
14 dated December 20, 2007.

15 Q What about the physician or the physician's
16 assistant that saw Mr. Durham while he was at Heartland
17 of Zephyrhills, did you formulate any opinions in
18 regard to the care that they provided?

19 A I didn't find anything significant concerning
20 those individuals.

21 Q Can you tell me, Doctor, then in regard to
22 Heartland of Zephyrhills -- let me go back and ask you
23 this.

24 The CT scan of October 27, 2008, what were
25 the findings on that?

1 A The CT scan was done of the chest on October
2 27, 2008, in which they found some abnormalities but
3 these were mostly old abnormalities.

4 There was an indication that Mr. Durham had
5 had part of his right lung removed and that there was
6 some scarring after that. ,There was also a right hilar
7 mass. That's a lung mass. And there was an indication
8 that there might be some fibrotic changes in the left
9 side of the lung.

10 **Q Was there any significance to you in that CT**
11 **scan?**

12 A The significance was that this was a
13 gentleman who had had problems with his lungs in the
14 past.

15 **Q Did you attribute any of those problems that**
16 **you saw in the October 2008 CT scan to any events that**
17 **occurred at Heartland of Zephyrhills?**

18 A No, I did not.

19 MS. MCDONALD: Object to the form.

20 BY MS. MOULDS:

21 **Q I'm sorry. You said no?**

22 A That is correct.

23 **Q Did you review any other documents: any of**
24 **the VA documents, any of the documents from**
25 **Mr. Durham's subsequent long-term care stays, anything**

1 **like that?**

2 A Subsequent to --

3 **Q Heartland of Zephyrhills.**

4 A Only the material pertaining to the stay at
5 Pasco Regional Medical Center in March and also a visit
6 in May 2008.

7 **Q Did you ask for the -- if there were any**
8 **other medical records for Mr. Durham following the May**
9 **of 2008 ER visit to Pasco Regional?**

10 A I had asked whether anything else existed.

11 **Q And what were you told?**

12 A I think I was told that they were trying to
13 obtain it or they didn't have it or something like
14 that.

15 **Q Do you know who you asked about those**
16 **records?**

17 A I know I did ask again yesterday a
18 Mr. Wilander about any of the records.

19 **Q And what did he tell you?**

20 A I don't remember. It was something along the
21 lines of we don't have it I think.

22 **Q What was your purpose in asking for those**
23 **records?**

24 A I just wanted to know if there was anything
25 else that I would be interested in seeing.

1 Q Would you be interested in seeing records of
2 Mr. Durham's condition post his stay at Heartland of
3 Zephyrhills beyond March of 2008?

4 A If I was to render an opinion as to whether
5 the deviations of the standard of care at Heartland
6 impacted upon him later on, then I would be interested
7 in seeing that.

8 Q Doctor, let's look then at your opinions in
9 regard to Heartland of Zephyrhills.

10 A And I'm comfortable doing this whatever way
11 works best for you. Unfortunately, I don't have your
12 notes in from of me and you don't have your affidavit.

13 Q So why don't we talk about what is your first
14 area of criticism or concern in regard to Mr. Durham's
15 care?

16 A Maybe we can fax things back and forth.
17 Would that make it easier?

18 Q How many pages are there?

19 A Ten.

20 MS. MOULDS: Let me see if we can do
21 that.

22 MS. MCDONALD: Did you want us to fax
23 your affidavit to you?

24 THE WITNESS: Yes.

25 (A brief recess was held from 12:11 p.m.)

1 to 12:25 p.m.)

2 BY MS. MOULDS:

3 Q Do you need a minute to glance at your
4 affidavit or are you ready, Doctor?

5 A (Reviewing document) No. I'm familiar with
6 it. I'm ready to go.

7 Q Why don't we go ahead, Doctor, and let's look
8 at your affidavit if that works for you.

9 And if you can tell me from that the first
10 criticism that you have in regard to the care that
11 Mr. Durham received at Heartland of Zephyrhills?

12 A As it is on the affidavit, it would be that
13 they should have known that he was at risk of becoming
14 malnourished and dehydrated and should have implemented
15 a care plan properly in order to prevent dehydration
16 and malnutrition.

17 Q First of all, Doctor, can you tell me what is
18 the basis of your opinion that the facility should have
19 known that he was at risk for malnutrition and
20 dehydration?

21 A Well, there were several indicators that were
22 available to the staff that this could be a problem and
23 one was that he had a history of swallowing problems.
24 Also, in their own assessment some of their employees
25 were able to make that determination.

1 For instance, there is a nutrition risk
2 assessment on February 26, 2008, where the author of
3 that notes writes that he is at risk for problems with
4 food intake and problems with fluid intake.

5 **Q Anything else that you used as a basis for**
6 **the opinion that they should have known he was at risk**
7 **for malnutrition and dehydration?**

8 A There was also a medical history of which he
9 had become dehydrated in the past so that also was
10 available to them. There is also a history of people
11 planning for his problems with dysphagia so it's all
12 the same.

13 What I'm trying to say is other caregivers
14 prior to Manor Care, Heartland of Zephyrhills did
15 recognize it. So that would have been available to
16 them, plus on their own assessment they would have seen
17 that he had a problem and, in fact, some of them did.

18 There is also another note, which is called
19 the -- another nutrition risk assessment also dated
20 February 26, 2008. This is a handwritten note by what
21 seems to be registered dietician, and the dietician
22 writes that the resident is at nutrition and hydration
23 risk.

24 **Q Anything else in that specific regard? And**
25 **the question specifically was what is your basis of**

1 **your opinion that they should have known that he was at**
2 **risk for malnutrition and dehydration?**

3 A Well, then it becomes an ongoing assessment.
4 It's not just the initial evaluation. It's also
5 observations that they make while he is in the
6 facility.

7 And there are multiple indicators that he is
8 not consuming nutrients and fluids adequately. And
9 this turns up in one place on the activities of daily
10 living worksheet where it seemed that his meal intake
11 is poor.

12 **Q In response to your opinion that they should**
13 **have known he was at risk for malnutrition and**
14 **dehydration, did the facility do anything in this**
15 **regard?**

16 A Yes, they did some things. They did do a
17 risk assessment or at least the registered dietician
18 did. And they did develop a care plan, several weeks
19 into his stay there, addressing possible nutritional
20 problems.

21 They intermittently recorded his intake.
22 They intermittently monitored him. So they did pieces
23 of it but they didn't do enough to meet the standard of
24 care.

25 **Q I think you said that some other caregivers**

1 had previously recognized these problems.

2 Do you know what caregivers previously
3 recognized these problems?

4 A In the records of Dr. John, there are home
5 health certification and plan of treatment forms. The
6 individuals who filled out those forms would have
7 recognized it. I would have to check the names now if
8 you need those names.

9 But there were these care plans which had
10 existed in 2007 which addressed Mr. Durham's problems
11 with swallowing.

12 Q In paragraph 8 of your affidavit, you said
13 they developed a care plan.

14 Do you have any criticisms of the care plan
15 that was developed?

16 A The care plan which I'm discussing is one
17 which was initiated on March 13, 2008, and one
18 criticism is that it was late in being developed.

19 It does address his poor oral intake and it's
20 good that they did take a look at that. But the delay
21 in developing the care plan is a problem for
22 Mr. Durham.

23 The other criticism I would have is the care
24 plan specifically fails to address problems with
25 aspiration, which we'll talk about later, and problems

1 with hydration. It seems to focus just on the
2 nutrition.

3 The other criticisms I would have is that it
4 was not actually properly implemented.

5 **Q When, in your opinion, should a care plan**
6 **regarding nutrition have been developed?**

7 A Well, probably there should have been an
8 interim care plan developed right after admission since
9 he had this known preexisting condition.

10 If that got delayed somehow and was
11 overlooked, then when the registered dietician did the
12 nutrition risk assessment then that's another
13 opportunity to try and catch up and develop a care
14 plan. But they failed to do it at that time as well.

15 **Q And what is the purpose of a care plan?**

16 A The purpose of a care plan is to identify a
17 problem, put interventions into place that all the
18 caregivers can draw upon and be advised also and then
19 also have a basis by which to review the care plan if
20 necessary.

21 So it is a structure which the facility would
22 use in order to provide care to a resident.

23 **Q In regard Mr. Durham's, which you deemed a**
24 **risk for malnutrition, were there any interventions put**
25 **in place?**

1 A Well, certain things did happen. There were
2 orders to provide nutritional supplements.

3 **Q Anything else?**

4 A As I mentioned before, they were sometimes
5 documenting how much he ate. But they didn't do it
6 consistently and they didn't act upon their
7 documentation.

8 They also weighed him every once in a while,
9 but not consistently from what I can see.

10 **Q How frequently, in your opinion, should he**
11 **have been weighed?**

12 A Well, the nutritionist was advising weighing
13 weekly. And then once that is being done, if you see
14 that the weights are fluctuating, and in his case
15 decreasing, then you might want to increase that.

16 But it doesn't look like they actually
17 weighed him weekly as advised by the individual doing
18 the nutrition risk assessment.

19 **Q And where were you looking for those weights?**

20 A Everywhere. One of the places that I found
21 them was on weight record.

22 **Q In terms of the nutritional supplements that**
23 **were ordered, were those a reasonable order?**

24 A It's certainly reasonable to order a
25 nutritional supplement if the patient is able to

1 consume them safely and regularly.

2 **Q** **Would you agree, Doctor, that it would be**
3 **appropriate for a care plan to include nutritional**
4 **supplements being given to Mr. Durham?**

5 A I think in general it would be appropriate,
6 yes.

7 **Q** **And if he was in fact receiving those**
8 **nutritional supplements whether or not on the care**
9 **plan, would that meet the standard of care for**
10 **Mr. Durham?**

11 MS. MCDONALD: Object to the form.

12 A The standard of care would require that he
13 receives adequate calories, fluid, and protein.

14 So in order to answer the question, I would
15 have to know whether the nutritional supplements were
16 able to provide that.

17 **Q** **And did you look at that to see if what the**
18 **registered dietician had ordered was appropriate?**

19 A Well, the registered dietician only wrote one
20 note. And in that note, the dietician wrote that he
21 would need above 2,000 calories a day.

22 I also looked at the administration record of
23 the supplements, and Mr. Durham was not taking the
24 supplements as prescribed. He was taking a fraction of
25 them.

1 So it does not seem that he was able to
2 actually maintain the requirements for nutrition and
3 hydration as based just based on those supplements.

4 **Q Does the patient have a right to turn down**
5 **supplements?**

6 A The patient has the right to turn down
7 supplements, and he also has the right for the
8 caregivers then to come up with another approach.

9 **Q Did you see any orders in regard to --**
10 **doctor's orders in regard to supplements or foods**
11 **related to Mr. Durham and his risk for malnutrition?**

12 A Yes. I did see some doctor's orders
13 pertaining to that.

14 **Q Did you have any criticism of those doctor's**
15 **orders?**

16 A No. The doctor's orders were concerning the
17 addition of supplements, enhanced foods, and
18 administration of liquids, and I do not have criticisms
19 of that.

20 **Q In your opinion then, Doctor, what should the**
21 **facility have done that it did not do in regard to**
22 **Mr. Durham's risk for malnutrition?**

23 A One, they should have consistently recorded
24 his food acceptance, which they did not; two, there
25 should have been consistency between the documentation

1 in the records of his food consumption and there was
2 not. There is actually internal inconsistencies within
3 the record, which, of course, then makes it difficult
4 to manage an individual.

5 Three, having seen he is not consuming
6 adequately, they should devise a care plan in a timely
7 fashion and revise the care plan in a timely fashion.

8 **Q Anything else?**

9 A Well, some of this may also extend over to
10 the discussions of aspiration and hydration because it
11 all -- this all basically is his problems with
12 swallowing.

13 He has to get what he needs to sustain a
14 healthy life into his system, but he also has to make
15 sure that he doesn't choke on material that doesn't go
16 down the right tube. So I would have additional
17 criticisms that would extend to that too.

18 **Q Anything else that the facility in your**
19 **opinion should have done that they did not do?**

20 A It all continues to come under the same
21 heading in general of properly devising, implementing,
22 and revising a care plan for the prevention of
23 nutritional problems.

24 **Q So all these criticisms, Doctor, are**
25 **basically related to documentation; is that correct?**

1 MS. MCDONALD: Object to the form.

2 A Absolutely not, no. It's not documentation.
3 It's implementation. The document is a part of the
4 implementation.

5 Q Well, is it your opinion that Mr. Durham was
6 not getting the supplements that were ordered for him?

7 A He was getting them. He just wasn't
8 consuming all of them.

9 Q Is it your opinion that he wasn't getting the
10 enhanced foods that were ordered for him?

11 A Once again, the criticism is that the
12 material is being delivered to him but he is not
13 consuming it, which means he is falling below the
14 requirements that he needs to sustain a healthy life
15 and the facility has to act on that.

16 Q Are you aware of any other action that the
17 facility took to address issues related to Mr. Durham's
18 consumption?

19 A There were evaluations of his speech and
20 swallowing and then rehabilitation of his swallowing.

21 Q Do you agree with those?

22 A I agree that the assessment was correct. I
23 agree that it was the right thing to do. However, it
24 did not seem to extend to all of the caregivers.

25 Q What do you mean by that, Doctor?

1 A There is an eating and swallowing evaluation
2 on February 25, 2008, which points out many of his
3 problems, including that in his mouth there is weakness
4 on the right side, sensation is disrupted, and material
5 actually spills out of his mouth on the right side.
6 This is part of his problem.

7 There is also an indication that fluids will
8 penetrate into his larynx, which would disrupt the
9 breathing part of the body.

10 So a recommendation is actually made as to
11 how to position his head to counter that during eating
12 because part of the -- one side of the head doesn't
13 function as well as the other, the recommendation would
14 be to move the head and decrease the risk for
15 aspiration and improve food intake.

16 However, as I said, not all the caregivers
17 seem to have been aware of that. There is no
18 indication this was actually ever done outside the
19 setting of the speech therapy.

20 Along with that criticism, if you look at the
21 rehabilitation note concerning swallowing there are
22 indications that in order to keep him safe during
23 eating he requires supervision.

24 But I don't see anything that indicates that
25 the staff was aware of this, care planned for it, or

1 implemented it. And in fact, it seemed to fall on the
2 shoulders of his spouse to make sure this happened
3 during meals.

4 **Q And what is the basis of your opinion that**
5 **this fell on the shoulders of his spouse?**

6 A Because the way they are writing the notes,
7 they keep saying that they're educating the spouse,
8 that she's present frequently, she is supportive.

9 But there is no indication that they are
10 informing the rest of the staff. And it doesn't turn
11 up in any of the notes that I could see of the nurses
12 that this was -- that they're aware of this, that they
13 are doing this. It's not in the care plan. In fact, I
14 don't see any care plan whatsoever for aspiration
15 prevention.

16 **Q Have you ever talked to Mrs. Durham?**

17 A No, I have not.

18 **Q Do you have any idea whether or not she**
19 **wanted to be the one that was there present and**
20 **assisting her husband with meals?**

21 A Even if that was the case, I don't think that
22 supersedes the responsibility of the staff of Heartland
23 of Zephyrhills.

24 **Q I don't think that was my question. My**
25 **question was do you know whether or not Mrs. Durham**

1 wanted to be the person that was there and assisting
2 her husband with meals?

3 A I don't know it but it actually would not
4 change my criticism of the staff of Heartland of
5 Zephyrhills.

6 Q Are there any other areas of criticism that
7 you have in regard to what you stated is not adequately
8 dealing with Mr. Durham's risk of malnutrition?

9 A Well, there is additional indicators that
10 there seems to be a fragmentation of care at Heartland
11 of Zephyrhills, that not all the caregivers are aware
12 of his problems. And this, of course, then impacts
13 upon the delivery of care.

14 Specifically, if you look at the minimum data
15 sets of which there were two, one in February and one
16 in March, where the caregivers indicate his problems,
17 his needs, in both minimum data sets, although there is
18 a place to indicate whether the resident has swallowing
19 problems, the staff of Heartland of Zephyrhills
20 indicated he has no swallowing problems.

21 And since care plans spring forth from the
22 minimum data set, that then impacts upon him as well.

23 Q Anything else?

24 A I believe it would be just more similar
25 items.

1 **Q Was Mr. Durham malnourished when he came to**
2 **Heartland of Zephyrhills?**

3 A I believe that his albumin level in February
4 was in the normal range.

5 **Q And that was on admission to our facility?**

6 A I don't have the exact date. It was either
7 on it -- I don't have access right now to the records,
8 but it was either on admission or prior to it at the
9 other facility. I remember seeing a normal albumin
10 level.

11 THE COURT REPORTER: Give me one second
12 to turn his computer back on.

13 MS. MOULDS: Okay.

14 THE WITNESS: (Reviewing document) On
15 February 4, 2008, there was an albumin level
16 within normal range and a total protein level
17 within normal range.

18 BY MS. MOULDS:

19 **Q So that's on 2/4 of '08?**

20 A Yes.

21 **Q Is that correct?**

22 A That is correct.

23 **Q And the basis of that determination in your**
24 **mind is on his albumin level?**

25 MS. MCDONALD: Object to the form.

1 A Well, it indicates that it was normal. So at
2 that particular time, yes, we didn't have that
3 indicator of malnutrition.

4 **Q On 2/4/2008 -- I guess my question to you is**
5 **was he malnourished when he came to Heartland of**
6 **Zephyrhills?**

7 A According to the dietician's note, he was at
8 risk of nutritional problems and hydration problems.
9 But the dietician does not write he was malnourished
10 and that's on February 26, 2008.

11 **Q Is it your opinion that Mr. Durham was**
12 **malnourished when he was discharged from Heartland of**
13 **Zephyrhills?**

14 A Yes.

15 **Q What is the basis of that opinion?**

16 A The basis of that opinion is looking at
17 similar indicators at Pasco Regional Medical Center at
18 the time of entry on March 21, 2008.

19 **Q And what was his albumin on March 21, 2008?**

20 A I see that it was 2.7.

21 **Q And what is normal range for that lab?**

22 A For the laboratory that this was done in, the
23 normal range is 3.4 to 5.0.

24 **Q Did you look at any albumin levels for**
25 **Mr. Durham prior to February 4, 2008?**

1 A Yes.

2 Q What dates?

3 A I have one from January 5, 2007.

4 Q And what was it at that time?

5 A 4.0.

6 Q Any other albumin levels prior to February of
7 2008?

8 A I have one from October 11, 2007.

9 Q What was it then?

10 A 3.4.

11 Q Was that below normal?

12 A No. In that laboratory, that was a normal
13 range.

14 Q Any others that you looked at?

15 A I haven't got any notes on any others, so I'm
16 not sure if I looked at them.

17 Q Do you know where you obtained those lab
18 reports since they don't cover any of the dates of
19 records you advised me you had reviewed?

20 A Yes. I obtained them from the records of
21 Dr. John.

22 Q Okay. Did you look at any of Mr. Durham's
23 albumin levels after he left our facility?

24 A The ones that I looked at --

25 Q I'm sorry. Other than the ones we've already

1 discussed when he first went to the hospital.

2 A No. I don't think I had access to that.

3 MS. MOULDS: Doctor, can we take just a
4 quick five-minute break?

5 THE WITNESS: Sure.

6 (A brief recess was held from 12:58 p.m.
7 to 1:04 p.m.)

8 BY MS. MOULDS:

9 Q Doctor, I think we were talking about the
10 albumin levels that you had reviewed, and I just want
11 to make sure that I have those right.

12 You looked at the -- you saw one from 1/5/07
13 and from 10/11/07 from Dr. John's records, you
14 referenced one from 2/4/08 and then the one on
15 discharge, correct, from Heartland of Zephyrhills?

16 And I think my question to you had been did
17 you see any other albumin levels after the discharge
18 from our facility other than the one when he went to
19 the hospital from our facility?

20 A Just to be clear, the one on discharge
21 actually was as after discharge from Heartland, not --

22 Q Okay. What is the date on that?

23 A That was the one at Pasco Regional Medical
24 Center and I believe the date is March 21st. So it's
25 right after the patient was admitted to Pasco Regional

1 Medical Center.

2 **Q Are there any other subsequent albumin levels**
3 **that you reviewed?**

4 A Not after the discharge from Pasco Regional
5 Medical Center in March of 2008.

6 **Q Are there any other opinions regarding**
7 **malnourishment, Doctor, that we have not covered?**

8 A I believe we covered them all as indicated in
9 the affidavit. It might just be the one about another
10 problem, which I don't know if I spoke about today,
11 which is the dietician only seeing the resident one
12 time.

13 **Q Okay. And you did mention that but let me**
14 **ask you about that, Doctor.**

15 **In your opinion, how frequently did the**
16 **dietician need to see Mr. Durham during this residency?**

17 A Well, it's always hard to say when they don't
18 come back for that second visit because you don't know
19 what they would have found.

20 But more likely than not, being that the
21 dietician is asking for weekly weights, the dietician
22 should then see that that weekly weight is obtained.
23 And then based on the value of the weight, then see the
24 patient either to say everything is okay or something
25 else needs to be done.

1 But there is no indication that the
2 registered dietician actually followed up on her own
3 treatment plan.

4 **Q Are you aware of any rules or regulations**
5 **regarding how frequently a registered dietician needs**
6 **to see someone in long-term care?**

7 A I don't know off hand of any specific rule.
8 But good practice would indicate that if a patient
9 needs you and you've actually put forth a plan that you
10 should carry out your own plan.

11 **Q Do you have any certification as a dietician?**

12 A No. I'm not a dietician.

13 **Q Any other items in the area of what you've**
14 **deemed are risks for malnutrition that we have not yet**
15 **covered?**

16 A I believe we have touched upon the essence of
17 my opinions in our discussion.

18 **Q When you say the essence of your opinions,**
19 **that makes me a little nervous. It makes me think like**
20 **there is some depth that we haven't gotten to.**

21 **Is there more to those opinions regarding**
22 **malnutrition that we have not covered?**

23 A No. Please, do not be nervous. What I meant
24 to say is I have made a general statement about my
25 opinions. There might be some additional details to

1 bolster my opinions but I think we have covered it all.

2 **Q** **Okay. As you sit there right now, are there**
3 **other details that come to your mind that would bolster**
4 **your opinion regarding your criticism as to nutritional**
5 **status?**

6 **A** There might be but I -- this is at the risk
7 of repeating myself -- I would mention that the nurses
8 will write in their notes that Mr. Durham is having a
9 good oral intake or that his appetite is good on the
10 same day where there is other documentation that he is
11 actually only eating 50 percent of his meals.

12 And then I would combine that with the
13 dietician's recommendation that he receives a certain
14 amount of calories each day. Clearly, that day he did
15 not receive them.

16 **Q** **When a nurse says good appetite, in your**
17 **opinion does that correlate to any particular**
18 **percentage of meal intake?**

19 **A** Well, they are not being specific when they
20 write the word "good." But for instance, on February
21 25, 2008, they wrote good oral intake and that is on
22 the same day when it's indicated that he ate half of
23 breakfast and half of dinner on the ADL worksheet.

24 And I don't think half would be considered to
25 be good by anybody's criteria.

1 Q Okay. Anything else in the area -- and I'm
2 certainly not asking you to be repetitive. I just want
3 to make sure I've covered everything.

4 So are there any other areas in regard to
5 your concerns as to nutrition that we have not yet
6 covered?

7 A I believe we have covered it all.

8 Q What is your next area of criticism or
9 concern, Doctor?

10 A The next general area would be that of
11 hydration.

12 Q And what is your criticism there?

13 A And this is similar with the criticism with
14 nutrition that Mr. Durham was a gentleman who was at
15 risk of becoming dehydrated and the facility failed to
16 properly develop and implement a care plan for the
17 prevention of dehydration.

18 Q Was anything being done to address
19 Mr. Durham's risk of dehydration?

20 A There were many things that weren't being
21 done, so it's hard to say if anything was being done.

22 I would be able to say that the registered
23 dietician did recognize that he was at risk so that is
24 a starting point.

25 Q Okay. Anything else other than the

1 **registered dietician noting that he was at risk?**

2 A From that point on, it was a failure to meet
3 the standard of care.

4 The resident assessment protocol summary did
5 not trigger a dehydration and fluid maintenance plan.
6 There was no care plan properly developed and
7 implemented for the prevention of dehydration. His
8 intake and output were not monitored.

9 So there were more failures here than there
10 were successes.

11 **Q In your opinion, what needed to have been**
12 **done in regard to Mr. Durham's risk for dehydration?**

13 A Well, similar with the discussion of
14 nutrition, at the time of entry it was known to the
15 staff that he had problems with swallowing, so that
16 would pertain to fluids as well as food, and that a
17 care plan or an interim care plan should have been
18 developed and implemented for the prevention of the
19 dehydration.

20 Then when the nutritionist or dietician
21 recognized that he was at risk for dehydration on
22 February 26, 2008, a care plan should have been
23 developed, by that point certainly, for the prevention
24 of dehydration.

25 However, there is no evidence that there was

1 ever any care plan developed for dehydration during his
2 entire stay at Heartland of Zephyrhills.

3 **Q Any other criticisms in that regard?**

4 A Well, it also extends to another opportunity
5 which they had and failed to act on which was a care
6 plan where they were looking as his use of medications.

7 And it's good that they actually developed a
8 care plan which would address the side effects of
9 medications. But as far as the aspect of the
10 prevention of dehydration, they did not do so.

11 Specifically, there was a care plan on
12 February 25, 2008, for the risk of the adverse effects
13 of one of his medications, which was BuSpar, which has
14 several side effects, one of which can be the increase
15 in the frequency of urination.

16 And part of the interventions was to
17 encourage him to take as much fluid as possible. But
18 there is no indication that there was any action on the
19 part of the staff to monitor his fluid balance.

20 So not only does he have problems consuming
21 fluids, he has a possible risk of losing fluids
22 secondary to a medication and, yet, the staff failed to
23 act on that.

24 **Q Did the doctor ever order I and O's for**
25 **Mr. Durham?**

1 A I didn't see a specific order for I's and O's
2 from the physician.

3 Q Do you ever order that for your patients?

4 A Yes.

5 Q Other than creating a care plan related to
6 dehydration, do you have any opinions of other action
7 that you believe the facility should have taken in
8 regard to Mr. Durham being at risk?

9 A Yes, I do.

10 Q And what is that?

11 A Offer him water.

12 Q Anything else?

13 A It's really very basic stuff. You offer him
14 fluids. You see if he takes it in. You see how much
15 he puts out and you make sure he remains in a positive
16 balance.

17 Q Do you have any opinion as to whether or not
18 Mr. Durham was dehydrated on admission to our facility?

19 A Yes, I do.

20 Q And what is that?

21 A He probably was in a state where he was --
22 his fluid balance was already in the area of
23 dehydration.

24 Q And what is the basis of that opinion?

25 A The basis of that is the laboratory values.

1 The ones that I have do not show that the blood urea
2 nitrogen was in a normal range.

3 Specifically, during his previous stay at
4 Pasco Regional Medical Center it was elevated to 24.
5 It did come down to a range that was normal at 18. The
6 next one I have is March 3, 2008, and it's back up to
7 24.

8 So I can't say with certainty that he wasn't
9 slightly dehydrated on entry to Heartland of
10 Zephyrhills but he probably wasn't dehydrated. I would
11 say more likely than not he wasn't dehydrated because
12 on February 22, 2008, the blood urea nitrogen was
13 normal and that was the date of admission.

14 **Q Did Mr. Durham's have any medical conditions**
15 **that would predispose him to being at risk for**
16 **dehydration?**

17 A Well, he was predisposed, one, because of
18 difficulties taking fluid in. He also at different
19 times in his life did have problems with
20 gastroenteritis. He had had bouts of colitis.

21 So that would lead to fluid losses so if not
22 properly managed he could become dehydrated.

23 **Q What about the diarrhea he had from the**
24 **C. diff?**

25 A Right, and that's the same thing I was

1 speaking about, the gastrointestinal problems that --
2 the feces contained fluid so he would be losing
3 excessive amounts of fluid through the bowel.

4 **Q Did you review any BUN or creatinine levels**
5 **for Mr. Durham prior to those that you've just**
6 **discussed when he was hospitalized immediately prior to**
7 **coming to our facility?**

8 A Yes. Aside from the ones that I reviewed on
9 February 21st and 22nd, I did also review ones from
10 2007.

11 **Q And were those from Dr. John's records?**

12 A Once again, those are contained in Dr. John's
13 records, yes.

14 **Q And what are your findings there?**

15 A There were some normals and then there was
16 one that was elevated.

17 On January 5, 2007, the blood urea nitrogen
18 or BUN was 18, which was in the normal range. On
19 October 11, 2007, the BUN was 21, also in the normal
20 range. And on November 15, 2007, the BUN was 31. The
21 normal range in that laboratory was 10 to 30 so this
22 would have been elevated.

23 **Q Any other BUN's that you looked at prior to**
24 **Mr. Durham's admission to our facility?**

25 A I might have looked at other ones but these

1 are the only ones I had taken notes on.

2 Q Did you look at any BUN levels after
3 Mr. Durham left our facility other than ones from his
4 hospitalization at Pasco Regional in March of '08?

5 A Yes, I did.

6 Q And what were those?

7 A He was again at Pasco Regional Medical Center
8 on May 2, 2008, and there was a BUN obtained, which was
9 25. The normal range for that laboratory was 7 to 18
10 so that was elevated.

11 Q And do you know where he had been residing at
12 the time he went to the ER in May of '08?

13 A I believe he might have been at a place
14 called Heritage Park but I do not have the records.

15 Q Any other BUN's that you reviewed post his
16 admission to our facility?

17 A No.

18 Q Any other areas of criticism or concern that
19 you have regarding hydration that we have not
20 discussed?

21 A There was the area of actually offering him
22 the fluids, and I don't know if we had gone any further
23 on that.

24 Q Okay. What is that, Doctor?

25 A Because that is one of the components of

1 maintaining hydration. I checked to see how fluids
2 were offered to him, and they were not offered
3 consistently as directed by their own care plan.

4 **Q What is your basis for that opinion?**

5 A There is a section of the chart called the
6 Florida ADL worksheet where the staff will indicate
7 whether fluids are offered. And for multiple shifts on
8 multiple days, fluids were not offered to Mr. Durham.

9 **Q Fluids weren't offered or it was not**
10 **documented that fluids were offered?**

11 MS. MCDONALD: Object to the form.

12 A Well, more likely than not, based on his
13 clinical picture they weren't offered and the
14 documentation is consistent with that.

15 **Q Can infections cause someone to be**
16 **dehydrated?**

17 A Yes, certain infections can.

18 **Q Does a resident in a long-term care facility**
19 **have a right to turn down fluids that are offered to**
20 **them?**

21 A They have the right to turn it down if they
22 have the capacity to turn it down. He also has the
23 right to have an appropriate response by the staff to
24 provide alternatives and develop a care plan based on
25 that.

1 **Q** **If someone refuses fluids when they are**
2 **offered to them, what do you suggest that a staff at a**
3 **long-term care facility do?**

4 **A** Determine why he is refusing the fluids.
5 That's a starting point.

6 **Q** **And then what?**

7 **A** Based upon what their determination is, then
8 you develop and implement a care plan.

9 **Q** **Any other areas of criticism or concern that**
10 **you have regarding hydration?**

11 **A** I believe that in general covers it.

12 **Q** **What is your next area of criticism, Doctor?**

13 **A** The failure to properly develop and implement
14 a care plan to prevent aspiration.

15 **Q** **And what is the basis of that opinion?**

16 **A** Once again, it's similar to the other two of
17 hydration and nutrition. He has problems with
18 swallowing so that also means he may have a problem
19 with keeping material out of his airway.

20 Once again, although it was recognized that
21 he has this difficulty, there is no evidence that a
22 care plan for the prevention of aspiration was properly
23 developed and implemented.

24 **Q** **Is it your opinion, Doctor, that Mr. Durham**
25 **had aspiration pneumonia?**

1 A Yes.

2 **Q What is the basis of that opinion?**

3 A The basis of that is contained in the records
4 of Pasco Regional Medical Center for the March 21,
5 2008, admission.

6 **Q And what are you relying on there, Doctor?**

7 A Several aspects, one that the diagnosis of
8 pneumonia was made, that there is a chest x-ray showing
9 the pneumonia, that there is in several infectious
10 disease notes indicating that more likely than not that
11 this is a result of aspiration and also there are notes
12 from speech therapy which talk about his aspiration.

13 There is actually a note on March 24, 2008,
14 which indicates that he more likely than not has been
15 suffering from silent aspiration.

16 **Q What is silent aspiration?**

17 A Silent aspiration would be silent to the
18 outside observer that his respiratory function is
19 compromised by material getting into the airway;
20 however, because he is not coughing or making noise it
21 just occurs.

22 **Q Did you see a final x-ray report for**
23 **Mr. Durham from that hospital stay?**

24 A The x-ray report I saw had the heading of
25 temporary radiology teleradiology report.

1 **Q That's not a final report, is it?**

2 A That's the only report that I saw in the
3 records. And then the clinical impression in the
4 discharge summary was pneumonia.

5 **Q Did you review any x-ray reports prior to**
6 **Mr. Durham's admission to Pasco Regional Medical Center**
7 **on March 21, 2008?**

8 A I had seen x-ray reports from earlier, yes.

9 **Q Do you recall what they said?**

10 A Without checking the records now, I believe
11 they had commented on the fact that he had previous
12 surgery done for lung cancer.

13 **Q Anything else?**

14 A That's all I recall. I'm just basing on
15 memory now.

16 **Q Did you review any x-ray reports after the**
17 **March 21st admission to Pasco Regional Medical Center?**

18 A The one that I had was the CT scan of the
19 chest.

20 **Q That's the one that we spoke about earlier**
21 **from 10/27/08?**

22 A That is correct.

23 **Q Any other issues or criticisms that you have**
24 **in regard to your concern that Mr. Durham was at risk**
25 **for aspiration?**

1 A It remains the general criticism that there
2 was not a care plan developed and implemented to
3 prevent aspiration in Mr. Durham. There were no
4 aspiration precautions that were consistently utilized
5 or communicated to the staff.

6 **Q Any other areas of criticism that you have?**

7 A Beyond aspiration?

8 **Q Have we discussed all of your concerns**
9 **regarding aspiration?**

10 A I may not have gone over some of the
11 specifics which bolstered my opinion.

12 **Q Okay. And what is that?**

13 A They did not have a plan to consistently keep
14 the head of the bed up or keep his head up to prevent
15 aspiration. Meals were not consistently supervised
16 even though the speech therapist had indicated that
17 this was necessary.

18 And even a minimum data set indicates that
19 the nurses were removed from the eating and swallowing
20 problems that Mr. Durham had.

21 **Q Any other specific areas that we have not**
22 **talked about?**

23 A No. I believe that covers it.

24 **Q Okay. Any other general area of criticism**
25 **that you have?**

1 We talked about nutritional status,
2 hydration, and aspiration.

3 A No. I don't believe I have any other
4 opinions at this time.

5 Q Doctor, I notice in your affidavit that you
6 say that there was -- and I'm looking at paragraph 12.
7 You indicate that you find the failure of the nursing
8 home staff to be gross negligence.

9 Does the word "gross negligence" have some
10 legal significance to you?

11 A I may not know the exact terminology but the
12 significance it has is the staff knew that something
13 had to be done and, yet, negated to do it on a
14 consistent basis. That there is actually a pattern of
15 neglect and as a result of that the person under their
16 care becomes injured.

17 Q Did you choose those words for this
18 affidavit?

19 A Yes.

20 Q I thought you told me earlier you didn't
21 draft this affidavit?

22 MS. MCDONALD: Object to the form.

23 A I didn't draft the affidavit --

24 Q Did you say to somebody -- I'm sorry. I was
25 talking over you. Go ahead, respond.

1 A I don't remember the exact conversation. But
2 based on previous experiences in matters such as this,
3 I probably do talk a certain way. So when I'm speaking
4 to the individual, and I believe it was Peggy Tyre, I
5 say and this is a case of gross negligence.

6 Q And then later on in paragraph 17 you say
7 this is an outrageous deviation.

8 Do you attach any legal significance to the
9 word "outrageous"?

10 A Here I'm not sure if there is a legal
11 significance. But when I probably was having this
12 conversation, I used the word "outrageous" because here
13 you had a situation which was preventable, it was
14 doable, an ordinary and prudent facility should have
15 and could have done it. And I find that deviation from
16 the standard of care to be outrageous.

17 Q What does the term "criminal manslaughter"
18 mean to you?

19 A Criminal manslaughter is murder. I'm not
20 sure why you're asking me that.

21 Q Does it have any legal significance to you as
22 it relates to this case?

23 A I'm not sure how it applies to this case.

24 Q What do you charge for review of cases?

25 A Two hundred dollars for an hour.

1 Q And what about for deposition?

2 A Two hundred dollars for an hour.

3 Q What about for trial testimony?

4 A Two hundred dollars for an hour.

5 Q If you were asked to come to a trial in
6 Florida, how would you bill: from the time you left
7 until the time you got home or how does that work?

8 A I would only bill for times that I am
9 working. So if I'm sleeping, I wouldn't bill. If I'm
10 traveling but not preparing for the case, I wouldn't
11 bill. If I'm traveling and reading material, then I
12 would bill.

13 Q How long have you been reviewing cases for
14 the Wilkes & McHugh law firm?

15 A I would have to guess at an answer. Should I
16 guess?

17 Q Can you tell me approximately?

18 A Maybe seven years.

19 Q I'm sorry. What did you say: about seven
20 years?

21 A I'm guessing, maybe seven.

22 Q Okay. Have you ever given trial testimony
23 where you were testifying on behalf of someone
24 represented by Wilkes & McHugh?

25 A Yes, I have.

1 Q How many times?

2 A I believe two.

3 Q And what states?

4 A One in Florida, one in Pennsylvania.

5 Q Do you recall the name of the case in
6 Florida?

7 A No. It was three or four years ago.

8 Q Do you remember the resident's name?

9 A No, I don't.

10 Q Do you remember where you testified, what
11 county or courthouse?

12 A I believe I was in Tampa.

13 Q Do you remember the outcome of that case?

14 A I was never told the outcome.

15 Q What about the case in Pennsylvania, how long
16 ago was that?

17 A That was maybe around the same time, three or
18 four years ago.

19 Q Do you remember the resident's name in that
20 case?

21 A No, I do not.

22 Q Do you remember the name of the nursing home
23 in that case?

24 A I do not.

25 Q Do you remember the name of the nursing home

1 in the Florida case?

2 A I do not.

3 Q Do you recall where in Pennsylvania you gave
4 testimony?

5 A Philadelphia.

6 Q Do you know the outcome of that case?

7 A Yes, I do.

8 Q What was it?

9 A It was in favor of the plaintiff.

10 Q Do you know the amount of the award?

11 A No, I don't know that.

12 Q What attorney did you work with in the Tampa
13 case?

14 A I think his name is Lazzara or something like
15 that.

16 Q Yes, Mr. Lazzara?

17 A That sounds right.

18 Q What about the Pennsylvania case, do you
19 recall the name of the attorney that you worked with?

20 A No, I don't.

21 Q Have you given trial testimony in this type
22 of case, a long-term care or a geriatric case, any time
23 other than the two times that you just told me about?

24 A Yes, I believe I have.

25 Q How often?

1 A I think I've only been to trial to testify
2 about ten times.

3 Q Can you tell me the names of any of the other
4 law firms that you've worked with besides Wilkes &
5 McHugh?

6 A At all?

7 Q Yes.

8 A Some I haven't worked with in a while.
9 Fillmore, F-i-l-l-m-o-r-e.

10 Q And where is that firm located?

11 A Texas. Borchardt, B-o-r-c-h-a-r-d-t, and
12 it's somebody and somebody. That's also in Texas but
13 I'm not remembering the second name. Doolan,
14 D-o-o-l-a-n, that's in New York. I'm not going to be
15 able to remember them all.

16 Q Okay. Do you have a list somewhere of the
17 cases where you have given trial testimony?

18 A No. I don't keep that kind of a list.

19 Q Do you have any record anywhere of the cases
20 that you've reviewed?

21 A No. I don't have a formal record. I only
22 keep the cases that are currently active and the rest I
23 have destroyed.

24 Q In regard to the total number of cases, how
25 many cases have you done of this type of legal review

1 in the last three years?

2 A I'd have to estimate, 20 or 25.

3 Q Approximately how many of those were reviewed
4 on behalf of the plaintiff, the person suing the
5 nursing home?

6 A I would say the majority, maybe 90 or 95
7 percent. I'm not sure but I would say the majority.

8 Q Of those 20 to 25 cases that you've reviewed
9 in the last three years, can you tell me the names of
10 any of the defense firms that have retained you to
11 review cases?

12 A No, I can not.

13 Q Of those approximately 20 to 25 cases that
14 you've reviewed in the last three years, how many of
15 them were from the Wilkes & McHugh firm?

16 A I would have to guess, maybe four or five.

17 Q Do you know what you have billed so far in
18 this case?

19 A I have not submitted a bill.

20 Q Doctor, have we discussed all of the opinions
21 that you have formulated to this point in regard to
22 this matter?

23 A Yes, I believe we have discussed all the
24 opinions I have formulated to this point.

25 Q Let me just ask you this real quickly,

1 Doctor. I've been advised by Wilkes & McHugh that they
2 are not proceeding for punitive damages against my
3 director of nurses, Patricia Ayetin.

4 But I just wanted to make sure, as you
5 reviewed this cart did you formulate any separate
6 opinions regarding her care?

7 A I would only say that my opinion would apply
8 to her as she is a part of the staff of Heartland of
9 Zephyrhills.

10 Q But in terms of any specific action, you
11 haven't formulated any specific opinions regarding her?

12 A No, I don't have any specific opinions
13 regarding her separate from my other opinions at this
14 time.

15 MS. MOULDS: Okay. That's all I have,

16 Doctor. Thank you very much.

17 CROSS-EXAMINATION BY

18 MS. MCDONALD:

19 Q Doctor, just a couple of things. In
20 paragraph 5 of your affidavit, you indicated that you
21 were familiar with the Florida Statutes, Chapter 400,
22 the resident rights?

23 A Yes.

24 Q And my question, sir -- my question is, is
25 one of those rights the right to adequate and

1 appropriate health care and protective and support
2 services?

3 A Yes, that's my understanding.

4 Q Is it also your opinion that Heartland of
5 Zephyrhills violated the right of James Durham in that
6 respect?

7 A Yes, that is my opinion.

8 MS. MCDONALD: Okay. Did you attach the
9 affidavit as an exhibit?

10 MS. MOULDS: I did not yet. I can. Do
11 you want me to?

12 MS. MCDONALD: The only other thing I
13 have is just to attach your affidavit as an
14 exhibit.

15 MS. MOULDS: Do you want to make it
16 Plaintiff or we can do it Defense No. 5?

17 You want to just do that?

18 MS. MCDONALD: Yeah, that's fine.

19 MS. MOULDS: Let's just go ahead and do
20 it as Defense Exhibit No. 5.

21 (Defendant's Exhibit No. 5 was marked
22 for identification.)

23 MS. MCDONALD: I have nothing else.

24 MS. MOULDS: Okay. Doctor, I think
25 we're done for the day.

1 MS. MCDONALD: I would just ask that you
2 read and sign, Doctor, when the transcript is
3 available.

4 THE WITNESS: Yes, I will.

5 (The deposition concluded at 1:49 p.m.)

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J U R A T S I G N A T U R E P A G E

I have read the foregoing record of my
testimony taken at the time and place noted
in the above heading hereof, and I do hereby
acknowledge it to be a true and correct
transcript of the same.

PERRY J. STARER, M.D.

Subscribed and sworn to
before me this ____ day
of _____, 2011.

NOTARY PUBLIC

C E R T I F I C A T I O N

1
2
3 I, Allison Howell, a Notary Public, do
4 hereby certify:

5 That the foregoing witness, PERRY J. STARER,
6 M.D., was duly sworn by me on the date indicated, and
7 that the foregoing is a true record of the testimony
8 given by said witness.

9 I further certify that I am not related to any
10 of the parties to this action by blood or marriage, and
11 that I am in no way interested in the outcome of this
12 matter.

13 IN WITNESS WHEREOF, I have hereunto set my
14 hand this 12th day of April, 2011.

15
16
17 _____
Allison Howell
Notary Public - State of New York
Qualified in New York County
18 No. 01HO6195824
19 Expires: November 3, 2012
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I N D E X

WITNESS

PAGE NO.

PERRY J. STARER, M.D.

Direct Examination by Ms. Moulds. . . . 3
Cross-Examination by Ms. McDonald . . .71

E X H I B I T S

Defendant's Exhibit No. 14
(curriculum vitae)
Defendant's Exhibit No. 2 19
(ten pages of notes)
Defendant's Exhibit No. 3 19
(Agency for Health Care Policy & Research printout)
Defendant's Exhibit No. 4 22
(Wilkes & McHugh, P.A., 2/2/11 letter)
Defendant's Exhibit No. 5 72
(affidavit)

- - -

A			B
a.m 1:14	23:8,12,17 24:12	52:4 58:18 60:9	B 76:8
a/k/a 1:8	24:25 25:4,21,24	63:6,21	B-o-r-c-h-a-r-d-t
able 32:25 37:25	31:12,23 32:4,8	arrange 21:3	69:11
38:16 39:1 52:22	32:12 35:12 49:9	arrangement 21:7	back 28:22 31:16
69:15	64:5,18,21,23	arrangements 24:4	45:12 49:18 56:6
abnormalities 29:2	71:20 72:9,13	arrival 20:19	bad 12:25
29:3	76:16	article 19:13,21	balance 54:19
Absolutely 41:2	affiliated 5:7	aside 13:18 14:4	55:16,22
academic 4:18	10:19	24:3 57:8	based 5:2 8:14,17
acceptance 39:24	afternoon 13:23	asked 30:10,15	17:12 28:1 39:3
access 21:23 45:7	age 8:15	66:5	39:3 49:23 59:12
48:2	Aged 10:9	asking 3:9 7:15	59:24 60:7 65:2
acknowledge 74:6	Agency 18:9 76:13	12:11 30:22	basic 55:13
act 8:6 37:6 41:15	ago 16:23 67:7,16	49:21 52:2 65:20	basically 40:11,25
54:5,23	67:18	aspect 54:9	basing 62:14
action 41:16 54:18	agree 38:2 41:21	aspects 18:11 61:7	basis 32:18 33:5
55:6 71:10 75:10	41:22,23	aspiration 35:25	33:25 36:19 43:4
active 69:22	ahead 4:11 19:10	40:10 42:15	45:23 46:15,16
activities 34:9	19:12 22:3 32:7	43:14 60:14,22	55:24,25 59:4
acute-care 6:12	64:25 72:19	60:25 61:11,12	60:15 61:2,3
14:7	airway 60:19 61:19	61:15,16,17	64:14
addition 39:17	al 77:3	62:25 63:3,4,7,9	becoming 32:13
additional 11:12	albumin 45:3,9,15	63:15 64:2	52:15
40:16 44:9 50:25	45:24 46:19,24	assessment 32:24	bed 8:17 63:14
address 3:21 4:3,4	47:6,23 48:10,17	33:2,16,19 34:3	beds 8:22
4:6 35:19,24	49:2	34:17 36:12	began 28:13
41:17 52:18 54:8	Allison 1:23 75:3	37:18 41:22 53:4	behalf 1:21 2:3,9
addressed 17:23,25	75:16	assigned 5:6 8:4	66:23 70:4
35:10	alter 22:20	13:19 14:13	believe 6:20 9:13
addresses 18:11	alternatives 59:24	assignment 13:4	15:23 17:25 20:2
addressing 34:19	amount 51:14 68:10	assistant 4:19	23:18,23 25:3,9
adequate 18:23	amounts 57:3	6:23 28:16	25:14,20 27:23
38:13 71:25	answer 38:14 66:15	assisting 43:20	44:24 45:3 48:24
adequately 34:8	anybody's 51:25	44:1	49:8 50:16 52:7
40:6 44:7	aphagia 17:19	associated 10:14	55:7 58:13 60:11
ADL 51:23 59:6	apologize 12:9	assuming 7:3	62:10 63:23 64:3
administration	21:14	ate 37:5 51:22	65:4 67:2,12
38:22 39:18	appears 11:3,11	attach 4:12 19:10	68:24 70:23
administrative	appetite 51:9,16	22:4 65:8 72:8	belong 15:16
24:4	applies 65:23	72:13	belongs 21:15
admission 15:7,12	apply 71:7	attached 19:3	best 8:16 31:11
26:16,17 27:2,11	appointment 4:23	22:10	beyond 28:8 31:3
36:8 45:5,8	6:21 7:2	attending 7:25 8:4	63:7
55:18 56:13	appointments 4:18	8:5 9:22,23 13:5	bill 66:6,8,9,11
57:24 58:16 61:5	appreciate 21:1	attorney 1:4 68:12	66:12 70:19
62:6,17	approach 39:8	68:19	billed 70:17
admissions 13:9	appropriate 18:24	attribute 29:15	bit 7:10
14:1	38:3,5,18 59:23	author 33:2	blood 56:1,12
admitted 8:1,7	72:1	availability 8:17	57:17 75:10
14:20 48:25	approximately 9:11	available 32:22	board 11:14,17
adult 4:20	13:18 66:17 70:3	33:10,15 73:3	body 17:20 42:9
adverse 54:12	70:13	Avenue 2:11	bolster 51:1,3
advised 36:18	April 1:14 75:14	award 68:10	bolstered 63:11
37:17 47:19 71:1	77:2	aware 21:23 22:20	bone 14:18
advising 37:12	area 7:23 31:14	24:21 41:16	Borchardt 69:11
affidavit 17:24	50:13 52:1,8,10	42:17,25 43:12	borrowed 21:13
22:25 23:1,2,3,5	55:22 58:21	44:11 50:4	bouts 56:20
	60:12 63:24	Ayetin 1:8,9 71:3	
	areas 11:16 44:6		

29:1,10,16 62:18 currently 5:6 9:18 69:22 curriculum 76:10 CV 4:8,9 11:2 cwilander@wilk... 2:6 cycle 14:2	delineated 20:4 delivered 23:9 24:15 41:12 delivery 44:13 dementia 8:12 department 4:19 5:1,13 6:21,24 7:18 13:22 depending 13:4 DEPONENT 77:4 deposition 1:19 4:12 21:7 24:17 66:1 73:5 77:3 depositions 23:19 24:22 depth 50:20 describe 7:10,16 12:24 described 14:8 designated 9:8 destroyed 69:23 details 50:25 51:3 determination 8:13 8:14 16:7 32:25 45:23 60:7 Determine 60:4 develop 34:18 36:13 52:16 59:24 60:8,13 developed 35:13,15 35:18 36:6,8 53:6,18,23 54:1 54:7 60:23 63:2 developing 35:21 development 4:20 deviation 65:7,15 deviations 26:20 26:22,23 27:4,9 27:14,17,19,22 28:2 31:5 devise 40:6 devised 17:14 devising 40:21 diagnosis 61:7 diagnostic 13:11 diarrhea 56:23 dietician 33:21,21 34:17 36:11 38:18,19,20 46:9 49:11,16,21,21 50:2,5,11,12 52:23 53:1,20 dietician's 46:7 51:13 diff 56:24 different 4:3 14:15 56:18 difficult 40:3 difficulties 56:18	difficulty 60:21 dinner 51:23 Direct 3:5 76:4 directed 59:3 director 8:24 9:15 9:17 71:3 discharge 48:15,17 48:20,21 49:4 62:4 discharged 9:20 46:12 discharges 14:3 discuss 21:3 discussed 19:25 21:21 23:6 25:7 25:10,17 48:1 57:6 58:20 63:8 70:20,23 discussing 35:16 discussion 50:17 53:13 discussions 40:10 disease 14:20 61:10 diseases 14:21 disk 21:15,17,18 21:20,22,25 22:17,18,19,20 25:11 disrupt 42:8 disrupted 42:4 DISTRICT 1:1 divide 6:6 DIVISION 1:2 divisions 7:19 doable 65:14 doctor 3:7,18 4:8 4:17,24 7:15 11:2 12:9,20 13:16 14:24 16:2 17:2 18:2,12 19:4,18 21:4,8 21:17 22:3,9 23:1 25:21 26:2 28:21 31:8 32:4 32:7,17 38:2 39:20 40:24 41:25 48:3,9 49:7,14 52:9 54:24 58:24 60:12,24 61:6 64:5 70:20 71:1 71:16,19 72:24 73:2 doctor's 39:10,12 39:14,16 document 4:10 16:4 16:12 18:19 19:7 20:9 32:5 41:3	45:14 documentation 25:10 37:7 39:25 40:25 41:2 51:10 59:14 documented 59:10 documenting 37:5 documents 16:1 20:4 29:23,24,24 doing 31:10 37:17 43:13 dollars 65:25 66:2 66:4 Doolan 69:13 Dr 3:20 15:17 27:19,23 28:4,11 35:4 47:21 48:13 57:11,12 draft 23:1 64:21 64:23 draw 36:18 duly 3:2 75:6 Durham 1:4 15:17 16:19 17:18 26:11 28:16 29:4 30:8 32:11 35:22 38:4,10,23 39:11 41:5 43:16,25 45:1 46:11,25 49:16 51:8 52:14 54:25 55:8,18 57:5 58:3 59:8 60:24 61:23 62:24 63:3,20 72:5 77:3 Durham's 15:4 16:11 17:3,13 26:5 27:11 29:25 31:2,14 35:10 36:23 39:22 41:17 44:8 47:22 52:19 53:12 56:14 57:24 62:6 dysphagia 18:5 33:11
		E	
		E 2:1,1 74:1,1 75:1 76:1,8 77:1 77:1,1 e-mail 21:6 24:12 e-mails 24:17,20 24:22 earlier 14:8 62:8 62:20 64:20 early 10:24 easier 31:17 East 1:12 eating 42:1,11,23	

51:11 63:19	76:14, 15	fellowship 11:12	formulating 16:2
educating 43:7	existed 30:10	fibrotic 29:8	16:14
education 7:23	35:10	figure 8:10	forth 31:16 44:21
13:18	experiences 65:2	filled 35:6	50:9
educational 13:20	expert 3:12	Fillmore 69:9	found 29:2 37:20
14:5	expires 75:18	final 61:22 62:1	49:19
effects 17:6, 10	77:25	find 26:19, 23 27:5	four 67:7, 18 70:16
54:8, 12, 14	expressive 17:19	27:9, 14, 21 28:2	fraction 38:24
effort 6:3	extend 40:9, 17	28:19 64:7 65:15	fragmentation
egregious 26:20, 22	41:24	findings 28:25	44:10
either 5:23 25:11	extends 54:4	57:14	frequency 54:15
45:6, 8 49:24		fine 72:18	frequently 37:10
electronic 25:11	F	firm 25:13 66:14	43:8 49:15 50:5
elevated 56:4	F 2:10 75:1	69:10 70:15	front 15:25 25:23
57:16, 22 58:10	F-i-l-l-m-o-r-e	firms 69:4 70:10	full 3:15
eleven 13:18	69:9	first 3:2, 16 5:17	function 42:13
Elmhurst 3:22 4:4	facilities 9:19, 21	12:13 20:13	61:18
5:7, 10 6:11, 15	26:14	31:13 32:9, 17	further 58:22 75:9
7:2, 6, 17 9:7	facility 7:3 8:25	48:1	
10:5, 18, 23, 24	9:5, 6, 8, 16, 24, 25	five 70:16	G
emergency 15:14	10:6, 7, 8 32:18	five-minute 48:4	G 74:1, 1
27:16	34:6, 14 36:21	FL 1:7	Gail 2:10 3:8
employees 7:24	39:21 40:18	floors 9:7	gastroenteritis
32:24	41:15, 17 45:5, 9	Florida 1:1 2:5, 12	56:20
employment 12:20	47:23 48:18, 19	15:5 26:15, 24	gastrointestinal
encourage 54:17	52:15 55:7, 18	59:6 66:6 67:4, 6	57:1
enhanced 39:17	57:7, 24 58:3, 16	68:1 71:21	gee 28:5
41:10	59:18 60:3 65:14	fluctuating 37:14	general 13:21 38:5
entails 4:25	fact 33:17 38:7	fluid 33:4 38:13	40:21 50:24
entire 27:23, 25	43:1, 13 62:11	53:5 54:17, 19	52:10 60:11 63:1
54:2	faculty 4:2	55:22 56:18, 21	63:24
entity 6:2	failed 36:14 52:15	57:2, 3	generally 14:13
entry 46:18 53:14	54:5, 22	fluids 34:8 42:7	gentleman 29:13
56:9	fails 35:24	53:16 54:21, 21	52:14
ER 30:9 58:12	failure 53:2 60:13	55:14 58:22 59:1	geriatric 6:24 7:8
Esquire 2:4, 10	64:7	59:7, 8, 9, 10, 19	7:22 8:2, 8, 22
essence 50:16, 18	failures 53:9	60:1, 4	11:18, 19, 22 14:9
estimate 70:2	fall 43:1	focus 36:1	14:13 68:22
et 77:3	fallen 14:17	followed 50:2	geriatrics 4:20
etranscripts@d...	falling 41:13	following 11:6	5:11 6:7 7:17, 21
2:13	familiar 32:5	22:23 30:8	7:23 11:12
evaluation 34:4	71:21	follows 3:4	getting 41:6, 7, 9
42:1	far 16:11 54:9	food 33:4 39:24	61:19
evaluations 41:19	70:17	40:1 42:15 53:16	give 5:19, 19 16:12
events 29:16	fashion 16:13 40:7	foods 39:10, 17	45:11
everybody 8:10	40:7	41:10	given 4:8 38:4
evidence 53:25	favor 68:9	foregoing 74:3	66:22 68:21
60:21	fax 31:16, 22	75:5, 7	69:17 75:8
exact 9:13 45:6	February 15:6, 8, 11	form 23:8, 13 29:19	glance 32:3
64:11 65:1	20:12 26:16, 24	38:11 41:1 45:25	go 4:11 5:15 8:11
exactly 20:22	27:8 33:2, 20	59:11 64:22	9:21 19:9, 12
Examination 3:5	42:2 44:15 45:3	formal 7:5 69:21	22:3 28:22 32:6
76:4	45:15 46:10, 25	formally 26:14	32:7 40:15 64:25
examined 3:4	47:6 51:20 53:22	format 24:24	72:19
excessive 57:3	54:12 56:12 57:9	forms 35:5, 6	going 3:9 69:14
exhibit 4:13, 14	feces 57:2	formulate 26:10, 13	good 21:13 35:20
19:11, 15 22:5, 6	federal 16:16	26:16 28:17 71:5	50:8 51:9, 9, 16
22:11 72:9, 14, 20	18:13, 18 19:1	formulated 26:4	51:20, 21, 25 54:7
72:21 76:9, 11, 12	fell 43:5	70:21, 24 71:11	gotten 50:20

letter 20:9,23,24 20:25 22:4 76:14	majority 70:6,7	10:19 11:3,6	3:17 7:5 9:5
level 45:3,10,15 45:16,24	making 23:15 24:4 25:6 61:20	14:22 15:8,13,14	10:8 67:5,8,19
levels 46:24 47:6 47:23 48:10,17	malnourished 14:19 32:14 45:1 46:5	20:4 27:8,12	67:22,25 68:14
49:2 57:4 58:2	46:9,12	30:5,8 33:8	68:19 69:13
life 40:14 41:14 56:19	malnourishment 49:7	46:17 48:23 49:1	names 35:7,8 69:3 70:9
LINE (S) 77:6	malnutrition 8:20	49:5 56:4,14	nature 22:16
lines 30:21	32:16,19 33:7	58:7 61:4 62:6	necessary 36:20 63:17
liquids 39:18	34:2,13 36:24	medication 54:22	need 12:17 32:3 35:8 38:21 49:16
list 15:1 69:16,18	39:11,22 44:8	medications 54:6,9 54:13	needed 53:11
listed 4:18 7:1,7	46:3 50:14,22	medicine 4:3,21	needs 17:13 40:13 41:14 44:17
literature 16:18 18:1,4	manage 40:4	5:8,12 6:4,8,19	49:25 50:5,9
little 7:10 50:19	managed 56:22	6:21,24 7:19	negated 64:13
living 34:10	Manor 1:8 33:14	11:4,10,17,18,20	neglect 64:15
LLC 1:8	manslaughter 65:17 65:19	11:23 12:4,12,14	negligence 64:8,9 65:5
located 69:10	March 15:11,13	12:15 13:6	nervous 50:19,23
locations 4:1 26:12	27:12 30:5 31:3	meet 13:20 34:23 38:9 53:2	never 67:14
long 24:6 66:13 67:15	35:17 44:16	meeting 13:7	new 1:13,13,25 3:3 3:23,23 5:3 6:4
long-term 6:15	46:18,19 48:24	meetings 14:4	11:4 13:8 69:14 75:17,17
8:25 9:16,19,21	49:5 56:6 58:4	members 13:21	night 13:8
9:24 29:25 50:6	61:4,13 62:7,17	memory 19:2 62:15	nitrogen 56:2,12 57:17
59:18 60:3 68:22	marked 4:14 19:16 22:6 72:21	mention 49:13 51:7	noise 61:20
look 11:2,11 16:9	marriage 75:10	mentioned 37:4	noon 13:21
31:8 32:7 35:20	mass 29:7,7	messages 21:6	normal 45:4,9,16 45:17 46:1,21,23
37:16 38:17	material 15:12,18	middle 3:16	47:11,12 56:2,5
42:20 44:14	18:6 19:19 27:20	mind 6:5 45:24 51:3	56:13 57:18,19
46:24 47:22 58:2	28:12,13 30:4	minimum 44:14,17 44:22 63:18	57:21 58:9
looked 18:6 19:1	40:15 41:12 42:4	minute 32:3	normals 57:15
26:18 28:4 38:22	60:19 61:19	minutes 24:8,10	North 2:5
47:14,16,24	66:11	monitor 54:19	Nos 19:15
48:12 57:23,25	materials 20:19	monitored 34:22 53:8	Notary 1:25 3:3 74:15 75:3,17 77:24
looking 18:4,19	matter 70:22 75:12	months 8:3,5	notations 22:11
27:6 37:19 46:16	matters 65:2	morning 14:5	note 33:18,20 38:20,20 42:21 46:7 61:13
54:6 64:6	McDonald 2:4 29:19	Moulds 2:10,11 3:6 3:8 4:11,16 7:14	46:7 61:13
losing 54:21 57:2	31:22 38:11 41:1	12:8 13:15 17:1	noted 74:4
losses 56:21	45:25 59:11	19:9,17 22:3,8	notes 13:12 15:24 18:16 19:5,8,10
LUCINDA 1:4	64:22 71:18 72:8	29:20 31:20 32:2	19:20 22:9 28:12
lung 29:5,7,9 62:12	72:12,18,23 73:1 76:5	45:13,18 48:3,8	31:12 33:3 43:6
lungs 29:13	McHugh 2:4 20:1,8 20:14 21:5 22:1	71:15 72:10,15	43:11 47:15 51:8
	22:23 24:21	72:19,24 76:4	58:1 61:10,11 76:11
	25:13,18 66:14	Mount 4:2,20 5:8 6:1,3,19,22	notice 21:8 64:5
	66:24 69:5 70:15	10:17,20 11:3	noting 53:1
	71:1 76:14	mouth 42:3,5	November 57:20 75:18
M	meal 34:10 51:18	move 42:14	number 69:24
M.D 1:19 3:1 74:9 75:6 76:3 77:4 77:19	meals 43:3,20 44:2 51:11 63:15	multiple 34:7 59:7 59:8	numbers 19:3
M.J 2:4	mean 10:13 41:25 65:18	murder 65:19	
Mabry 2:5	means 41:13 60:18		
mail 24:12,15 25:11	meant 50:23		
maintain 39:2	medical 3:18 5:2 5:15,17,22 6:10	N	
maintaining 59:1	8:24 9:15,17	N2 :1 74:1 75:1 76:1	
maintenance 18:20 18:22 53:5		name 3:8,15,16,16	

prescribed 38:24	5:6 6:5 74:15	33:15 52:23	41:17 55:5 75:9
present 4:19 43:8 43:19	75:3,17 77:24	recognized 17:13 35:1,3,7 53:21 60:20	relates 65:22
presented 23:7,13	punitive 71:2	recommendation 42:10,13 51:13	relationships 12:21
pressure 8:19	purpose 30:22 36:15,16	record 37:21 38:22 40:3 69:19,21 74:3 75:7	relied 16:4
prevent 32:15 60:14 63:3,14	purposes 13:20	recorded 34:21 39:23	relying 61:6
preventable 65:13	put 21:16 36:17,24 50:9	records 15:1,4,7 15:10,16 16:22 21:2,18,21 22:14 22:15 27:10 30:8 30:16,18,23 31:1 35:4 40:1 45:7 47:19,20 48:13 57:11,13 58:14 61:3 62:3,10	remains 55:15 63:1
prevention 40:22 43:15 52:17 53:7 53:18,23 54:10 60:22	puts 55:15	referenced 48:14	remember 9:13 10:25 23:8 24:15 24:24 30:20 45:9 65:1 67:8,10,13 67:19,22,25 69:15
previous 56:3 62:11 65:2	<hr/> Q <hr/>	referenced 48:14	remembering 69:13
previously 25:16 35:1,2	Qualified 75:17	references 18:25	removed 29:5 63:19
printout 76:13	question 8:9 12:25 17:2 27:13 33:25 38:14 43:24,25 46:4 48:16 71:24 71:24	refuses 60:1	render 31:4
prior 9:3 10:22 17:3 20:15,19 28:9 33:14 45:8 46:25 47:6 57:5 57:6,23 62:5	questions 3:10	refusing 60:4	repeating 51:7
private 10:17,20	quick 48:4	regard 13:16 14:25 19:13 20:14,20 22:13 23:16 25:19 26:4,15 28:18,21 31:9,14 32:10 33:24 34:15 36:23 39:9 39:10,21 44:7 52:4 53:12 54:3 55:8 62:24 69:24 70:21	report 15:20 22:22 22:24 61:22,24 61:25 62:1,2
probably 8:9 20:15 20:18 28:5,7 36:7 55:21 56:10 65:3,11	quickly 70:25	regarding 24:17 26:10,17 36:6 49:6 50:5,21 51:4 58:19 60:10 63:9 71:6,11,13	Reporter 1:25 45:11
problem 32:22 33:17 35:21 36:17 42:6 49:10 60:18	<hr/> R <hr/>	Regional 15:8,10 15:13,14 27:7,12 27:17 30:5,9 46:17 48:23,25 49:4 56:4 58:4,7 61:4 62:6,17	reports 47:18 62:5 62:8,16
problems 13:24 17:18,22 29:13 29:15 32:23 33:3 33:4,11 34:20 35:1,3,10,24,25 40:11,23 42:3 44:12,16,19,20 46:8,8 53:15 54:20 56:19 57:1 60:17 63:20	R2:1 74:1,1 75:1 77:1,1	registered 33:21 34:17 36:11 38:18,19 50:2,5 52:22 53:1	represent 3:8
proceeding 71:2	radiology 61:25	regularly 38:1	represented 66:24
professional 3:20	range 45:4,16,17 46:21,23 47:13 56:2,5 57:18,20 57:21 58:9	regulations 16:17 18:13,18,20 19:1 50:4	require 38:12
professor 4:19 6:24	reaching 25:8	rehabilitation 41:20 42:21	requirements 39:2 41:14
properly 17:14 32:15 36:4 40:21 52:16 53:6 56:22 60:13,22	read 73:2 74:3	Reins 20:24 22:4	requires 42:23
protective 72:1	reading 18:5 66:11	related 21:10 26:7 39:11 40:25	Research 18:10 76:13
protein 38:13 45:16	ready 32:4,6		residency 11:7,9 26:24 49:16
protocol 53:4	real 70:25		resident 18:21,22 33:22 36:22 44:18 49:11 53:4 59:18 71:22
provide 20:3 36:22 37:2 38:16 59:24	really 13:23 14:6 14:22 16:11 55:13		resident's 67:8,19
provided 7:23 20:1 28:1,18	REASON 77:6		residents 5:10,24 6:11
prudent 65:14	reasonable 37:23 37:24		residing 58:11
public 1:25 3:3	recall 19:24 20:17 23:15 24:14 25:1 25:6 62:9,14 67:5 68:3,19		residual 17:6,10

review 13:10,11,11
 16:1,14,16 18:18
 22:10,13,23
 27:14 29:23
 36:19 57:4,9
 62:5,16 65:24
 69:25 70:11
reviewed 14:25
 18:1,3,12 19:19
 19:21,23 23:19
 25:8 47:19 48:10
 49:3 57:8 58:15
 69:20 70:3,8,14
 71:5
reviewing 4:10
 16:17 18:19 19:6
 19:7 20:9 27:10
 32:5 45:14 66:13
revise 40:7
revising 40:22
right 4:24 17:21
 18:23 26:2 29:5
 29:6 36:8 39:4,6
 39:7 40:16 41:23
 42:4,5 45:7
 48:11,25 51:2
 56:25 59:19,21
 59:23 68:17
 71:25 72:5
rights 71:22,25
risk 32:13,19 33:1
 33:3,6,19,23
 34:2,13,17 36:12
 36:24 37:18
 39:11,22 42:14
 44:8 46:8 51:6
 52:15,19,23 53:1
 53:12,21 54:12
 54:21 55:8 56:15
 62:24
risks 50:14
room 15:14 27:16
rotate 5:10
roughly 8:18,23
 9:3
rule 50:7
rules 50:4
runs 6:4

S

S 2:1 74:1 76:8
 77:1
S-t-a-r-e-r 3:17
safe 42:22
safely 38:1
Saint 2:12
saw 28:16 29:16
 48:12 61:24 62:2
saying 43:7

says 21:1 51:16
scan 15:20 28:24
 29:1,11,16 62:18
scarring 29:6
schedule 14:6
scheduled 14:4
scheduling 24:17
school 4:3,21 5:3
 5:4,4,8,16,17,19
 5:23 6:4,19
 10:19 11:3,4,6
second 2:11 45:11
 49:18 69:13
secondary 17:13
 54:22
section 1:7 7:8,21
 59:5
see 13:10,25 16:10
 28:6 31:20 37:9
 37:13 38:17 39:9
 39:12 42:24
 43:11,14 46:20
 48:17 49:16,22
 49:23 50:6 55:1
 55:14,14 59:1
 61:22
seeing 6:11 10:12
 11:1 30:25 31:1
 31:7 45:9 49:11
seen 15:17 33:16
 40:5 62:8
sends 5:18
sensation 42:4
sent 15:1,23 24:14
separate 10:7
 11:19 19:5 71:5
 71:13
served 8:24
service 13:6
services 72:2
sessions 14:5
set 10:15 13:18
 44:22 63:18
 75:13
sets 44:15,17
setting 6:12 14:7
 42:19
seven 66:18,19,21
shifts 59:7
shingle 10:15
short 15:9
shoulders 43:2,5
show 56:1
showing 61:8
side 17:21 29:9
 42:4,5,12 54:8
 54:14
sign 73:2
signal 7:13 12:7

13:14 16:25
signed 20:24 23:17
 24:25
significance 29:10
 29:12 64:10,12
 65:8,11,21
significant 28:19
silent 61:15,16,17
 61:17
similar 44:24
 46:17 52:13
 53:13 60:16
simple 5:2
Sinai 4:2,20 5:8
 6:1,3,19,22
 10:18,21 11:3
sir 71:24
sit 51:2
situation 65:13
SIXTH 1:1
skilled 6:15 9:8
 9:19,24
skin 14:12
sleeping 66:9
slightly 56:9
Smith 2:11
SNOWDEN 1:4
somebody 64:24
 69:12,12
sorry 24:9 29:21
 47:25 64:24
 66:19
sounds 68:17
South 2:11
space 14:10
speak 24:6
speaking 17:19
 57:1 65:3
specialty 7:20
specific 14:14
 18:25 33:24 50:7
 51:19 55:1 63:21
 71:10,11,12
specifically 8:11
 16:5 18:5,7
 33:25 35:24
 44:14 54:11 56:3
specifics 63:11
speech 41:19 42:19
 61:12 63:16
spills 42:5
spoke 49:10 62:20
spouse 43:2,5,7
spring 44:21
staff 5:9 32:22
 42:25 43:10,22
 44:4,19 53:15
 54:19,22 59:6,23
 60:2 63:5 64:8

64:12 71:8
standard 26:20,23
 27:15 28:2 31:5
 34:23 38:9,12
 53:3 65:16
Starer 1:19 3:1,17
 3:20 74:9 75:5
 76:3 77:4,19
start 13:6
started 3:7
starting 52:24
 60:5
state 1:1,25 3:3
 3:15 16:16 18:13
 55:21 75:17
stated 3:7 44:7
statement 50:24
states 67:3
status 51:5 64:1
statutes 19:1
 71:21
stay 15:5,9 27:7
 30:4 31:2 34:19
 54:2 56:3 61:23
stays 29:25
stickies 22:12
stopped 10:25
straight 5:14
Street 1:12
stroke 8:20 14:11
 16:19 17:3,6,8,9
 17:11,14,17
strokes 16:18 18:2
 19:13
structure 36:21
students 5:9,18,22
 6:10 7:24
studies 13:11
stuff 55:13
submitted 25:5
 70:19
Subscribed 74:11
 77:21
subsequent 27:11
 29:25 30:2 49:2
successes 53:10
suffering 61:15
suggest 60:2
suing 70:4
Suite 1:12 2:5,11
summary 53:4 62:4
supersedes 43:22
supervised 63:15
supervision 42:23
supplement 37:25
supplements 37:2
 37:22 38:4,8,15
 38:23,24 39:3,5
 39:7,10,17 41:6

support 1:12 72:1	terminology 64:11	35:5 50:3	violated 72:5
supportive 43:8	terms 28:10 37:22	trial 66:3,5,22	visit 15:14 27:16
sure 40:15 43:2	71:10	68:21 69:1,17	30:5,9 49:18
47:16 48:5,11	testified 3:4	trigger 53:5	vitae 76:10
52:3 55:15 65:10	67:10	true 6:25 7:9 11:8	vs 1:6 77:3
65:20,23 70:7	testify 69:1	12:4 74:6 75:7	
71:4	testifying 66:23	try 36:13	W
surgery 62:12	testimony 5:21	trying 8:10 30:12	want 31:22 37:15
sustain 40:13	24:23 66:3,22	33:13	48:10 52:2 72:11
41:14	68:4,21 69:17	tube 40:16	72:15,17
swallowing 17:22	74:4 75:7	Tuesday 1:14	wanted 30:24 43:19
32:23 35:11	Texas 69:11,12	turn 25:21 39:4,6	44:1 71:4
40:12 41:20,20	thank 15:3 71:16	43:10 45:12	wasn't 22:20 41:7
42:1,21 44:18,20	therapist 63:16	59:19,21,22	41:9 56:8,10,11
53:15 60:18	therapy 42:19	turns 34:9	water 55:11
63:19	61:12	twelve 13:20	way 16:9 22:18
sworn 3:2 74:11	thing 21:15 41:23	twenty 24:8,10	28:7 31:10 43:6
75:6 77:21	56:25 72:12	two 5:17 9:7 20:19	65:3 75:11
system 6:5 40:14	things 13:1 22:18	39:24 44:15	we'll 19:12 35:25
	22:19 31:16	60:16 65:25 66:2	we're 12:10 19:18
T	34:16 37:1 52:20	66:4 67:2 68:23	72:25
	71:19	type 5:5 6:14 10:5	we've 7:3 19:19
T 74:1,1 75:1,1	think 7:15 12:11	10:10 14:14	22:10 47:25
76:8 77:1,1	16:9,23 17:2	22:22 68:21	weakness 17:20
tabbed 22:19	19:24 24:10 28:5	69:25	42:3
tabs 22:12	30:12,21 34:25	types 14:12	week 20:19
take 8:20 13:25	38:5 43:21,24	typical 13:1,2,4	weekly 37:13,17
14:22 35:20 48:3	48:2,9,16 50:19	Tyre 23:11,24	49:21,22
54:17	51:1,24 68:14	25:16 65:4	weeks 34:18
taken 1:19 23:20	69:1 72:24		weighed 37:8,11,17
55:7 58:1 74:4	thought 23:23	U	weighing 37:12
takes 55:14	64:20	U 74:1,1	weight 37:21 49:22
talk 23:10 26:2	three 40:5 67:7,17	U.S 1:12	49:23
31:13 35:25	70:1,9,14	ulcers 8:19	weights 37:14,19
61:12 65:3	time 6:17 13:17	unable 21:23	49:21
talked 7:3 12:21	15:19 21:3 36:14	understand 5:21	went 11:3 48:1,18
19:13,18,19,20	46:2,18 47:4	24:23	58:12
43:16 63:22 64:1	49:12 53:14	understanding 3:11	weren't 52:20 59:9
talking 48:9 64:25	58:12 64:4 66:6	72:3	59:13
talks 4:17	66:7 67:17 68:22	Unfortunately	whatsoever 43:14
Tampa 2:5 67:12	71:14 74:4	31:11	WHEREOF 75:13
68:12	timely 40:6,7	unit 7:22 8:2,8,11	Wilander 24:5,6
teach 5:4,11,11,25	times 56:19 66:8	8:22 13:19 14:9	25:16 30:18
6:7	67:1 68:23 69:2	14:13	Wilkes 2:4 20:1,7
teaching 5:5,15,22	today 3:8,10 4:9	unscheduled 13:23	20:14 21:5,25
team 13:19	12:10,22 21:9	urea 56:1,12 57:17	22:22 24:20
teleconference	24:23 25:1 49:10	urination 54:15	25:12,18 66:14
1:23 2:7,14 7:13	told 30:11,12	use 36:22 54:6	66:24 69:4 70:15
12:7 13:14 16:25	64:20 67:14	utilized 63:4	71:1 76:14
teleradiology	68:23		witness 3:2 31:24
61:25	total 45:16 69:24	V	45:14 48:5 73:4
tell 4:24 12:13	touched 50:16	VA 29:24	75:5,8,13 76:2
14:24 18:2,8	training 5:6	value 49:23	wonder 28:8
28:21 30:19 32:9	transcript 73:2	values 55:25	word 51:20 64:9
32:17 66:17 69:3	74:7	vary 8:3	65:9,12
70:9	traveling 66:10,11	verbal 25:17	words 64:17
temporary 61:25	treated 26:12	video 1:21 2:7,14	work 4:1,6 9:15
ten 12:3 31:19	treating 14:22	7:12 12:6 13:13	11:12 66:7 68:12
69:2 76:11	treatment 13:12	16:24	workday 13:2
term 65:17			

worked 10:12, 18 68:19 69:4, 8	10/27/08 62:21 100 2:11	21st 10:25 48:24 57:9 62:17
working 14:6 66:9	10022 1:13	22 56:12 76:14
works 31:11 32:8	11 47:8 57:19	22nd 57:9
worksheet 34:10 51:23 59:6	11:07 1:14	24 56:4, 7 61:13
wouldn't 66:9, 10	11373 3:24	25 42:2 51:21 54:12 58:9 70:2 70:8, 13
write 13:12 19:2, 4 23:2 46:9 51:8 51:20	115 1:12	26 33:2, 20 46:10 53:22
writes 33:3, 22	12 1:14 64:6 77:2	27 28:24 29:2
writing 43:6	12:11 31:25	
written 22:24	12:25 32:1	3
wrote 23:3, 4 38:19 38:20 51:21	12:58 48:6	3 19:14, 15 56:6 75:18 76:4, 12
	1230 1:12	3.4 46:23 47:10
X	12th 75:14	30 57:21
X 76:1, 8	13 35:17	31 57:20
x-ray 61:8, 22, 24 62:5, 8, 16	15 57:20	33609 2:5
	17 65:6	33701 2:12
Y	18 56:5 57:18 58:9	35 8:23
Y 1:7	19 76:11, 12	
Yeah 72:18	1958 16:23	4
year 8:3 9:13 28:9	1980s 9:4 10:3	4 22:5, 6 26:16 45:15 46:25 76:9 76:14
years 5:17 12:3 16:22 66:18, 20 67:7, 18 70:1, 9 70:14	1983 12:16	4.0 47:5
yesterday 24:5, 7 25:16 30:17	1985 4:19	400 71:21
York 1:13, 13, 25 3:3, 23, 23 5:3 6:4 11:4 69:14 75:17, 17	1988 11:24	
younger 8:19	1990s 9:4, 14 10:4	5
		5 28:13 47:3 57:17 71:20 72:16, 20 72:21 76:15
Z	2	5.0 46:23
Zephyrhills 1:7, 9 15:5, 11 26:8 28:17, 22 29:17 30:3 31:3, 9 32:11 33:14 43:23 44:5, 11, 19 45:2 46:6, 13 48:15 54:2 56:10 71:9 72:5 77:3	2 4:18 19:11, 15 20:12 27:16 58:8 76:11	50 51:11
	2,000 38:21	51-2009CA4401ES 1:6
0	2.7 46:20	57th 1:12
01HO6195824 75:18 08 45:19 58:4, 12	2/2/11 76:14	
	2/4 45:19	6
1	2/4/08 48:14	6 28:18 65 8:10, 18
1 4:13, 14 76:9	2/4/2008 46:4	
1/5/07 48:12	20 28:14 70:2, 8, 13	7
1:04 48:7	2000 9:3 10:22	7 58:9 71 76:5 72 76:15
1:49 1:14 73:5	2007 15:18 28:9, 9 28:13, 14 35:10 47:3, 8 57:10, 17 57:19, 20	727) 565-0039 2:12
10 57:21	2008 15:6, 8, 11, 13 15:15, 21 26:16 26:25 27:8, 12, 16 28:24 29:2, 16 30:6, 9 31:3 33:2 33:20 35:17 42:2 45:15 46:10, 18 46:19, 25 47:7 49:5 51:21 53:22 54:12 56:6, 12 58:8 61:5, 13 62:7	79-01 3:23
10/11/07 48:13	2011 1:14 20:12 74:13 75:14 77:2 77:22	8
	2012 75:18	8 35:12 800 2:5 800) 255-5070 2:6
	21 46:18, 19 57:19 61:4 62:7	9
		90 70:6 902 2:11 95 70:6